STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SIREN SUPPORT STAFF ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF SIREN, Respondent.	Case 21 No. 49440 MP-2755 Decision No. 27764-A

Appearances:

Mr. Barry Delaney, Executive Director, Chequamegon United Teachers, P.O. Box 311, Hayw

Weld, Riley, Prenn and Ricci, S.C., Attorneys at Law, P.O. Box 1030, Eau Claire, W

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Siren Support Staff Association, ("the Union"), on June 23, 1993, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission in which it alleged the School District of Siren ("the District") had committed prohibited practices within the meaning of Chapter 111, Stats. On August 11, 1993, the Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. Hearing was held set for September 3, 1993, in Siren, Wisconsin. At that time the parties attempted to settle the dispute voluntarily. When those efforts proved unsuccessful, hearing was set for April 8, 1994. A transcript was taken and received April 26, 1994. Briefs were filed, the last of which was received July 5, 1994. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Siren Support Staff Association ("the Union"), is a labor organization with offices at 213 E. First Street, Hayward, Wisconsin 54843-0311.

2. The Siren School District ("the District"), is a municipal employer with offices at 24022 Fourth Avenue, Siren, Wisconsin.

3. The Union and the District are parties to a succession of collective bargaining agreements. During the time relevant to the dispute herein, said collective bargaining agreement contained the following pertinent provisions:

ARTICLE I - RECOGNITION

> The Board of Education (hereinafter the "Board") for the School District of Siren (hereinafter the "District") recognizes the School District of Siren Support Staff Association (hereinafter the "Union") as the exclusive and sole bargaining representative for all full-time and regular part-time noncertified employees employed by the District, excluding confidential, supervisory and management employees.

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ARTICLE XIII - JOB VACANCIES

> A. All employees will be notified by the Board of any vacancies at least ten (10) days prior to the filling of vacancies.
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> B. Current employees who apply for a vacant position shall receive the position if they are the best qualified.

ARTICLE XVI - WAGE SCHEDULE

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	Wage Rate Per Hour	
Position	Effective 7/1/92	Effective 7/1/93
Daytime Assistant Custodian	10.05	10.45
Assistant Night Custodian	7.77	8.08

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4. The collective bargaining agreement contains no provision for the arbitration of disputes concerning the interpretation and application of the agreement.

5. Nancy Kouba has been employed by the District as an Assistant Night

Custodian since August 26, 1992. During the school year she worked 17.5 hours a week, performing vacuuming unless another custodian was absent in which case she performed the absent employe's more general cleaning responsibilities. During the school term she was paid pursuant to the contractual rate of $7.77 an hour. During her employment interview, she was not told whether she was employed for only the school year or for the entire year. At all times she received all the holidays provided by the contract for calendar year employes. During the spring of 1993, she asked District Administrator Gerald Mikunda if she would work during the summer. He told her that she could, but not for more than twenty hours a week because if she worked more hours she would be eligible for health and dental insurance benefits.

6. During the summer, 1993, Ms. Kouba worked twenty hours a week at her previous wage rate. In July, 1993, after the negotiation of the successor contract, she was paid $8.08 an hour. She did not perform the same duties as in her school term assignment. She performed the annual cleaning duties such as floor stripping that were also performed by the three full-year custodians and the two students working at the same time. The only task she did not perform was the use of the large buffing machine which was done by the Head Custodian and the Night Custodian. The buffing machine was used approximately two days during the summer.

7. When Ms. Kouba was first hired, she was paid $6 an hour and fair share monies were not deducted from her pay check. After challenge by the Union, by letter dated February 18, 1993, the District agreed to pay her the contractual rate of $7.77 an hour and deduct fair share monies from her paycheck pursuant to the contract.

8. Ms. Kouba was a member of the bargaining unit during both the winter and summer employment.

9. The District has in the past hired students to work on summer cleaning. Some of these students have been paid by funds of job training programs such as the Community Employment Program under the Private Industry Council and the Job Training Manpower Act. These students were not rehired for a second summer. In summer of 1993, students Jamie Rivard and Ron Malamphy were employed, but the District was not reimbursed by any program for their wages. Their wage rate was $5.00 an hour. They performed essentially the same tasks as the custodians with whom they worked.

10. Ms. Rivard and Mr. Malamphy were not regular part-time employes.

11. A vacancy for a forty-hour bargaining unit custodial position did not exist during the summer of 1993 and the District did not violate the collective bargaining agreement by not posting any such position.

12. Nancy Kouba performed the work of a Daytime Assistant Custodian during the summer of 1993 and the District violated the collective bargaining agreement by failing to compensate her at the contractual rate for that position.

13. Since employees Jamie Rivard and Ron Malamphy are not regular part-time employees, they are not included by the collective bargaining agreement and the District did not violate the collective bargaining agreement by the paying them the $5.00 an hour wage rate.

CONCLUSIONS OF LAW

1. Inasmuch as a vacancy did not exist within the meaning of the collective bargaining agreement, the District did not violate the contract when it failed to post a vacancy for a forty-hour a week custodial position during summer, 1993 and therefore the District did not violate Sec. 111.70(3)(a)5, Stats.

2. Inasmuch as Nancy Kouba was a bargaining unit member performing essentially the same duties as the other custodians during the daytime hours, by failing to compensate her at the Daytime Assistant Custodian wage rate, the District violated Sec. 111.70(3)(a)5, Stats.

3. Inasmuch as employees Jamie Rivard and Ron Malamphy are not regular part-time employees, they are not included in the collective bargaining unit, and the District did not violate the collective bargaining agreement by the compensation it paid to them during summer, 1993, and thereby did not violate Sec. 111.70(3)(a)5, Stats.

ORDER 1/

1. The Complaint should be, and hereby is, dismissed as to the allegations that the District violated Sec.111.70(3)(a)5 Stats., by not compensating Jamie Rivard and Ron Malamphy at the contractual wage rate and by not assigning Nancy Kouba forty hours of work during the summer of 1993.

2. The District is ordered to take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a. Make Nancy Kouba whole for the losses she incurred by its failure to pay her the Daytime Assistant Custodian rate during the summer of 1993.

b. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of the Order as to the steps it has taken to comply with this order.

Dated at Madison, Wisconsin this 2nd day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, Examiner

(Footnote 1/ appears on the next page.)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

SIREN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Nancy Kouba was first hired by the District on August 26, 1992 to perform evening cleaning duties 17.5 hours a week. After some disagreement between the District and the Union the parties agreed that she was an Assistant Night Custodian and her wage rate was $7.77 an hour pursuant to the contract. During the summer of 1993, she worked twenty hours a week, working alongside the three other full-time, full-year custodians and two students. The students were paid $5.00 an hour which is not a contractual wage rate. On June 23, 1993 the Union filed a complaint of prohibited practices 2/ asserting that the District violated the contract by not offering Ms. Kouba a forty-hour a week position, by not compensating her at the Daytime Assistant Custodian rate and by not compensating the two students at the contractual rate.

POSITIONS OF THE PARTIES

The Union

The Union asserts that Ms. Kouba was a bargaining unit employe. It argues that this status was indicated by various events: One: In the past, employes who worked as assistant night custodians during the school year were employed as regular employes during the summer; Two: The District never notified the Union that Ms. Kouba was a temporary employe; Three: The District treated Ms. Kouba as a regular employe by granting her all the holidays granted the calendar year employes and paying her at the wage rate provided in the collective bargaining agreement; Four: During the summer, Ms. Kouba performed the duties of a regular custodian. The Union further argues that Ms. Kouba was entitled to forty hours a week of work because she was more qualified than

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2/ Since the collective bargaining agreement does not provide arbitration for the resolution of disputes regarding its interpretation, the Union is proceeding pursuant to Sec. 111.70(3)(a)5, Stats. The District does not dispute the Commission's jurisdiction to resolve the instant dispute.

Jamie Rivard and Ron Malamphy who were assigned forty hours a week. Finally the Union argues that Ms. Rivard and Mr. Malamphy should have been paid at the wage rate provided for in the collective bargaining agreement. The Union requests a make whole remedy based on the contractual wage rate and a forty-hour week instead of the twenty hour week she was assigned during the summer of 1993.

In its reply brief, the Union reiterates earlier arguments and notes that the District's tacit understanding that Ms. Kouba was a bargaining unit employe was demonstrated by Mr. Mikunda's stated unwillingness to give Ms. Kouba a forty hour a week position because the collective bargaining unit would require the District to pay health insurance benefits, and the District's action in granting her the negotiated wage increase in mid-summer when the successor contract was ratified. The Union also supports its position regarding her bargaining unit status by citing the arbitration award involving St. Croix School District.

The District

The District asserts that the Ms. Kouba, Ms. Rivard and Mr. Malamphy were seasonal employes and as such were not covered by the collective bargaining agreement. It points to Ms. Kouba's acknowledgment that she was never told she was a regular employe and that her action in asking Mr. Mikunda whether she would be working during the summer confirms that she had no reasonable expectation as to summer employment. Likewise, Ms. Rivard and Mr. Malamphy had no reasonable expectation of continued employment. It asserts that for at least the last five years, no school-year Assistant Night Custodian has been employed during the summer other than a student who was not a member of the bargaining unit. The District challenges the reliability of the Union testimony that Assistant Night Custodians were employed for summer custodial work. The District asserts there is a long-standing practice of using non-bargaining unit members for summer work.

In its reply brief, the District notes how its arguments refute the Union's arguments. In addition, it characterizes the District's paying of the contractual wage rate to Ms. Kouba during the summer as a "mistaken kindness" rather than an indication that she was a member of the bargaining unit during the summer. It argues that other school districts hire employes who are bargaining unit members during the school term such as bus drivers for other work during the summer but that they are not members of the bargaining unit during the summer work.

DISCUSSION

Sec. 111.70(3)(a)5, Stats., provides that it is a prohibited practice to violate a collective bargaining agreement.

A. The $5 Wage Rate for Jamie Rivard and Ron Malamphy

The recognition clause of the collective bargaining agreement (set forth

in Finding of Fact 3, above), provides that the agreement covers all full-time and regular part-time employes of the District. Obviously, the students employed for the summer were not full-time employes. Since the agreement offers no definition of regular part-time employes, the parties are presumed to intend that "regular part-time employes" has the meaning commonly used in labor relations, that is, an employe who works on a regular basis with a reasonable expectation of continued employment. 3/

The students, Ms. Rivard and Mr. Malamphy, were hired for summer work and there is no contention they were told that they would have continued employment either after the summer or for the next year; furthermore, based on the District's history of hiring students for summer work or short term only, they could not have reasonably expected continued employment. Given these facts, they were not part-time employes, but rather were temporary employes and as such are not included within the Article I - Recognition Clause definition of the bargaining unit and do not receive the protection of the collective bargaining agreement. The District, therefore, was within its rights when it unilaterally set their wages at $5 an hour and it did not violate the contract thereby. The complaint is dismissed as to this allegation.

B. The District's Failure to Post a Vacancy for the Forty-Hour Position

The Association alleges that since Ms. Rivard and Mr. Malamphy were performing the same tasks as Ms. Kouba and there was no showing that they had special skills that she lacked, the work they performed constituted a vacancy to which she should have been allowed to bid to receive a full forty-hour a week position during the summer.

The Association's claim is based on Article XIII - Job Vacancies (set forth in Finding of Fact 3, above). That provision entitles bargaining unit employes to be assigned vacant positions if they are best qualified. To prevail, the Union must show: one, that Ms. Kouba was a bargaining unit member; two, that a vacancy existed; and three, that Ms. Kouba was the best qualified applicant.

The undersigned first considers the District's argument that Ms. Kouba was not a member of the bargaining unit when she worked during the summer. Although the District is right that it is theoretically possible that an employe be a bargaining unit member during the school term, but not while they are performing summer work, that is not the situation here.

As a starting point, it is noted that High School Principal James Bucher wrote to the Union on February 18, 1993, acknowledging Ms. Kouba's bargaining unit status for her school term work.

Additionally, several indications demonstrate that the District

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3/ See, for example, Village of Bayside, (Public Safety Department), Dec. No. 27056 (WERC, 10/91).

understood that her bargaining unit status survived when she worked in the summer months. She had been credited throughout the year with the holidays (on a pro-rated basis) to which calendar year employes are entitled, rather than the lesser number of holidays to which school year employes are entitled. During the summer months she was paid at the contractual pay rate for Assistant Night Custodian and when the successor contract was negotiated, she was paid at the new contract's rate. Finally, District Administrator Gerald Mikunda told Ms. Kouba that he could not increase her hours beyond twenty during the summer because that would obligate the District to pay her health and dental benefits. Those benefits are required by the collective bargaining agreement and by recognizing that obligation, Mr. Mikunda acknowledged her continued membership in the bargaining unit.

The undersigned rejects the District's argument that the wages and holidays were granted to Ms. Kouba only, "out of respect for the position" and as a "mistaken kindness." Those two acts might be ambiguous, but the decisive evidence relates to the increased summer hours and the District's act of allowing the amount of additional hours to be controlled by consideration of the contractual provision of health and dental benefits. There can be no doubt that the District viewed Ms. Kouba's summer employment as governed by the contract.

Having found that Ms. Kouba was a bargaining unit employe during her summer employment, the undersigned must consider whether a vacancy existed which the District was obliged to post.

Although the District did not post a forty-hour a week bargaining unit vacancy, the Union claims that one in fact existed because some of the work performed by Ms. Rivard and Mr. Malamphy could have been assigned to Ms. Kouba. This argument is based on the Union's position that all work similar to that performed by bargaining unit members is bargaining unit work. However, the Union does not point to, nor is the undersigned aware of, any provision that defines and reserves all bargaining unit work. Nor is there any provision that prohibits or restricts the District's use of temporary or casual employes to perform work similar to work performed by bargaining unit members. In fact, the record shows that the District has consistently used temporary employes. Consequently, the District was not obligated by the contract to create a forty-hour a week bargaining unit position by decreasing some of the hours it assigned to the students.

In reaching this conclusion, the undersigned also rejects the Union's argument that the District should have offered Ms. Kouba a forty-hour position because in the past the Assistant Night Custodian was assigned forty hours in the summer time.

The evidence fails to establish that in the past, any Assistant Night Custodian who worked less than forty hours during the school year was increased to forty hours during the summer. Although Head Custodian Norman Hinze and Tom Hagen, Assistant Executive Director of Chequamegon United Teachers, testified that at some unspecified time in the past, such was the case, that testimony was contradicted by the testimony of Administrator Mikunda. Administrator

Mikunda testified that in the five years of his tenure, during which time he had been responsible for employment, no Assistant Night Custodian was assigned forty hours during the summer. The possibility that the accuracy of Mr. Hinze's and Mr. Hagen's recollection is blurred by the passage of time is made more likely since Mr. Hinze was unable to give any name, and Mr. Hagen could only offer the name "John" for the employes to whom he was referring, and they were unable to otherwise support their recollection in any way. Consequently, I find Administrator Mikunda's recollection more reliable and conclude that the District has not had bargaining unit Assistant Night Custodians who worked less than forty hours during the school year but forty hours during the summer. The Union's argument that a past practice created a bargaining unit position of forty hours is unpersuasive.

To summarize, the undersigned concludes that although Ms. Kouba was a bargaining unit member during her summer employment, no vacancy in a forty-hour position existed and the District did not violate the collective bargaining agreement when it did not offer her a forty-hour a week summer position and the complaint must be dismissed as to this allegation.

C. The District's Failure to Compensate Nancy Kouba at the Assistant Day Custodian Wage Rate

Having found that, contrary to the District's argument, Ms. Kouba was a bargaining unit employe when she worked during the summer months, the undersigned finds that during that time, when she worked not at night, but during the day, the contract requires that she be compensated at the Daytime Assistant Custodian wage rate. The record is devoid of any evidence that the parties had a particular understanding, if any, regarding what constituted Daytime Assistant Custodian work and what was Assistant Night Custodian work. The foregoing conclusion is based on the following three factors: one, during the summer Ms. Kouba worked not at night but in the daytime; two, during the summer she does not spend 95 percent of her time vacuuming, as she did in winter; and, three, in summer she performs essentially the same tasks as the other custodians. These three facts demonstrate that her summer assignment is dramatically different from that for which she received the Assistant Night Custodian rate during the school term. Accordingly, the District is found to have violated the collective bargaining agreement by continuing to compensate Ms. Kouba at the Assistant Night Custodian rate for her work in the summer of 1993. A make-whole remedy has been ordered.

Dated at Madison, Wisconsin this 2nd day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, Examiner