STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. ST. CROIX FALLS SCHOOL DISTRICT, Respondent.	Case 31 No. 46214 MP-2516 Decision No. 27215-A

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, appearing on behalf of the District, 16 West John Street, Rice Lake, Wisconsin 54868.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Mr. Stephen L. Weld, appearing on behalf of the Respondent.

ORDER DENYING REQUEST TO DEFER TO GRIEVANCE ARBITRATION

Northwest United Educators, hereafter NUE or Complainant, filed a complaint with the Wisconsin Employment Relations Commission, hereafter Commission, on September 3, 1991, alleging that the St. Croix Falls School District, hereafter District or Respondent, had committed prohibited practices in violation of Wisconsin Statutes 111.70(3)(a)1, 3, and 4 when it unilaterally changed the hours and compensation of two secretaries who were members of the bargaining unit represented by NUE. On March 30, 1992, the Commission appointed Coleen A. Burns, an Examiner on the Commission's staff, to conduct a hearing on the complaint and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.70(4)(a) and 111.07, Stats. On April 29, 1992, the hearing was rescheduled from May 14, 1992 to June 23, 1992. On April 20, 1992, Complainant filed an amended complaint alleging that the Respondent had committed prohibited practices when the District Administrator issued a January 2, 1992 memo which unilaterally changed the working conditions of employes represented by the Complainant. Respondent filed its answer to the original complaint on April 24, 1992, and its answer to the amended complaint on May 8, 1992. On June 22, 1992, the Respondent filed a Motion to Dismiss Amended Complaint alleging, inter alia, that the matters involving the January 2, 1992 memo should be deferred to grievance arbitration. 1/ Hearing on the complaint was held on June 23, 1992, in St. Croix Falls, Wisconsin. At hearing, the Examiner reserved ruling on Respondent's Motion to Dismiss Amended Complaint and allowed the parties to present evidence relevant to the complaint, the amended complaint and Respondent's Motion to Dismiss Amended Complaint. At hearing, Respondent waived its right to make any further argument on its Motion and Complainant reserved the right to file a letter brief in response to the motion. The parties further agreed that the Examiner should rule on the deferral issue prior to deciding the other issues raised in the Complaint. On June 30, 1992, Complainant advised the Examiner that it

1/ While a facsimile copy of the Respondent's Motion to Dismiss Amended Complaint was received on June 19, 1992, the Commission does not accept facsimile copies of such motions.

would not be filing a brief in response to Respondent's Motion. By letter dated July 1, 1992, the Examiner advised the parties that she would rule on the deferral issue after she had received the transcript. The transcript was received on July 13, 1992. Having considered the Respondent's request to defer the matters raised in the amended complaint to grievance arbitration, the relevant evidence, and the arguments of the parties;

NOW, THEREFORE, it is

ORDERED

The portion of Respondent's Motion to Dismiss Amended Complaint which requests that the issues raised in the amended complaint be deferred to grievance arbitration is denied.

Dated at Madison, Wisconsin this 10th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

MEMORANDUM ACCOMPANYING ORDER
DENYING REQUEST TO DEFER TO GRIEVANCE ARBITRATION

Construing the amended complaint within the context of the original complaint, the Examiner is satisfied that the Complainant is alleging that the District Administrator's memo of January 2, 1991 unilaterally changed conditions of employment affecting the overtime and sick leave of bargaining unit employes represented by the Complainant, thereby violating Sec. 111.70(3)(a) 1, 3, and 4 of the Wisconsin Statutes. The Commission has previously stated that a Sec. 111.70(3)(a)4 allegation may be deferred to the contractual grievance arbitration forum in appropriate cases. The Commission has found it appropriate to defer when there is a high probability that grievance arbitration would fully resolve the refusal to bargain claim and the Respondent has objected to the Wisconsin Employment Relations Commission's exercise of prohibited practice jurisdiction. 2/

In the present case, the record establishes that the initial collective bargaining agreement between the parties was determined by the interest arbitration award of Arbitrator John Flagler. The Flagler Award was issued on November 4, 1991. The contract which was the subject of that award was effective from February 14, 1989 through June 30, 1991. At the time of hearing, on June 23, 1992, the parties had not yet agreed on a successor agreement.

The record does not establish that the parties entered into any agreement extending the contract past June 30, 1991. At the time of hearing, the parties had submitted final offers for interest arbitration on the agreement to succeed that which had expired on June 30, 1991. While portions of these final offers were identical, the parties did not have any agreement to implement any stipulations of agreement, or portions of the final offers, prior to the issuance of the interest arbitration award.

In a letter to District Administrator Johnson, dated December 16, 1991, Complainant Representative Manson identified Fourteen Items which he believed to be at issue with respect to the implementation of the collective bargaining agreement which had been the subject of Arbitrator Flagler's Award and proposed a resolution for each of these issues. In a letter dated December 30, 1991, Administrator Johnson advised Complainant Representative Manson that the District would agree to implement the proposed resolution in nine of the Fourteen Items.

In a letter dated January 22, 1992, identified as "RE: Grievances Involving the 1989-90 NUE ESP Contract", Complainant Representative Manson, referencing District Administrator Johnson's letter of December 30, 1991, advised District Administrator Johnson that it appeared that nine of the Fourteen Items addressed in his letter of December 16, 1991 had been resolved. Complainant Representative Manson also notified the District that his letter of January 22, 1992 was to be considered a grievance on the five items in his letter of December 16, 1991 which remained unresolved, as well as on an issue involving bus driver compensation.

In a letter to District Administrator Johnson, dated March 5, 1992, identified as "RE: Overtime, Leave Requests, and Uniforms", Complainant Representative Manson stated as follows:

Dear Mr. Johnson,

2/ Brown County, Dec. No. 19314-B (6/83).

During the past two months NUE and the District have had various communications on the above topics. Included in those communications have been your memo of January 2, 1992 to ESP members and dialogue at the bargaining table on January 14 and February 6.

The purpose of this letter is to clarify the position of the District on the above items. NUE reserves the right to file a grievance on the position taken by the District on these items, if in so clarifying its position, it becomes apparent that the District's procedures will be in violation of the collective bargaining agreement. Moreover, NUE reserves the right to file a complaint of prohibited practice against the District based on the District's apparent unilateral charge in mandatory subjects of bargaining. After you reply to this letter, NUE will determine if a grievance or grievances, and/or a complaint should be initiated.

With respect to the January 2 memo, it indicates that employees are to "complete the pink request form (copy attached) for time beyond the regular workday at least three days in advance." NUE has the following questions: Does this condition apply equally to the employer as well as the employee; that is, must the District notify an employee at least three days in advance that the employee will be asked to work beyond their regular workday? Furthermore, under what circumstances, if any, might an employee expect to have an overtime request approved on the day that the overtime is to be put in; that is, can an employee ask his or her immediate supervisor for permission to work extra hours on a particular day? Finally, does this represent a change from what was in place before 1/2/92, and, if so, how is it different?

Your January 2 memo also states: "All leave requests will be granted in one-half day minimums. Please complete a blue form (copy enclosed) in advance of the leave." NUE has the following questions with respect to this communication: If an employee, who is scheduled to work until 4:00 p.m., becomes ill on the job at 3:00 p.m., does this mean that the employee will be charged for half a day of sick leave if they leave work at 3:00 p.m.? Furthermore, does this mean that if an employee has a medical appointment scheduled for 3:30 p.m. on a day in which the employee is scheduled to work until 4:00 p.m. that the employee will be charged with half a day of sick leave if they work until 3:15 p.m. of that day? Again, does this represent a change from what was in place prior to 1/2/92, and, if so, how is it different.

With respect to this leave request item, please be advised that NUE is of the opinion that Article IX of the NUE St. Croix Falls ESP contract requires the employer to have just cause before reducing an employee's compensation, and that NUE believes that accumulated sick leave is a form of compensation, and

> further that should an employee become ill in the middle of the afternoon and go home that it would be a violation of this just cause standard for the employer to charge the sick leave account of the ill employee with more time than the employee actually took off. NUE is reserving its right to file a grievance on this matter pending any complaint by any employee. To date NUE is unaware that any employees have been reduced in compensation by District application of this item, and therefore NUE believes that it can file a grievance when, and if, such an occurrence takes place.
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> The third topic above is the uniform allowance. It is the position of NUE that Article IX prohibits the District from reducing the compensation of employees without just cause, and that the failure of the District to continue to provide uniforms to its custodians will, when it occurs, constitute an inappropriate reduction in compensation. Therefore, NUE is putting the District on notice that should it follow through on its statement (made at the bargaining table) that it had no intention of continuing payments for custodian uniforms, then NUE will file a grievance at that time, since NUE believes the violation of the just cause standard will be occurring at that time. With respect to this topic, would you please write me as to the details of the manner in which the District has been providing uniforms to the custodians. For example, NUE has been told that the custodians were provided with uniforms once a year, but it is not clear as to how new employees are treated, nor to the extent of the expenditures per custodian for the uniforms. Please provide the details of the past practice in this matter.
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> If you have any questions, please feel free to contact me at the NUE office.

The record establishes that, prior to March 5, 1992, Complainant Representative Manson had filed grievances concerning matters raised in his letter of December 16, 1992. The record, however, does not establish that, prior to March 5, 1992, Complainant Representative Manson had filed any grievances on the District Administrator's memo of January 2, 1992, or that Complainant Representative Manson had agreed to submit disputes concerning the District Administrator's memo of January 2, 1992 to grievance arbitration. In his letter of March 5, 1992, Complainant Representative Manson expressly reserved the right to file either a grievance or a prohibited practice complaint on the matters raised in the District Administrator's letter of January 2, 1991. Neither the subsequent correspondence of the parties, nor any other record evidence, demonstrates that Complainant Representative Manson subsequently waived his right to file a prohibited practice complaint on matters raised in the District Administrator's memo of January 2, 1992, or that he otherwise agreed to submit disputes involving the District Administrator's memo of January 2, 1992 to grievance arbitration.

The Examiner is satisfied that the January 2, 1992 memo was not issued during a period of time in which the parties were covered by a collective bargaining agreement. Rather, the January 2, 1992 memo was issued after the expiration of the parties' initial collective bargaining agreement and prior to the implementation of the successor agreement. Consequently, there was no

effective contractual grievance arbitration procedure. The Examiner is further satisfied that the Complainant did not agree to submit disputes concerning the January 2, 1992 memo to grievance arbitration. Contrary to the argument of the Respondent, it is not appropriate to defer the matters raised in the amended complaint to grievance arbitration.

Dated at Madison, Wisconsin this 10th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner