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-B

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.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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 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. 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 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 and the Examiner's Order Denying Request to Defer to Grievance Arbitration was issued on September 10, 1992. Thereafter, the parties filed written briefs on the merits of the Complaint which were filed by

November 18, 1992. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Northwest United Educators, hereafter NUE or Complainant, is a labor organization and has offices located at 16 West John Street, Rice Lake, Wisconsin 54868.

2. St. Croix Falls School District, hereafter District or Respondent, is a municipal employer and has offices located at 650 E. Louisiana St., St. Croix Falls, Wisconsin 54024.

3. On February 14, 1989, the Wisconsin Employment Relations Commission issued Decision No. 25831 in which it certified NUE as the exclusive collective bargaining representative for a collective bargaining unit consisting of all regular full-time and regular part-time non-professional employes of the District, excluding professional, confidential, supervisory and managerial employes. On March 6, 1991, the Wisconsin Employment Relations Commission issued Decision No. 26811 in which it concluded that an impasse, within the meaning of Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act, existed between NUE and the District with respect to negotiations leading toward an initial collective bargaining agreement and ordered the parties to interest arbitration on their initial collective bargaining agreement. While portions of the final offers submitted to the interest arbitrator were identical, the parties did not have any agreement to implement any tentative agreements or portions of the final offers prior to the issuance of the interest arbitration award. The initial collective bargaining agreement between the parties was determined by the November 4, 1991 interest arbitration award of Arbitrator John Flagler. The initial collective bargaining agreement, by its terms, was effective from February 14, 1989 through June 30, 1991. The parties did not have any agreement to extend the initial collective bargaining agreement past June 30, 1991. The parties' initial collective bargaining agreement contained the following language:

ARTICLE IV - MANAGEMENT RIGHTS

> The Board, on its own behalf, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable rules and regulations to establish the framework of school policies and projects including, but without limitations because of enumeration, the right:
>
> 1. To the executive management and administrative control of the school system and its properties, programs, and activities.
>
> 2. To employ and reemploy all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion, and their work assignment.
>
> 3. To subcontract services provided it does not result in the layoff or the reduction in hours of any current employees.
>
> 4. The parties hereto recognize that the Board is

legally charged with the responsibility of, and the legal right to, the establishment and enactment of policies governing the operation of the school district.

5. To determine the management organization of the district and the selection of persons for appointment to supervisory and management positions.

6. To determine the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees and establishment of quality standards and judgment of employee performance.

7. To create, combine, modify, or eliminate positions deemed necessary by the Board.

8. To establish reasonable work rules and schedules of work.

9. Take whatever reasonable action that is necessary to carry out the functions of the district in situations of emergency.

Except as limited by this Agreement, the Board shall continue to have the right to contract or subcontract for work. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, and regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by specific and express terms of this Agreement.

Foregoing rights shall be subject to the laws of the State of Wisconsin and the Constitution of the United States of America.

ARTICLE IX - EMPLOYEE DISCIPLINE

. . .

B. No employee shall be disciplined or reduced in compensation without just cause nor after the completion of the probationary period, reduced in rank, discharged, or suspended without just cause.

ARTICLE XII - LAYOFF AND RECALL

A. If necessary to decrease the number of employees, the Board may lay off, in whole or in part, the necessary number within a department but only in inverse order of an employee's seniority within the department unless volunteers are received or unless the qualifications of the position, e.g. handicap aide, mechanic, or bookkeeper, require someone other than the least senior employee in the

department to be laid off.

. . .

ARTICLE XIII - LEAVES OF ABSENCE

A. Sick leave shall be granted at the rate of one day per month (9 days for school-year employees), cumulative to 84. An employee beginning his employment in the district shall report to one day of work to qualify for sick leave. All sick leave will be accredited to each employee the first day of school or the first day they report to work. Any disability payments received under the Workmans Compensation Act may be endorsed over to the Board by the employee and the employee shall in lieu thereof receive sick leave. (Sick leave accumulated by current employees as of 2/14/89 shall be credited to the employees' individual sick leave accounts.

ARTICLE XXV - ENTIRE MEMORANDUM OF AGREEMENT

> This Agreement, 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.

The final offers submitted to Interest Arbitrator Flagler each contained a Management Rights clause and an Employee Discipline clause. While the two Management Rights clauses differed only with respect to the subcontracting language contained in Item 3 of Article IV, the Employee Discipline clauses did not share an identity of language. For example, the District's Employee Discipline clause provided that "no employee shall be discharged or suspended without just cause", while NUE's Employee Discipline clause provided that "no employee shall be disciplined or reduced in compensation without just cause". The language contained in Article XII, Layoff and Recall, and Article XXV, Entire Memorandum of Agreement, were contained in the Stipulation of Tentative Agreements which were submitted to Interest Arbitrator Flagler.

4. Fred Johnson has been the District Administrator for nine years. From the time that Johnson began his tenure as District Administrator until 1988, District Principles had the responsibility to call in substitute teachers as needed by the District. From 1988 to the beginning of the 1991-92 school year, District staff have been directed to telephone District Secretaries Judy Westlund and Kelly Anderson at their homes, prior to the start of the school day, to report absences. While at home, the two secretaries secured substitutes for employes who had reported an absence by telephoning substitutes who appeared on the substitute list. Westlund was responsible for securing substitutes for Grades 9 through 12 and Anderson was responsible for securing substitutes for Grades Kindergarten through 8. In exchange for receiving telephone calls and securing substitutes while at their home, the secretaries received forty-five hours of paid leave at the end of each school year. Westlund and Anderson began their school work day at 7:30 or 7:45 a.m. NUE Representative Alan Manson sent District Administrator Johnson the following letter, dated July 18, 1991:

> RE: Unilateral Change in Secretary Wages and Working Conditions
>
> Dear Mr. Johnson:
>
> It has come to the attention of NUE that you have informed two secretaries they are to modify their work schedule with the start of the 1991-92 school year. The modification is that they are instructed not to take calls at home nor to make calls for securing substitutes and that as a result they will receive five days less compensation. The work apparently is being assigned to another employe.
>
> Please be advised that such a unilateral change in wages and working conditions is prohibited under Wisconsin Statute 111.70 as it applies to the time during which the parties are negotiating for their initial collective bargaining agreement. Furthermore, both final offers provide substantial protection for the two secretaries

involved with respect to such a reduction in work and compensation.

NUE believes that the unilateral change by the employer at this time is a prohibited practice under Wisconsin Statute 111.70. And NUE believes that, regardless of which final offer is selected, such a change would be a violation of the terms of the resulting contract.

Please let me know what the position of the District is relative to this issue. Specifically, has the District directed secretaries Westlund and Anderson to change their working schedule for the 1991-92 year and indicated to them that they will be reduced in compensation by five days pay? Has the work they have been doing in securing substitutes been reassigned to another employee? If so, what other employee is to be doing that work, and has the additional worked (sic) resulted in additional hours or a change of hours for that employee?

A written response to this inquiry and request would be greatly appreciated, even though we have recently talked about this by phone. NUE reserves the right to file a prohibited practice complaint and/or a grievance on behalf of these individuals should the District not provide them with appropriate equal working conditions and wages under the terms of Wisconsin Statute 111.70 and the pending agreement.

At the start of the 1991-92 school year, Cindy Larson, who had previously worked as an Educational Aide at the District's middle school, assumed a newly created secretarial position in the District's central office. Larson, who began work at 6:00 a.m., had the responsibility to receive absence reports from District employes and to secure substitutes for the absent employes. The District Administrator had a discussion with Larson about changing her hours and there was agreement. As a result of this assignment to Larson, Westlund and Anderson no longer received absence report calls at home or secured substitutes from home and no longer received the forty-five hours of paid leave at the end of the school year. At all times material hereto, Larson, Anderson, and Westlund have been members of the collective bargaining unit represented by NUE. The District Administrator, in consultation with other District administrative staff, created the new secretarial position at the District's central office. Prior to the creation of the new secretarial position, the main switchboard had been in another secretary's office, which caused a disruption for this secretary. With the creation of the new secretarial position, the telephone calls were received in the District's central office by Larson, the employe occupying the new secretarial position. The new secretarial position was created for the purpose of streamlining business operations and avoiding disruption of the other secretary's work activity. Having only one secretary handle the absence reports and substitute procurement avoided duplicate calls to substitutes. In creating the new secretarial position, the District provided the public with access to information concerning District activities, including information on school closings, or other decisions involving inclement weather, prior to the start of the school day. The duties of receiving employe absence reports and securing substitute employes are fairly within the scope of responsibilities applicable to the kind of work performed by secretarial employes represented by NUE.

5. In a letter to District Administrator Johnson, dated December 16, 1991, NUE 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 NUE Representative Manson that the District would agree to implement the proposed resolution in nine of the Fourteen Items.

6. In a letter dated January 22, 1992, identified as "RE: Grievances Involving the 1989-90 NUE ESP Contract", NUE 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. NUE 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.

7. On January 2, 1992, District Administrator Johnson issued the following:

> TO: E.S.P. MEMBERS
>
> FROM: Fred Johnson
>
> RE: Contract Implementation
>
> As the new contract is implemented, it is necessary to have everyone operating under the same working conditions. I am sure that future communications of this nature may be necessary to clarify other items. Thanks in advance for your cooperation to the following items:
>
> 1. Please punch in and out at the contracted times so your time card reflects actual working hours.
> 2. Punch out and in for all breaks that take you away from the building.
> 3. Complete the pink request form (copy attached) for time beyond the regular work day at least three days in advance.

4. Any compensatory time that is accumulated to date must be used prior to June 30, 1992.
5. Any compensatory time that may be granted in the future must be used within the next payroll period.
6. All leave requests will be granted in one-half day minimums. Please complete a blue form (copy enclosed) in advance of the leave.
7. Lunch breaks, when part of the work day, will be for a thirty minute period and must be scheduled with your supervisor.

A copy of the January 2, 1992 memo was also sent to NUE Representative Manson. The January 2, 1992 memo was drafted by District Administrator Johnson in consultation with other District administrators. Carolie Gubasta, the District's Bookkeeper and Administrative Secretary, maintains the District's sick leave records. Before the issuance of the January 2, 1992 memo, employes represented by NUE were able to use sick leave in increments of one hour and if an employe became sick during the day, the employe was charged sick leave only for the amount of time lost. Since the issuance of the January 2, 1992 memo, employes represented by NUE have been required to use sick leave in one-half day minimums.

8. The parties met on January 14, 1992 for the purpose of exchanging initial written proposals on the collective bargaining agreement to succeed the parties' initial collective bargaining agreement. The initial written proposals submitted by NUE contained a proposal on overtime, i.e., to add the following sentence to Article XI - Work Schedule: "All non-emergency overtime shall be scheduled by mutual consent." The initial written proposals submitted by NUE did not contain any proposal on the administration of sick leave, nor did the written proposals contain any other type of sick leave proposal. In a letter to District Administrator Johnson, dated March 5, 1992, identified as "RE: Overtime, Leave Requests, and Uniforms", NUE Representative Manson stated as follows:

> 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.

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.
>
> If you have any questions, please feel free to contact me at the NUE office.

The record does not establish the content of the dialogue which occurred at the bargaining table on January 14 and February 6. Nor does the record establish that either party made a bargaining proposal on the change in sick leave policy, or on any other aspect of sick leave during the negotiation of the agreement to succeed the initial collective bargaining agreement. The change in the sick leave policy involved a dispute which was subject to the interest arbitration procedures set forth in Sec. 111.70(4)(cm), Stats. In a letter to District Administrator Johnson, dated April 7, 1992, NUE Representative Manson stated the following:

> RE: Overtime, Leave Requests, and Uniforms
>
> Dear Mr. Johnson,
>
> NUE has not yet received any reply to its 3/5/92 letter to you on the above subjects.
>
> Would you please reply to the questions raised in that earlier letter. I am enclosing a copy of the original letter for your convenience.

In a letter dated April 17, 1992, District Administrator Johnson advised NUE Representative Manson of the following:

> In the initial offer of the NUE for 1991-94 St. Croix Falls ESP Contract, item #4 addressed uniforms and item #9 addressed overtime. It seems to me that it is not necessary to clarify the District's position on these items in that you have chose (sic) to bargain said items and/or included them in your final offer.
>
> Further, the issue on leave requests was known by bargaining unit members on January 2, 1992, and yourself on January 14, 1992. If the January 2, 1992 memo was a problem, it seems that you should have continued dialogue at the bargaining table and/or included same as part of your initial offer.
>
> Please also refer to Article XXV...."Any supplemental amendments to this Agreement or past practices shall not be binding on either party unless executed in writing by the parties hereto."

9. On September 3, 1991, NUE filed a complaint with the Wisconsin Employment Relations Commission, hereafter Commission, in which NUE alleges that the District had committed prohibited practices in violation of Sec. 111.70(3)(a)1, 3, and 4 by unilaterally changing the hours and compensation of secretaries who were members of the bargaining unit represented by NUE. On April 16, 1992, NUE filed an amendment to its complaint which alleges that the District committed additional prohibited practices when it issued the memo dated January 2, 1992, thereby unilaterally changing the working conditions of members of the bargaining unit represented by NUE. By the time of hearing on the instant complaint, June 23, 1992, the parties had submitted final offers for interest arbitration on the agreement to succeed the initial collective bargaining agreement which had expired on June 30, 1991.

10. Neither District Administrator Johnson, nor any other District representative, contacted any NUE representative to discuss the decision to create a new secretarial position at the District's central office prior to implementing the decision to create the new secretarial position. Nor did any District representative contact any NUE representative to discuss the decision to reassign the absence reporting work and the substitute procurement work from Judy Westlund and Kelly Anderson to the new secretarial position at the District's central office prior to implementing the reassignment.

11. Neither District Administrator Johnson, nor any other District Representative, contacted any NUE representative to discuss the sick leave and overtime procedures set forth in District Administrator Johnson's memo of January 2, 1992 prior to issuing the memo of January 2, 1992, which implemented the leave procedures set forth in the memo of January 2, 1992.

12. Complainant has not been shown to have made a request to bargain over the impact of Respondent's decision to create a new secretarial position in the District's central office on the wages, hours and working conditions of employes represented by Complainant. Complainant has not been shown to have made a request to bargain over the impact of Respondent's decision to reassign the duties of receiving employe absence reports and procuring substitute employes from Judy Westlund and Kelly Anderson to the newly created secretarial

position in the District's central office on the wages, hours and working conditions of employes represented by Complainant.

13. Respondent's decision to create the new secretarial position in the District's central office at the beginning of the 1991-92 school year and Respondent's decision to reassign the duties of receiving employe absence reports and procuring substitute employes from Judy Westlund and Kelly Anderson to the new secretarial position are matters which are primarily related to educational policy, school management and operation, as well as to the management and direction of the school system.

14. Sick leave and the change in the usage of sick leave implemented by the District Administrator's memo of January 2, 1992 are matters which are primarily related to the wages, hours and working conditions of employes represented by NUE.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Respondent's decision to create a new secretarial position in the District's central office at the beginning of the 1991-92 school year is a permissive subject of bargaining which could be unilaterally implemented by the Respondent.

4. Respondent's decision to reassign the duties of receiving employe absence reports and procuring substitute employes from Judy Westlund and Kelly Anderson to the newly created secretarial position in the District's central office is a permissive subject of bargaining which could be unilaterally implemented by the Respondent.

5. Respondent has not been shown to have committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, or 4, Stats., by its conduct in creating the new secretarial position in the District's central office and reassigning the duties of receiving employe absence report calls and procuring substitute employes from Judy Westlund and Kelly Anderson to the newly created secretarial position.

6. Prior to the issuance of the District Administrator's memo of January 2, 1992, the status quo on sick leave usage was that employes represented by Complainant were permitted to use sick leave in increments of one hour and if such an employe became ill during the work day, the employe was charged sick leave only for the time lost from work.

7. By issuing the memo of January 2, 1992, which implemented a sick leave policy which requires employes represented by Complainant to use sick leave in one-half day minimums, Respondent unilaterally changed the status quo on a mandatory subject of bargaining.

8. By unilaterally changing a sick leave policy which is a mandatory subject of bargaining during a contract hiatus period, without a valid defense, Respondent has committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., and, derivatively, within the meaning of Sec. 111.70(3)(a)1, Stats.

9. Respondent has not been shown to have committed an independent

violation of Sec. 111.70(3)(a)1, Stats., and Respondent has not been shown to have committed prohibited practices within the meaning of Sec. 111.70(3)(a)2 or 3, Stats., by its conduct in unilaterally changing the sick leave policy.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 2/

IT IS HEREBY ORDERED THAT:

1. Those portions of the complaint and amended complaint which allege that Respondent violated Secs. 111.70(3)(a)1, 2, 3 and 4, Stats., with regard to Respondent's conduct in creating the new secretarial position in the District's central office at the start of the 1991-92 school year and in reassigning duties from Judy Westlund and Kelly Anderson to the new secretarial position are hereby dismissed.

2. Those portions of the complaint and amended complaint which allege that Respondent committed an independent violation of Sec. 111.70(3)(a)1, Stats., and which allege that Respondent violated Secs. 111.70(3)(a)2 and 3, Stats., when Respondent unilaterally changed the District's leave policy on January 2, 1992 are hereby dismissed.

3. Respondent St. Croix Falls School District, its officers and agents, shall immediately cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by unilaterally changing the sick leave policy affecting employes in the bargaining unit represented by Complainant Northwest United Educators by requiring such employes to use sick leave in one-half day minimums.

4. Respondent St. Croix Falls School District, its officers and agents, shall immediately take the following affirmative action which the Examiner finds will effectuate the purpose of the Municipal Employment Relations Act:

(a) Make whole all of those employes in the

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.

bargaining unit represented by Complainant who have been affected by the unilateral change in the sick leave policy by restoring to these bargaining unit employes all of the sick leave lost as a result of the Respondent's unilateral change in the sick leave policy which required bargaining unit employes represented by Complainant to use sick leave in one-half day minimums; and immediately restore the status quo ante of permitting bargaining unit employes represented by the Complainant to use sick leave in one hour increments and of charging such employes who become ill at work for actual time lost from work.

(b) Notify all of its employes in the bargaining unit represented by the Complainant by posting, in conspicuous places in its place of business where such employes are employed, copies of the notice attached hereto and marked "Appendix A". The notice shall be signed by the District Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 19th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL immediately reinstate the sick leave policy of permitting employes in the bargaining unit of non-professional employes represented by Northwest United Educators to use sick leave in one hour increments and of charging such employes who become ill at work only for actual time lost from work and restore to those employes all of the sick leave which they were required to use under the sick leave policy of requiring employes to use sick leave in one-half day minimums, but which they would not have been required to use under the sick leave policy of permitting such employes to use sick leave in one hour increments and of charging such employes who become ill at work only for actual time lost from work.

2. WE WILL NOT commit unlawful unilateral changes in the sick leave policy affecting employes in the non-professional bargaining unit represented by Northwest United Educators.

3. 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.

_____
District Administrator,
St. Croix Falls School District

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

ST. CROIX FALLS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

NUE

Until November 4, 1991, the date of the interest arbitration award which determined the terms and conditions of the parties initial contract, the District was statutorily required to maintain the status quo on wages, hours and working conditions. There was no agreement between the parties to implement any of the stipulations or any portions of the final offers. Thus, the District cannot rely on the Management Rights provisions contained in the final offers to validate changes to the status quo.

Contrary to the argument of the District, the changes were not reasonable. Not only did the changes result in the reduction of employe compensation and hours, but the changes conflicted with portions of the contract governing layoff and recall, as well as employe discipline. Despite the District's argument to the contrary, the District did not have an unlimited waiver from NUE to change secretary hours and compensation. The District violated Wisconsin Statute 111.70 by refusing to negotiate with NUE in good faith when it negotiated individually with the three secretaries regarding changes in their wages, hours, and working conditions.

With the issuance of the November 4th interest arbitration decision, the parties had a settled collective bargaining agreement. However, since the collective bargaining agreement was effective from February 14, 1989 through June 30, 1991, the parties were immediately in a hiatus period. Until the parties had agreed upon the terms and conditions of the successor agreement, the District was required to maintain the status quo which was generated by the initial collective bargaining agreement. The District's unilateral action to change the basis for allocating leave by requiring that sick leave and other leaves be used in one-half day minimum amounts, during a period of time in which negotiations for the successor agreement were in progress, and without discussing with or obtaining consent from NUE, violated the District's statutory duty to maintain the status quo.

NUE does not dispute that the District has a right to make reasonable changes in the work rules governing employes. However, in the present case, the District's changes were not reasonable. The secretaries suffered an annual 45 hour reduction in compensation and the unilaterally established sick leave policy provided for a more rapid depletion of sick leave which was based upon an artificial use of sick leave. The District cannot, in the name of business efficiency, ignore established protected rights of employes or the existence of a union which is able to litigate to enforce those rights. The District's acknowledged refusal to deal with NUE on these significant matters was an attempt to discourage employes from membership in the newly formed labor organization.

The District has violated Wisconsin Statutes 111.70(3)(a)(1) by coercing individual municipal employes into changes in their wages, hours and working conditions and without dealing with NUE, the representative of those employes. The District has violated Sec. 111.70(3)(a)(2) by disregarding NUE and making significant changes in the wages, hours and working conditions of employes at one of the most sensitive times in the establishment of labor relations between NUE and the District, thereby, discouraging employes from belonging to the recently certified union. The District has violated Sec. 111.70(3)(a)(4) by its direct refusal to bargain collectively with NUE and by unilaterally determining changes in the wages, hours and working conditions of represented employes and, thereafter, implementing the changes without consultation with or consent from NUE, the certified bargaining agent. As a remedy for this statutory violation, the District should be ordered to reinstate the working conditions which existed prior to its improper actions and to make whole all employes who suffered any loss as a result of the District's unlawful conduct.

DISTRICT

At the time of the reassignment of secretarial tasks, there was no collective bargaining agreement in effect. However, the final offers of each party contained a Management Rights provision which differed on a single issue, i.e., the subcontracting language, which language is not an issue in the present case. The language which was identical in both final offers provided the District with the right to determine employe work assignments, to determine the allocation of work, to modify positions as deemed necessary by the Board, and to establish reasonable work rules and schedules of work. Clearly, the language contained in the Management Rights clause provides the District with the right to reassign the secretarial duties.

Given the identity of language contained in the Management Rights clause of the final offers, the District had bargained the right to make the reassignment of the secretarial duties. Even if there were no expressly negotiated contract language, it has long been established that management retains the right to direct the working forces and assign the work.

Under the reassignment, only one employe began work early. The use of only one employe avoided duplicate calls to a substitute. There was also the benefit of having an employe at the school who could receive calls from faculty, students and parents regarding school cancelation or delay of the start of the school day. The District's actions were for valid business reasons and were within the scope of the District's rights.

The District's conduct did not contain a threat of reprisal or a promise of benefit which would interfere with a protected employe right. The record clearly establishes that the reassignment decision resulted from the District's desire to streamline operations and was not motivated, in any part, by anti-union animus. Nor was there any discrimination on the part of the District.

After the decision was made to reassign the secretarial work, NUE Executive Director Manson telephoned District Administrator Fred Johnson to inform him that, if a change in the secretary's assignment occurred without the consent of NUE, then NUE would pursue a potential violation of the statute. In response, District Administrator Johnson advised Mr. Manson that the District would make the assignment change. In a prior decision, the Examiner has stated that it is not a violation of Sec. 111.70(3)(a)1 for a representative of a municipal employer to advise a representative of municipal employes of the District's legal rights. District Administrator Johnson's remarks to Mr. Manson were not made for the purpose of interfering with, restraining or coercing employes in the exercise of their rights, but rather, were made for the purpose of informing the NUE representative that, in the District's opinion, the District did not have a duty to bargain the reassignment decision.

The Commission has recognized that, during contract hiatus periods, there is a dynamic status quo standard applicable to both benefits and conditions of employment. The dynamic status quo standard is particularly applicable where, as here, the parties had negotiated agreed upon management rights language which reserved managerial rights. Another Examiner has found that where an employer negotiated in good faith and acted properly in identifying an impasse, it was permitted to implement its final offer when the disputed item was not subject to interest arbitration. The District contends that there was an impasse; that there was a waiver; and that there was a necessity to take actions when they were taken.

The employe discipline language cited by NUE, unlike the Management Rights language relied upon by the District, was not contained in both final offers. Even if it had been agreed upon, neither the employe discipline language, nor the layoff and recall language, prohibits the District from making reassignments. Clearly this language relates to disciplinary actions

taken by the District.

The record is devoid of any evidence that anti-union animus was a factor in the decision to issue the January 2, 1992 memo. The purpose of the memo was to provide supervisors with directions on how to implement the collective bargaining agreement in a uniform manner. The memo was issued consistent with the Management Rights clause of the contract, which in turn was consistent with the implicit reservation, by management, of the right to run the enterprise.

NUE did not present any evidence to establish that the January 2, 1992 memo was intended to impair the free exercise of protected rights. Nor did NUE present evidence establishing that the memorandum contained a threat of reprisal or a promise of benefit which interfered with the employe's protected rights.

After the interest arbitration award was issued, it had to be implemented. By sending the memo to all bargaining unit members, with a copy to the NUE's Executive Director, the District gave notice that it was uniformly applying the language across all departments, which notice effectively repudiated any contrary past practices. The District properly notified NUE that it intended to discontinue any conflicting departmental practices regarding overtime and sick leave. Of significance in this regard, is the language contained in Article XXV, Entire Memorandum of Agreement.

NUE and the District exchanged several communications regarding overtime and leave requests during the two preceding months and discussed NUE's concerns at the bargaining table on January 14 and February 6. In negotiating the new contract, NUE did seek to change the overtime provision, which change would have negated the thrust of the memo. NUE chose not to bargain the leave increment issue. Contrary to the argument of NUE, the District did not refuse to bargain regarding its January 2, 1992 memo.

NUE has abandoned its claim involving the portion of the January 2, 1992 memo addressing overtime practices. Apparently, NUE has realized that the overtime issue was subsequently discussed in negotiations and that District did not refuse to bargain this issue. NUE had the same opportunity to bargain the sick leave issue during negotiations, but it failed to do so. By this failure, NUE has waived its right to bargain the issue.

Under Commission law, necessity is a defense to an alleged violation of Sec. 111.70(3)(a)4. The District had a business necessity for its actions in reassigning certain secretarial duties and in issuing the January 2, 1992 memo. All of NUE's charges alleging a violation of Sec. 111.70, Wisconsin Statutes, should be dismissed.

DISCUSSION

In the complaint, as originally filed, NUE alleges that the District violated Sec. 111.70(3)(a) 1, 3, and 4, Stats., when it reassigned duties from Judy Westlund and Kelly Anderson to Cindy Larson. The amendment to the complaint, filed on April 20, 1992, also contests the right of the District to order employes represented by NUE to "complete the pink request form for time beyond the regular work day at least three days in advance" and to require that "all leave requests be granted in one-half day minimums".

In post-hearing written argument, NUE alleges (1) that the District violated Sec. 111.70(3)(a)1, Stats., by coercing individual municipal employes into changes in their wages, hours, and working conditions without dealing with the representative of the employes, (2) that the District violated Sec. 111.70(3)(a)2, Stats., by completely disregarding NUE in making significant changes in the wages, hours and working conditions of employees and, thereby, discouraging employees from belonging to NUE, and (3) that the District violated Sec. 111.70(3)(a)4, Stats., by its direct refusal to bargain with NUE and by unilaterally determining and implementing changes in the wages, hours

and working conditions of employes represented by NUE without consultation with or consent from NUE.

Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer "To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Section 111.70(2), Stats., provides as follows:

> **(2)** RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In order to prevail upon the allegation that an employer has violated Sec. 111.70(3)(a)1, Stats., the complaining party must demonstrate, by a clear and satisfactory preponderance of the evidence, that an employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 3/ A violation may be found where the employer did not intend to interfere and an employe did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights. 4/ A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1. 5/

Just as employes have a protected right to express their opinions to their employers, so also do public sector employers enjoy a protected right of free speech. 6/ Recognizing that labor relations policy is best served by an uninhibited, robust and wide-open debate, the Commission has found that neither inaccurate employer statements, nor employer statements critical of the employes' bargaining representative are violative of Sec. 111.70(3)(a)1, per se. 7/ The test is whether such statements, construed in light of surrounding circumstances, express or imply threats of reprisal or promises of benefits which would reasonably tend to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. 8/

Sec. 111.70(3)(a)2, Stats.

Under Sec. 111.70(3)(a)2, Stats., it is a prohibited practice for a municipal employer to "initiate, create, dominate or interfere with the

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2/ WERC v. Evansville, 69 Wis. 2d 140 (1975).

3/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

4/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

6/ Ashwaubenon Jt. School District No. 1, Dec. No. 14774-A (WERC, 10/77).

7/ See generally: Lisbon-Pewaukee Jt. School District No. 2, Dec. No. 14691-A (Malamud, 6/76); Drummond Joint School District No. 1, Dec. No. 15909-A (Davis, 3/78); and Brown County (Sheriff-Traffic Department), Dec. No. 17258-A (Houlihan, 8/80).

8/ Id.

formation or administration of any labor or employee organization or contribute financial support to it, . . ." This statutory proscription contemplates a municipal employer's active involvement in creating or supporting a labor organization. 9/ Sec. 111.70(3)(a)2 "interference" is of a magnitude which threatens the independence of a labor organization as the representative of employe interests." 10/ "Domination" involves the actual subjugation of the labor organization to the employer's will. 11/ A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employe interests. 12/

Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. In order to establish a violation of this section, a complainant must show all of the following elements:

1. The employe was engaged in protected activities; and

2. The employer was aware of those activities; and

3. The employer was hostile to those activities; and

4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 13/

It is well-settled under Wisconsin's "in-part" test that anti-union animus need not be the employer's primary motive in order for an act to contravene this statute. 14/ If such animus forms any part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action. 15/ An employer may not subject an employe

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9/ Menomonie Jt. School District No. 1, Dec. No. 14811-C (McGilligan, 3/78).

10/ Columbia County, Dec. 22683-B (WERC, 1/87).

11/ Barron County, Dec. No. 26706-A (Jones, 8/91).

12/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85).

12/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87); Kewaunee County, supra.

13/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540 (1967); Employment Relations Department v. WERC, 122 Wis. 2d 132 (1985).

14/ Ibid.

to adverse consequences "when one of the motivating factors is his union activities, no matter how many other valid reasons exist" for the employer's action. 16/

Sec. 111.70(3)(a)4, Stats.

Sec. 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

> 4.To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2), Stats., rights of bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats. 17/

Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except at to those matters which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. 18/ Absent a valid defense, a unilateral change in the status quo wages, hours, or conditions of employment during negotiations of a first collective bargaining agreement, or during the hiatus period between collective bargaining agreements, is a per se violation of the Sec. 111.70(3)(a)4, Stats., duty to bargain. 19/ Waiver and necessity have been

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15/ Muskego-Norway, supra, at p. 562.

17/ Green County, Dec. No. 20308-B (WERC, 11/84)

18/ Racine County, Dec. No. 26288-A (Shaw, 1/92).

18/ City of Whitewater, Dec. No. 26099-B (Engmann, 4/90); School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

recognized to be valid defenses to a charge of unilateral implementation in violation of Sec. 111.70(3)(a)4, Stats. 20/

The employer's status quo obligation only applies to matters which primarily relate to employe wages, hours and conditions of employment. 21/ The Commissi bargaining because such a unilateral change undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 22/ In addition, an employer's unilateral change evidences a disregard for the role and status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 23/

Status quo is a dynamic concept which can allow or mandate change in employe wages, hours and conditions of employment. 24/ Thus, application of the dynamic status quo principle may dictate that additional compensation be paid to employes during a contract hiatus period upon attainment of additional experience or education, 25/ or may give the employer the discretion to change work schedules during a contract hiatus period. 26/ When determining the status quo within the context of a contract hiatus period, the Commission considers relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. 27/

In disputes subject to final and binding interest arbitration, the statutory duty to bargain ordinarily requires that the parties maintain the status quo as regards mandatory subjects of bargaining until a settlement or arbitration award is reached in the matters. 28/ In the case of permissive subjects of bargaining, there is no such duty to bargain. 29/

Under Wisconsin law, a matter which is primarily related to wages, hours and conditions of employment is a mandatory subject of bargaining, while a matter which is primarily related to the formation and choice of public policy is a permissive subject of bargaining. 30/ In applying the "primary relationship test", the Wisconsin Supreme Court concluded that bargaining is not required with regard to "educational policy and school management and

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20/ Racine Unified School District, Dec. No. 23904-B (WERC, 9/87); Green County, supra.

21/ Mayville School District, Dec. No. 25144-D (WERC, 5/92).

21/ City of Brookfield and Green County, supra.

22/ School District of Wisconsin Rapids, supra.

24/ Mayville School District, supra.

25/ School District of Wisconsin Rapids, supra.

26/ Washington County, Dec. No. 23770-D (WERC, 10/87).

27/ School District of Wisconsin Rapids, supra, note 2.

28/ Racine Unified School District, Dec. No. 25283-A (Jones, 10/88).

29/ Greenfield School District No. 6, Dec. No. 14026-B (WERC, 11/77).

30/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977); Beloit Education Association v. WERC, 73 Wis.2d 43 (1976).

operation" or the "management and direction of the school system." 31/

The Change in the Secretarial Work Assignments

From 1988 until the 1991-92 school year, District secretaries Judy Westlund and Kelly Anderson were assigned the duties of receiving employe absence reports and of procuring substitute employes. These duties were performed prior to the start of the school day and while the secretaries were at home. In compensation for this assignment, each of the two secretaries received forty-five hours of paid leave at the end of the school year.

Commencing with the 1991-92 school year, Westlund and Anderson were no longer assigned the duty of receiving employe absence reports, or procuring substitutes, prior to the start of the school day. Rather, these duties were assigned to another District secretary, Cindy Larson, who received employe absence reports and secured substitutes from her workplace at the District Office and during her normal work day. 32/ As a result of the reassignment of duties, Westlund and Anderson did not receive forty-five hours of paid leave at the end of the school year.

The record establishes that, prior to the start of the 1991-92 school year, the District created a new secretarial position in the District's central office and assigned to this position duties which had been previously performed by two other District secretaries. This conduct occurred during the time period in which the parties were negotiating their initial collective bargaining agreement. More specifically, the conduct occurred during the period of time in which the parties' were awaiting the interest arbitration award which would determine the terms and conditions of their initial collective bargaining agreement. Applying the principles enunciated supra, it must be concluded that the creation of the new secretarial position and the assignment of the disputed duties to the new secretarial position occurred during a period of time in which the District had a statutory duty to maintain the status quo on mandatory subjects of bargaining.

As discussed supra, absent a valid defense, an employer's unilateral change in the status quo of a mandatory subject of bargaining is a per se violation of the employer's statutory duty to bargain. The initial question to be decided is whether the District's decision to create the new secretarial position and the decision to reassign the disputed duties to the new secretarial position involve mandatory subjects of bargaining.

At the time that the District reassigned the disputed duties from Westlund and Anderson to Larson, all three employes were secretaries represented by NUE. 33/ Given the fact that the disputed duties had been performed by secretaries, i.e., Anderson and Westlund, it is reasonable to conclude that the disputed duties are fairly within the scope of responsibilities applicable to the kind of work performed by District secretaries. The Commission has held that if a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employes involved, the decision to assign such work to such employes is

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31/ Beloit, supra at 52, 56.

32/ Westlund and Anderson started their school work day at 7:00 a.m. or 7:30 a.m. When Larson assumed the new secretarial position, she started her work day at 6:00 a.m.

33/ During the 1990-91 school year, Larson had been an Educational Aide. The disputed duties, however, were performed by Larson in her capacity as a secretary, and not as an Educational Aide.

a permissive subject of bargaining. 34/ It follows, therefore, that the decision to remove such duties from an employe is also a permissive subject of bargaining.

Before the creation of the new secretarial position, the District switchboard had been in another secretary's office, which caused disruption for this secretary. With the creation of the new secretarial position, telephone calls were received in the District's central office by the employe occupying the new secretarial position. In creating the new secretarial position, the District provided the public with a central location to telephone, prior to the start of the school day, for information concerning District activities, including information on school closings, or other decisions involving inclement weather. By reassigning the absence report and substitute procurement duties from Westlund and Anderson to the new secretarial position, the District avoided duplicate calls to substitutes. In previous cases, the Commission has recognized that the decision to establish a position 35/ and the decision to eliminate a position 36/ are primarily related to educational policy and, thus, are permissive subjects of bargaining.

It is true that the decision to reassign the duties from Westlund and Anderson to the new secretarial position impacted upon the wages, hours and working conditions of Westlund and Anderson. The Examiner is persuaded, however, that the District's decision to create the new secretarial position, as well as the District's decision to reassign the duties of receiving absence reports and procuring substitute employes from Westlund and Anderson to the new secretarial position, are primarily related to "educational policy and school management and operation" and the "management and direction of the school system" and, thus, are permissive subjects of bargaining. As discussed above, the District does not have a statutory duty to bargain decisions involving permissive subjects of bargaining prior to implementing such decisions.

A municipal employer who unilaterally changes a permissive subject of bargaining, may have a duty to bargain the impact of the change on the wages, hours, and working conditions of employes. The extent of a municipal employer's obligation to bargain such an impact is dependent upon the extent of the labor organization's request in that regard. 37/ In the present case, when NUE representative Manson became aware of the fact that the District was intending to reassign the disputed duties from Anderson and Westlund to another employe, he sent a letter to the District Administrator. A review of the letter, dated July 18, 1991, demonstrates that NUE challenged the right of the District to unilaterally reassign the duties from Westlund and Anderson to Larson, but does not demonstrate that NUE sought to bargain the impact of the reassignment decision on the wages, hours and working conditions of bargaining unit employes. Nor is there any other evidence that, prior to filing the instant complaint on September 3, 1991, NUE requested the District to bargain over the impact of the District's decision to create the new secretarial position and to reassign the disputed duties to the new secretarial position. Since the record fails to establish that NUE requested the District to bargain

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34/ City of Milwaukee Sewerage Commission, Dec. No. 17025 (WERC, 5/79). See also City of Milwaukee Sewerage Commission, Dec. No 17302 (WERC, 9/79) and City of Wauwatosa, Dec. No. 15917 (WERC, 11/77).

35/ Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83); Oak Creek Franklin Joint School District, Dec. No. 11827-D (WERC, 9/74).

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

37/ Racine Unified School District, Dec. No. 25283-A (Jones, 10/88); City of Madison, Dec. No. 17300-C (WERC, 7/83).

over the impact of the District's creation of the new secretarial position and the reassignment of the secretarial duties, there is no basis for concluding that the District violated its statutory duty to bargain over the impact of such conduct upon the wages, hours and working conditions of employes represented by NUE.

Parallel final offers or even tentative agreements do not constitute a binding contract between the parties unless the parties have a specific agreement to the contrary. 38/ In the present case, the parties did not have an agreement to implement any agreements, or any language contained in the final offers, prior to the issuance of the decision of the Interest Arbitrator. Thus, the language contained in the final offers did not become effective until the issuance of the interest arbitration award. Assuming arguendo, (1) that the parties' final offers contained identical language which expressly permitted the District to reassign the disputed duties, and (2) that the District had a statutory duty to bargain the decision to reassign the disputed duties, the District could not rely upon such language to argue that the District had complied with its statutory duty to bargain. Similarly, NUE could not rely upon the language contained in the final offers, or stipulations of agreement, to argue that the decisions of the District were contrary to NUE's contractual rights. 39/

NUE argues that the District negotiated individually with the three secretaries regarding changes in their wages, hours, and working conditions. While one may presume that the District informed Westlund and Anderson that they would no longer be assigned the duty of receiving absence reports or procuring substitutes, the record does not contain any evidence of any communication between Westlund and Anderson and District representatives. With respect to Larson, the only evidence of any communication between Larson and District representatives is contained in the testimony of the District Administrator. The relevant testimony is as follows: 40/

> Q: Did you talk to Cindy about changing her hours?
>
> A: Yes, I did.
>
> Q: Was there agreement?
>
> A: Yes, there was.

While it is evident that the District Administrator and Larson had a discussion concerning the change in work hours, it is not evident that the discussion rose to the level of a negotiation of Larson's wages, hours or working conditions. It may be that the discussion involved nothing more than the District Administrator offering the new secretarial position to Larson and Larson accepting the same.

Contrary to the argument of NUE, it is not evident that any District representative negotiated with any secretary concerning their wages, hours or working conditions. Nor does the record otherwise establish that the District

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38/ Racine Unified School District, Dec. No. 25283-B (WERC, 5/89); Sauk County, Dec. No. 22552-B (WERC, 6/87); aff'd (CtApp IV) 148 Wis.2d 392 (1988).

39/ Once the collective bargaining agreement which is the subject of the interest arbitration award becomes effective, NUE may have a contractual right to file a grievance over District conduct which occurred during the term of the collective bargaining agreement.

40/ T. at 32.

violated Sec. 111.70(4)(a), Stats., when it unilaterally created the new secretarial position and unilaterally reassigned the duties of receiving employe absence report calls and procuring substitute employes to the new secretarial position.

It is not evident that, in the creation of the new secretarial position and the reassignment of duties from Westlund and Anderson to the new secretarial position, there were any employer statements or conduct which, construed in light of surrounding circumstances, expressed or implied threats of reprisal or promises of benefits which would reasonably tend to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. Accordingly, the Examiner has rejected the claim that the District violated Sec. 111.70(3)(a)(1), Stats., when it created the new secretarial position and reassigned the disputed duties.

It is not evident that, in the creation of the new secretarial position and the reassignment of the disputed duties, the District initiated, created, dominated or interfered with the formation or administration of any labor or employee organization or contributed financial support to any labor or employee organization. Despite NUE's assertion to the contrary, the record does not support a finding that the District's conduct in this matter was violative of Sec. 111.70(3)(a)2, Stats.

As the District argues, the record establishes that the decision to create the new secretarial position and the decision to assign the disputed duties to the new secretarial position were motivated by legitimate business interests. As the District further argues, the record is devoid of any evidence that the District's conduct in this regard was motivated, in any part, by animus toward NUE, or toward any employe, for engaging in protected activity. Accordingly, NUE has not prevailed upon its allegation that the District's conduct in this matter was violative of Sec. 111.70(3)(a)3, Stats.

The Change in Leave Policies

In the amendment to the complaint, NUE contested the right of the District to implement overtime and sick leave policies. In post-hearing written argument, NUE focused solely on the right of the District to require that sick leave be taken in one-half day minimums. Given NUE's failure to address the overtime claim in post-hearing written argument, the Examiner has concluded that NUE has abandoned the overtime claim. Accordingly, the Examiner has limited her discussion to NUE's sick leave claim.

On January 2, 1992, the District Administrator issued a memo which, inter alia, required bargaining unit employes to use sick leave in one-half day minimums. A copy of the memo was provided to NUE Representative Manson and NUE bargaining unit members at the time that it was issued. NUE, contrary to the District, argues that by requiring bargaining unit employes to use sick leave in one half-day minimums, the District made a unilateral change in a mandatory subject of bargaining in violation of Sec. 111.70(3)(a)4, Stats.

The memo of January 2, 1992 was issued during a hiatus period between collective bargaining agreements. As discussed above, during such a hiatus period, and absent a valid defense, an employer's unilateral change in the status quo on matters which primarily relate to wages, hours, or conditions of employment is a per se violation of Sec. 111.70(3)(a)4, Stats. The Commission has recognized necessity to be a valid defense to the allegation that an employer has violated its statutory duty to bargain. 41/ The Commission has

41/ School District of Turtle Lake, Dec. No. 24686-A (Bielarczyk, 2/88); Green County, Dec. No. 20308-B (WERC, 11/84); and City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

also recognized the defense of waiver. It is well established, however, that a waiver of the right to bargain on mandatory subjects of bargaining must be clear and unmistakable, and that a finding of such waiver must be based on specific language in the agreement or bargaining history. 42/

Sick leave is primarily related to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining. 43/ The undersigned is persuaded that the decision to require bargaining unit employes to use sick leave in one-half day minimums is primarily related to the wages, hours and working conditions of Complainant's bargaining unit employes and, therefore, is a mandatory subject of bargaining. Thus, absent a valid defense, the District did have the statutory obligation to maintain the status quo on the sick leave policy during the contract hiatus period.

The Commission has found that the binding interest arbitration provisions of Sec. 111.70(4)(cm), Stats., make inappropriate an application of the private sector impasse defense principles to disputes subject to the statutory interest arbitration process and has concluded that, in negotiations subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats., impasse, however defined, is not a valid defense to a unilateral change in a mandatory subject of bargaining. 44/ The sick leave change occurred during the contract hiatus period and immediately prior to the time that the parties commenced negotiation on the successor agreement. Thus, the dispute over the sick leave change was subject to the interest arbitration procedure. Despite the District's argument to the contrary, the defense of impasse is not available to the District in the present case.

Having concluded that there was a duty to maintain the status quo on the sick leave policy, it becomes necessary to identify the status quo. As discussed above, when determining the status quo within the context of a contract hiatus period, the Commission considers relevant language from the expired contract, as historically applied, or as clarified by bargaining history.

In the present case, the expired agreement is the parties' initial agreement, the terms and conditions of which were determined by an interest arbitration award which was issued on November 4, 1991. Since this initial agreement was, by its terms, effective from February 14, 1989 through June 30, 1991, and there was no agreement to extend the term of the initial agreement, the agreement was expired at the time that the parties received the interest arbitration award. There is, therefore, no evidence of historical application of the contract language.

As the District argues, the expired initial collective bargaining agreement contains a Management Rights Clause which provides the District with various rights to manage school operations, including the right to establish reasonable work rules. The expired collective bargaining agreement also contains the following:

> This Agreement, 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

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42/ City of Appleton(Police Dept.), Dec. No. 14615-C (WERC, 1/78).

43/ Sauk County, Dec. No. 17657-C (McGilligan, 3/81).

44/ City of Brookfield, Dec. No. 19822-C (WERC,11/84).

> hereto. Waiver or any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

Assuming arguendo, that the change in the sick leave policy is a work rule, it is well established that a work rule which primarily relates to mandatory subjects of bargaining is a mandatory subject of bargaining. 45/ Contrary to the argument of the District, neither the language of the Management Rights Clause, nor any other language of the expired initial agreement, served as a waiver of NUE's right to bargain changes in the sick leave policy during the contract hiatus period which followed the expiration of the initial agreement. Nor did the language of the expired initial agreement create a dynamic status quo such that the District had the right to unilaterally change the sick leave policy during the contract hiatus period which followed the expiration of the initial collective bargaining agreement.

The sick leave language contained in the expired initial collective bargaining agreement does not mandate that sick leave be used in increments of one hour, nor does it mandate that sick leave be used in minimums of one-half day. Rather, the sick leave language is silent with respect to this aspect of sick leave usage.

At the time that the parties negotiated the initial collective bargaining agreement, Complainant's bargaining unit members were permitted to use sick leave in hour increments. If an employe became ill at work and left work early, the employe was charged only for the time lost. The record does not demonstrate that, at the time that the parties negotiated the sick leave language contained in the initial collective bargaining agreement, the District advised NUE that it would administer the contractual sick leave in a manner which differed from the existing practice. Nor is it evident that, prior to the issuance of the January 2, 1992 memo, the District did administer the sick leave in a manner which was inconsistent with the prior practice.

45/ City of Wauwatosa, Dec. No. 15917 (WERC, 11/77).

The Examiner is satisfied that, on January 2, 1992, the status quo on sick leave usage was that employes were entitled to use sick leave in one hour increments and that, if an employe became ill at work, the employe was charged only for the time lost from work. The Examiner is further satisfied that the District Administrator's memo of January 2, 1992, which stated that "All leave requests will be granted in one-half day minimums" unilaterally changed the status quo with respect to the use of sick leave. 46/

In raising the business necessity defense, the District argues that the change in the sick leave policy was necessary to obtain uniform contract administration. The record, however, indicates that, prior to the change in the sick leave policy, there was uniform administration of the sick leave policy, i.e., employes were entitled to use sick leave in one hour increments and, if an employe became ill at work, the employe was charged only for the time lost. 47/ While it may be that the change in the sick leave usage policy made it easier for the District's Bookkeeper to record sick leave usage, the ease of recording sick leave is not a "necessity" which justifies the District's unilateral change of the sick leave policy. Despite the District's argument to the contrary, the record does not establish a valid defense of "necessity."

At hearing, the District Administrator confirmed that he never consulted with any NUE Representative prior to issuing the January 2, 1992 memo. 48/ Within two weeks after the issuance of the memo of January 2, 1992, the parties met to exchange initial proposals on the agreement to succeed the expired initial agreement. As the District argues, the initial proposals presented by NUE do not address any aspect of sick leave. Nor is it evident that either NUE, or the District, made a bargaining proposal on any aspect of sick leave during the time that the parties negotiated a successor agreement. 49/

Waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in a mandatory subject, except where either the unilateral change amounts to a fait accompli or the circumstances otherwise indicate that the request to bargain would have been a futile gesture. 50/ The Examiner is persuaded that, in the present case, the District's unilateral change in the sick leave policy was a fait accompli. Despite the District's assertions to the contrary, NUE did not have a duty to bargain the maintenance of the status quo. 51/

In his letter of March 5, 1992, NUE Representative Manson indicated that, during the previous two months, the District and NUE had various communications on a variety of subjects, including "Leave Requests". The communications referred to in Manson's letter are "your memo of January 2, 1992" and "dialogue at the bargaining table on January 14 and February 6". The record does not

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46/ The District acknowledges, in its reply brief, that since the date of the issuance of the January 2, 1992 memo, NUE bargaining unit members have been charged sick leave in one-half day increments.

47/ T. at 21-22.

48/ T. at 26.

49/ At the time of hearing, the parties' had submitted final offers on the terms and conditions to be included in this successor agreement and were awaiting the interest arbitration award on the successor agreement.

50/ City of Appleton, Dec. No. 17034-C (McCrary, 1/80); Green Bay School District, Dec. No. 16753-A (Yaeger, 12/79); Walworth County, Dec. No. 15429-A, 15430-A (Gratz, 12/78).

51/ Menomonee Falls School District, Dec. No. 20499-B (WERC, 10/85).

establish the content of the "dialogue at the bargaining table". The record fails to establish that, during the negotiation of the successor agreement, NUE has waived its statutory duty to bargain over the change in the sick leave policy or that the District has complied with its statutory duty to bargain over the change in the sick leave policy.

In summary, the Examiner is satisfied that, when the District issued the memo of January 2, 1992, the District, without a valid defense, unilaterally changed a mandatory subject of bargaining. Accordingly, the Examiner has concluded that the District has violated Sec. 111.70(3)(a)4, Stats.

By violating Sec. 111.70(3)(a)4, Stats., the District has committed a derivative violation of Sec. 111.70(3)(a)1, Stats. The record, however, does not establish that the District's conduct in unilaterally changing the sick leave policy resulted in an independent violation of Sec. 111.70(3)(a) 1, Stats. Nor does the record establish that this conduct of the District violated Sec. 111.70(3)(a)2 or Sec. 111.70(3)(a)3, Stats. In remedy of the District's unlawful unilateral change in the sick leave policy, the Examiner has issued a cease and desist order, has ordered the District to return to the status quo ante, and has ordered the District to make employes whole for all sick leave lost as a result of the unlawful unilateral change. Additionally, the Examiner has ordered the District to post the appropriate notice.

Dated at Madison, Wisconsin this 19th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner