STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EDUCATION ASSOCIATION OF WAUKESHA, Complainant, vs. SCHOOL DISTRICT OF WAUKESHA, Respondent.	Case 111 No. 49785 MP-2789 Decision No. 27835-A

Appearances:

Mr. Stephen Pieroni and Ms. Mary Pitassi, Staff Counsel and Associate Counsel of the Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, WI 53708-8003, appearing on behalf of the Association.

Davis & Kuelthau, S.C., by Mr. Gary M. Ruesch and Mr. Victor Lazzaretti, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-4285, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Education Association of Waukesha filed a complaint with the Wisconsin Employment Relations Commission on September 14, 1993, alleging that the School District of Waukesha had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. On October 8, 1993, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearings were held in Waukesha, Wisconsin, on March 30, 1994, and May 25, 1994. The record was closed on August 30, 1994, upon receipt of transcript and written argument.

Having considered the evidence and arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Education Association of Waukesha, hereafter referred to as "Association," is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its principal office is c/o Mr. David Pfisterer, Executive Director, TriWauk UniServ Council, 13805 West Burleigh Road, Brookfield, WI 53005-3066.

2. The School District of Waukesha, hereafter referred to as "District," is a municipal employer within the meaning of Sec. 111.70(j), Stats. Its principal offices are c/o Dr. David Kampschroer, District Administrator, Waukesha School District, 222 Maple Avenue, Waukesha, WI 53186.

3. In 1963, Central Campus consisted of three buildings, i.e., Edison, Worthington and Lincoln. Lincoln housed Grades Seven and Eight. Edison and Worthington housed Grades Nine and Ten. South Campus housed Grades Eleven and Twelve. In 1974, when North High was completed, South High School had two campuses, i.e., South Campus and Central Campus. The Central Campus housed Grades Nine and Ten and the South Campus housed Grades Eleven and Twelve. When North High was completed, North High housed four grades, i.e., Nine, Ten, Eleven and Twelve; the District's two middle schools, Horning and Butler, housed Grades Seven and Eight; and the elementary schools housed Grades Kindergarten through Six. Effective with the 1979-80 school year, the elementary schools housed Grades Kindergarten through Six; Horning, Butler and Central middle schools housed Grades Seven through Nine; and North and South high schools housed Grades Ten through Twelve. Effective with the 1993-94 school year, the elementary schools housed Grades Kindergarten through Six; the middle schools housed Grades Seven and Eight; and the high schools housed Grades Nine through Twelve. At the start of the 1993-94 school year, the District had three high schools, North, South and the newly constructed West.

4. In 1963, teachers who taught Grades Seven through Twelve had a seven period schedule. Since at least 1973, teachers who have taught Grades Seven and Eight have had an eight period schedule. From at least 1963 until the start of the 1993-94 school year, teachers who have taught Grades Ten through Twelve have had a seven period schedule. Prior to the 1979-80 school year, teachers who taught Grade Nine had a seven period schedule. Effective with the 1979-80 school year, teachers who taught Grade Nine have had an eight period schedule. Neither the Association, nor any individual, filed a grievance on this change in the schedule of the Ninth Grade teachers. For at least twenty years, a teacher in Grades 7-12 with an eight period schedule has received his/her base salary for a teaching load consisting of six assignments and two preparation periods. For at least twenty years, a teacher in Grades 7-12 with a seven period schedule has received his/her base salary for a teaching load consisting of five assignments and two preparation periods. For at least twenty years, teachers in Grades 7-12 with a seven period schedule have received overload pay in the amount of one-fifth of their base salary for six assignments and one preparation period, while teachers in Grades 7-12 with an eight period schedule have received overload pay in the amount of one-sixth of their base salary for seven assignments and one preparation period.

5. The Association is the exclusive bargaining representative for the following employes of the District:

> All full-time and regular part-time teachers, guidance counselors, librarians, psychologists, social workers, speech and language pathologists, occupational therapists, physical therapists, and exceptional

education itinerants, but excluding aides, substitute teachers, secretarial, custodial, maintenance, lunch program, supervisory and all other employes.

The Association and District began their bargaining relationship in 1965. The parties' 1969-70 agreement contained the following:

ARTICLE XII
TEACHING HOURS AND TEACHING LOAD

12.06 The normal teaching load in schools serving grades 7-12 will include ten (10) preparation periods per week. Preparation periods shall be equal in length to a class period.

12.07 Every effort shall be made so that the normal teaching assignment shall include no more than two (2) distinct preparations. Distinct preparations shall be defined as preparations for classes of different grade levels, different ability levels or different subject areas.

The parties' 1971-72 agreement contained the following:

ARTICLE XI
TEACHING HOURS AND TEACHING LOAD

11.06 The normal teaching load in schools serving grades 7-12 will include ten (10) preparation periods per week. Preparation periods shall be equal in length to a class period. Any variation in scheduling shall not have the effect of reducing the preparation time of the teacher.

11.07 Every effort shall be made so that the normal teaching assignment shall include no more than two (2) distinct preparations. Distinct preparations shall be defined as preparations for classes of different grade levels, different ability levels or different subject areas.

The parties' 1972-73 agreement, executed on October 31, 1972, contained the following:

ARTICLE XI I
TEACHING HOURS AND TEACHING LOAD

12.06 The normal teaching load in schools serving grades 7-12 will include ten (10) preparation periods per week. Preparation periods shall be equal in length to a class period. Any variation in scheduling shall not have the effect of reducing the preparation time of the teacher.

12.07 Every reasonable effort shall be made so that the normal secondary teaching assignment shall include no more than two (2) distinct preparations. Distinct preparations shall be defined as preparations for classes of different grade levels, different ability sections or different subjects.

The parties' 1977-78 agreement contained the following:

ARTICLE XII I
TEACHING HOURS AND TEACHING LOAD

13.06 The normal teaching load in schools serving grades 7-12 will include ten (10) preparation periods per week. Preparation periods shall be equal in length to a class period. Any variation in scheduling shall not have the effect of reducing the preparation time of the teacher. Preparation time for regular classroom elementary teachers (K-6) will normally include the following minutes of preparation time per week:

K = 640 minutes
Grades 1-3 = 580 minutes
Grades 4-6 = 560 minutes

It is understood by the parties that scheduling on particular days or during particular weeks may necessitate the reduction of the above mentioned number of minutes. It is further understood that calculation of this preparation time shall be based on the regular teacher work day excluding the thirty (30) minute duty free lunch period.

13.07 Every reasonable effort shall be made so that the normal 7-12 teaching assignment shall include no more than two (2) distinct preparations. Distinct prepara- tions shall be defined as preparations for classes of different grade levels, different ability sections or different subjects.

The language of Sec. 13.06 and 13.07 continued through the parties' 1978-80 agreement. The parties' 1980-82 agreement contained:

ARTICLE XII I
TEACHING HOURS AND TEACHING LOAD S

13.06 The normal teaching load in schools serving

grades 7-12 will include ten (10) preparation periods per week. Preparation periods shall be equal in length to a class period. Any variation in scheduling shall not have the effect of reducing the preparation time of the teacher. It is the intent of the parties that the high school principals and their teachers work during the term of this agreement to establish a workable hall supervision program based upon a spirit of cooperation, voluntarism, (sic) equity, and professional responsibility. It is understood that occasional supervision may be assigned without pay during periods of high need. Preparation time for regular classroom elementary teachers (K-6) will normally include the following minutes of preparation time per week:

K = 640 minutes
Grades 1-3 = 580 minutes
Grades 4-6 = 560 minutes
Elementary Special Teachers = 560 minutes

It is understood by the parties that scheduling on particular days or during particular weeks may necessitate the reduction of the above mentioned number of minutes. It is further understood that calculation of this preparation time shall be based on the regular teacher work day excluding the thirty (30) minute duty free lunch period.

13.07 The Board understands the desirability of keeping the number of distinct preparations by each teacher in grades 7-12 to a minimum, preferably no more than two preparations. If the individual teacher desires an explanation of his/her assignment, it will be granted by the immediate supervisor. If the teacher is not satisfied, he/she may seek recourse through the complaint procedure.

The parties' 1991-1993 labor agreement, which by its terms remained "in full force and effect up to the opening of the 1993-94 school year" contains the following provisions:

ARTICLE XIII

TEACHING HOURS AND TEACHING LOADS

13.02 It is assumed that the routine assignments necessary to run a good school will be shared equitably by all and that extra pay will not be granted for these duties. Notwithstanding other provisions of this article, routine assignments may be made and/or meetings may extend beyond the school day. In any event, the total of these shall be limited to two (2) hours per week on a monthly average.

13.06 The normal teaching load in schools serving grades 7-12 will include ten (10) preparation periods per week. Preparation periods shall be equal in length to a class period. Except as provided in 13.02 above, any variation in scheduling shall not have the effect of reducing the preparation time of the teacher. It is the intent of the parties that the high school principals and their teachers work during the term of this Agreement to establish a workable hall supervision program based upon a spirit of cooperation, voluntarism, (sic) equity, and professional responsibility. It is understood that occasional supervision may be assigned without pay during periods of high need. Preparation time for regular classroom elementary teachers (K-6) will normally include the following minutes of preparation time per week:

K = 640 minutes
Grades 1-3 = 580 minutes
Grades 4-6 = 560 minutes
Elementary Special Teachers = 560 minutes

It is understood by the parties that scheduling on particular days or during particular weeks may necessitate the reduction of the above mentioned number of minutes. It is further understood that calculation of this preparation time shall be based on the regular teacher work day excluding the thirty (30) minute duty free lunch period.

13.07 The Board understands the desirability of keeping the number of distinct preparations by each teacher in grades 7-12 to a minimum, preferably no more than two preparations. If the individual teacher desires an explanation of his/her assignment, it will be granted by the immediate supervisor. If the teacher is not satisfied, he/she may seek recourse through the complaint procedure.

At the time of hearing, the parties had not reached agreement on a successor to their 1991-93 agreement. The Association concedes that the language of the expired 1991-93 collective bargaining agreement provides the District with the right to implement an eight period schedule at the high school. The Association further concedes, that within the context of an eight period schedule, high school teachers may be given six assignments and two preparation periods.

6. The Association's initial proposals for the 1991-1993 agreement, presented to the District on March 18, 1991, included a request to add the following language to the labor agreement:

> Additional Assignment (Overload) Pay
>
> An employee in the high school who volunteers or is given a sixth assignment will receive an additional one-fifth (1/5) of his/her salary as compensation for such assignment. An employee at the middle school who volunteers or is given a seventh assignment will receive an additional one-sixth (1/6) of his/her salary as compensation for such assignment.

Written rationale was attached to this proposal which stated "The policy enunciated in this proposal is the current District policy on pay for additional or overload assignments at the middle school and high school levels." The District agreed that it currently paid an additional one-fifth of salary to a high school teacher who had a sixth assignment, but advised the Association that the one-fifth payment was for the loss of a preparation period, rather than for a sixth assignment. The Association made this proposal because it understood that the District was contemplating the implementation of an eight period schedule at the high schools. In rejecting the proposal, the District advised the Association that the proposal would cause a problem with an eight period schedule at the high school. Neither the Association, nor the District, had made any prior bargaining proposal on overload pay. Nor had entitlement to overload pay been an issue during the negotiation of any previous contract. During a mediation session on the 1991-93 agreement, the Association understood that District Superintendent Kampschroer had given assurance that the District would not move to the eight period schedule at the high school until the 1995-96 school year. The Association further understood that the Superintendent would provide a written statement to that effect. Given this understanding, the Association dropped its proposal with respect to Additional Assignment (Overload) Pay for the 1991-93 agreement. The Association subsequently received a letter from the District's bargaining representative which stated:

> This letter will confirm the discussions we had during mediation and negotiations concerning the implementation of an eight hour day at the High School level. Because the new High School will not open until the 1993-94 school year, the District does not plan on implementing such a change during the 1991-92 or 1992-93 school years.
>
> Please contact the undersigned should you have any questions concerning this matter.

Concluding that the Association could not bind the District past the duration of the contract being bargained, i.e., 1991-93, the Association did not pursue the issue of the 1995-96 time frame. The Additional Assignment (Overload) Pay language proposed by the Association was not included in the parties' 1991-93 agreement. When the parties met to negotiate the successor to the 1991-93 agreement, the Association resubmitted its proposal on Additional Assignment (Overload) Pay.

7. The implementation of the eight period schedule at North, West and South High Schools occurred during a contract hiatus period, at a time in which

the parties were bargaining an agreement to succeed their expired 1991-93 agreement. The language of the expired 1991-93 agreement contains a provision addressing teaching hours and teaching loads, as do predecessor agreements as far back as the 1969-70 agreement. While the provision addressing teaching hours and teaching loads has been modified through the years, at all times since 1969-70, the provision has contained the following language: "The normal teaching load in schools serving Grades 7-12 will include ten (10) preparation periods per week. Preparation periods shall be equal in length to a class period." For at least twenty years, teachers in Grades 7-12 have been subject to one of two schedules, i.e., a seven period schedule or an eight period schedule. For at least twenty years, the normal teaching load of the eight period schedule has been six assignments and two preparation periods. Teachers in Grades 7-12 with an eight period schedule have never received overload pay, or any extra compensation, for a teaching load of six assignments and two preparation periods.

Upon the basis of the above Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. By virtue of a longstanding practice, the parties have defined the normal teaching load of teachers in Grades 7-12 to be six assignments and two preparation periods in an eight period schedule and five assignments and two preparation periods in a seven period schedule. Under this practice, teachers in Grades 7-12 who have an eight period schedule receive their base salary for a normal teaching load of six assignments and two preparation periods.

2. At the time that the District implemented the eight period schedule at the high schools, during the contract hiatus period, the status quo for teachers in Grades 7-12 with an eight period schedule is that such teachers receive their base salary for having six assignments and two preparation periods.

3. The District did not violate Sec. 111.70(3)(a)4, Stats., when it did not provide overload pay in an amount equal to one-fifth of base salary to high school teachers who had a sixth assignment in an eight period schedule.

Upon the basis of the above Findings of Fact and Conclusions of Law, the Examiner makes and issues the following:

ORDER 1/

The instant complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 27th day of October, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

WAUKESHA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint, as originally filed, alleged that the District had

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).

violated Sec. 111.70(3)(a)4, Stats., by unilaterally changing the status quo regarding overload pay at the high school and middle school level. At hearing on March 30, 1994, following settlement discussions between the parties, the Association withdrew those portions of the complaint which referenced the middle school. The remaining issue is the allegation that the District unilaterally changed the status quo by not paying high school teachers overload pay of 20% of their base salary for a sixth assignment. The District denies that it has violated Sec. 111.70(3)(a)4, Stats., and requests that the complaint be dismissed in its entirety.

POSITION OF THE PARTIES

Association

The District violated its statutory duty to maintain the status quo ante during a contract hiatus period when the District unilaterally changed the schedule of school teachers in Grades 10-12 from a seven period day, with five assignments and two preparation periods, to an eight period day, with six assignments and two preparation periods, without compensating for the sixth assignment at an amount equal to 20% of base salary. This change constitutes a per se violation of the District's statutory duty to bargain in good faith.

Three factors must be considered in determining the status quo prior to the hiatus: (1) language of the agreement, (2) bargaining history, and (3) past practice. It is conceded that Sec. 13.06 of the agreement provides the District with the authority to determine the number of periods in each day, as long as teachers get ten preparation periods each week and each period is equal in length to a class period. Sec. 13.06, however, is silent as to the manner in which teachers should be compensated for handling additional assignments.

The parties did not bargain on the issue of additional compensation for teachers taking assignments beyond the normal workload prior to the negotiations for the 1991-1993 agreement. At that time, the Association proposed contract language which provided for the additional compensation of one-fifth of base salary for a high school teacher who undertakes a sixth assignment. The District refused to agree to this language and it was not included in the agreement. The bargaining history provides no assistance in determining the status quo.

Since neither the language of the agreement, nor the bargaining history, resolves the issue, the issue can be resolved only by a determination of past practice. Uniformly, from 1970 until the District's unilateral change in the fall of 1993, the District paid high school teachers in Grades 10-12 additional compensation of 20% of their base salary for undertaking a sixth assignment. The teacher received this compensation for undertaking additional work and not for the loss of a preparation period.

During all the years in question, the District's personnel directors have always referred to the extra 20% compensation as compensation for taking the "extra class" or "additional responsibility" or the "overload assignments." The only testimony offered to the contrary, was that of the District's witness, George Shiroda. Shiroda, the former Superintendent, recalled that, in 1972, he had a discussion with former Personnel Director, Paul Dybvad, in which Dybvad stated that the 20% was intended to compensate for loss of a preparation period. Dybvad was not called as a witness by the District. The isolated comment recalled by Shiroda is not entitled to be given any weight in this proceeding.

It flies in the face of common sense to argue that the District has paid for the surrender of preparation time, rather than for the performance of additional services. As former principal Gobel testified, the District was

"paying people to teach an additional class, to assume the responsibility of teaching an additional class of children where we did not have a teacher." As Gobel further testified, he did not "go over to Mr. Carstens or his predecessor, Mr. Dybvad, and say `I have too many prep times in my building, so I have to get rid of some.'"

Uniformly, the additional payment has been 20% of the base salary, which is obviously based upon the five assignment periods. Mathematics compel the conclusion that extra compensation was paid for extra services, rather than for the surrender of a preparation period. If the payment were intended to compensate for the loss of a preparation period, then the additional payment would be based upon the seven periods which comprise the work schedule, i.e., five assignments and two preparation periods, resulting in a payment of 1/7 of the base salary.

Such a conclusion is also supported by the manner in which part-time high school teachers have been compensated. Part-time teachers are paid one-fifth of base salary for each assignment, based upon the normal workload of five assignments per day.

Sec. 13.06 expressly requires that each teacher receive ten preparation periods per week. If the extra compensation were intended to compensate for a loss of preparation period, then it would have been a simple matter to recite this entitlement in Sec. 13.06.

The Association did file a grievance in 1979 when teachers were required to undertake a fifteen minute hallway supervision assignment each day. This assignment did reduce the teachers' preparation time, as ruled by Arbitrator Krinsky. However, it also increased the workload of the teacher by fifteen minutes. The disposition of this grievance does not support the District's position that the 20% compensation historically has been paid for loss of preparation time, rather than for additional services.

Arbitrators have recognized that a binding past practice must be: (1) unequivocal, (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. As outlined above, the evidence clearly establishes each of these elements.

The change from a seven period schedule to an eight period schedule has increased the number of students each teacher teaches in a given day and has substantially increased the workload. Simple fairness dictates that a teacher who is forced to go from a seven period day to an eight period day should receive additional compensation. Under the District's position, the District could create a twelve period day with a 100% increase in the number of students taught each day, with no additional compensation to the affected teacher.

The Association did not file a grievance in the early 1980s, when each teacher was required to handle a silent reading program for fifteen minutes per day, five days per week, because the silent reading program did not increase teacher workload. The Association did not file a grievance when 9th grade teachers were transferred from the high school to the middle school in 1979, with their day changed from seven periods to eight periods, because payment of extra compensation has always been based upon school buildings.

The District erroneously contends that the parties have a past practice of compensating for the loss of a preparation period, rather than the addition of an assignment. Under the established past practice, additional compensation has been paid for performing an additional assignment and not for giving up a preparation period. Thus, the fact that teachers continue to receive two

preparation periods does not relieve the District of the obligation to pay additional compensation for the sixth assignment.

The Examiner should find the District to have violated the Municipal Employment Relations Act and award a full measure of relief, including back pay with interest to high school teachers who were not paid for the sixth assignment during the 1993-94 school year. The Examiner should order the District to cease and desist from terminating the economic benefit of compensation for a sixth assignment and direct the District to bargain to impasse on this issue.

District

As the Association argues, an employer cannot change the status quo during a contract hiatus. As the Association also argues, the status quo is determined by contract language, bargaining history, and past practice.

Sections 13.06 and 13.07 of the 1991-93 agreement provide the District with authority to change the schedule for high school teachers from seven periods per day to eight periods. Sec. 13.06 permits the District to change the schedule subject to the requirement that such a change "shall not have the effect of reducing the preparation time of the teacher." Sec. 13.06 also imposes a requirement of ten preparation periods per week, with each period being equal in length to a class period. The District's change to an eight period schedule meets these requirements. The Association's concession that Sec. 13.06 provides the District with the authority to implement the eight period schedule at the high school is compelled by these facts.

The parties have a longstanding practice in which a teacher on a seven period schedule, who undertakes a sixth assignment, receives extra compensation of 20% of base salary and a teacher on an eight period schedule, who undertakes a seventh assignment, receives extra compensation of one-sixth of base salary. In each situation, the payment is due to the fact that the teacher has forfeited one of the two contractually required preparation periods.

A review of the Association's behavior demonstrates that the Association has always been interested in protecting the two contractually guaranteed preparation periods. In 1979, when teachers were assigned fifteen minutes per day hallway supervision, the grievance filed by the Association alleged that the District's conduct violated Sec. 13.06 by reducing preparation time. Arbitrator Krinsky agreed stating "The language of 13.06 is clear that the District cannot make permanent changes in scheduling which reduce preparation time."

In 1979, 9th grade teachers were moved from the high school to the middle school. As a result of this change, the 9th grade teachers moved from a seven period day to an eight period day. The Association did not grieve the fact that the 9th grade teachers did not receive additional compensation for a sixth assignment because the teachers continued to receive the guaranteed two preparation periods per day. This is the exact situation which the Association is complaining of in this action.

In the early 1980s, a program was instituted whereby each teacher had to supervise silent reading for fifteen minutes per day, five days per week, if the reading were scheduled in a period in which the teacher was engaged in teaching. The Association did not file a grievance, even though this added a double workload for fifteen minutes each day, because the program did not reduce preparation time.

In summary, the Association concedes that the District had the authority

under Article 13.06 to change from a seven period schedule to an eight period schedule. The Association's position that the District should now pay extra compensation for performing the normal eight period schedule workload of six assignments and two preparation periods is contrary to the longstanding practice. No teacher on an eight period day has ever received compensation for teaching the normal six periods. Similarly, no teacher on a seven day period has ever received extra compensation for teaching the normal five periods. In all cases, extra compensation has been paid only when a teacher has worked more than the normal workload for the particular schedule, with the corresponding loss of a preparation period.

The complaint should be dismissed on its merits. Respondent should be awarded reasonable attorneys' fees and costs on the grounds that the action is frivolous, as well as any further relief that the Examiner may deem just and equitable.

DISCUSSION

The District implemented the eight period schedule at the high schools effective with the 1993-94 school year, during a contract hiatus period. The Association does not contest the right of the District to implement the eight period schedule at the high school. 2/ Nor does the Association contest the right of the District to make a sixth assignment within the context of an eight period schedule. 3/ The Association argues that the District's failure to pay teachers an amount equal to 20% of base salary for a sixth assignment at the high school constitutes a unilateral change in the status quo ante in violation of Sec. 111.70(3)(a)4, Stats. 4/

Sec. 111.70(3)(a)4

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

2/ T. Vol. I, p. 10.

3/ T. Vol. I, p. 24.

4/ The Association's initial brief alleges a violation of Sec. 111.70(3)(a)1 and 3, Stats. The Association's arguments, however, focus on the allegation that the District violated its statutory duty to bargain. Accordingly, the Examiner is persuaded that the reference to Sec. 111.70(3)(a)3 is an error.

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. 5/

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. 6/ Absent a valid defense, a unilateral change in the status quo wages, hours, or conditions of employment during negotiation 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. 7/ Waiver and necessity have been recognized to be valid defenses to a charge of unilateral implementation in violation of Sec. 111.70(3)(a)4, Stats. 8/

The employer's status quo obligation only applies to matters which primarily relate to employe wages, hours and conditions of employment. 9/ The Commission has found unilateral changes in the status quo wages, hours and conditions of employment to be tantamount to an outright refusal to bargain about a mandatory subject of 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. 10/ 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. 11/

Status quo is a dynamic concept which can allow or mandate change in employe wages, hours and conditions of employment. 12/ 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, 13/ or may give the employer the discretion to change

---

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

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

7/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

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

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

10/ School District of Wisconsin Rapids, supra.

11/ Id.

12/ Mayville School District, supra.

13/ School District of Wisconsin Rapids, supra.

work schedules during a contract hiatus period. 14/ 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. 15/

Alleged Violation

The payment in dispute is commonly referred to as "overload pay." Overload pay primarily relates to employe wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining.

As the Association argues, the District may not unilaterally change the status quo on overload pay during the contract hiatus period. Applying the principles enunciated above, the status quo is determined by a consideration of the relevant language from the expired contract as historically applied or as clarified by bargaining history, if any.

Article XIII of the parties' expired 1991-93 labor agreement addresses teaching hours and teaching loads. Sec. 13.06 states in relevant part that "The normal teaching load in schools serving Grades 7-12 will include ten (10) preparation periods per week." Given that the normal teaching load is defined in terms of a specific number of preparation periods, the language of Sec. 13.06 does support the inference that an overload results from the loss of preparation periods. Sec. 13.06, however, does not definitively address entitlement to overload pay. Thus, it is appropriate to consider the evidence of the parties' past practice and bargaining history to determine the status quo with respect to entitlement to overload pay.

Past Practices

For at least twenty years, teachers with a seven period schedule received their base salary for a teaching load of five assignments and two preparation periods, while teachers with an eight period schedule received their base salary for a teaching load of six assignments and two preparation periods. For at least twenty years, teachers on a seven period schedule received overload pay

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

15/ School District of Wisconsin Rapids, supra.

in the amount of one-fifth of their base salary for six assignments and one preparation period, while teachers with an eight period schedule received overload pay in the amount of one-sixth of their base salary for seven assignments and one preparation period. No teacher on an eight period schedule has received overload pay, or any extra compensation, for having six assignments and two preparation periods.

By these longstanding practices, which are acknowledged by both the Association and the District, the parties have defined the normal workload of an eight period schedule, i.e., six assignments and two preparation periods. These practices further demonstrate that a teacher with an eight period schedule is entitled to receive his/her base salary for a teaching load consisting of six assignments and two preparation periods, but is not due any overload pay, or extra compensation, for having such a teaching load.

It is true that, prior to the 1993-94 school year, the middle schools, but not the high schools, had an eight period schedule. Sec. 13.06, however, does not distinguish the normal teaching load on the basis of whether the teacher is assigned to a high school building or a middle school building. Rather, under the language of Sec. 13.06, the normal teaching load is applicable to all teachers who teach Grades 7-12. Given this contract language, the most reasonable construction of the evidence of the parties' past practice is that the practice defining the normal teaching load of an eight period schedule is applicable to all teachers who teach Grades 7-12, including the teachers who are assigned to a high school.

Bargaining History

The language of Sec. 13.06, referenced above, has been in the parties' collective bargaining agreement since at least 1969-70. Overload pay was not the subject of any bargaining discussion prior to March 18, 1991, the date on which the parties exchanged initial proposals on their 1991-93 agreement.

On March 18, 1991, the Association proposed the following language:

> Additional Assignment (Overload) Pay
>
> An employee in the high school who volunteers or is given a sixth assignment will receive an additional one-fifth (1/5) of his/her salary as compensation for such assignment. An employee at the middle school who volunteers or is given a seventh assignment will receive an additional one-sixth (1/6) of his/her salary as compensation for such assignment.

The Association proposed this language because it knew that the District was contemplating the implementation of an eight period schedule at the high schools. During the negotiation/mediation of the 1991-93 agreement, the

Association was assured that the District would not implement an eight period schedule at the high school before the expiration of the 1991-93 agreement and the Association dropped its proposal on Additional Assignment (Overload) Pay.

The written rationale attached to the Association's Additional Assignment (Overload) Pay proposal stated "The policy enunciated in this proposal is the current District policy on pay for additional or overload assignments at the middle school and high school levels." The District agreed that it currently paid an additional one-fifth of salary to a high school teacher who had a sixth assignment, but advised the Association that the one-fifth payment was compensation for the loss of a preparation period, rather than for a sixth assignment. It is not evident that the Association agreed that the one-fifth payment was compensation for loss of preparation period. Nor is it evident that the parties reached any other agreement with respect to entitlement to overload pay when they negotiated their 1991-93 agreement.

As discussed above, the evidence of the parties' past practices demonstrates that, for teachers in Grades 7-12, the normal teaching load of an eight period schedule is six assignments and two preparation periods. Neither the evidence of the 1991-93 bargain, nor any other evidence of bargaining history, establishes any agreement that this practice is limited to the middle schools, or that high school teachers, unlike middle school teachers, would receive overload pay for a sixth assignment in an eight period schedule.

Summary

The District argues that, historically, overload pay has been paid for loss of preparation time. The Association argues that, historically, the overload pay has been paid for an additional assignment. The Examiner responds that these arguments are immaterial to the resolution of the instant dispute.

Upon consideration of the relevant language from the expired contract, as historically applied, the Examiner is persuaded that, at the time that the District implemented the eight period schedule at the high schools, the status quo was that teachers in Grades 7-12 who are assigned an eight period schedule receive their base salary for a normal teaching load of six assignments and two preparation periods. Overload pay, whether triggered by the loss of a preparation period or the addition of an assignment, is not due a high school teacher who has six assignments and two preparation periods within an eight period schedule.

The Association's equity arguments concerning the sixth assignment at the high school are as applicable to the Ninth Grade teachers who were reassigned to the middle school, as to the current high school teachers. The parties determined equity when they established the normal teaching load of an eight period schedule, i.e., six assignments and two preparation periods.

Contrary to the argument of the Association, the District did not unilaterally change the status quo in violation of Sec. 111.70(3)(a)4, Stats., when the District did not pay an additional 20% of base salary to high school teachers who had six assignments in an eight period schedule. Accordingly, the complaint has been dismissed in its entirety.

Costs and Attorneys' Fees

The District has requested that it be awarded costs and attorney fees. In Wisconsin Dells School District, Dec. No. 25997-C (WERC, 1990), the Commission stated as follows:

> As the Examiner correctly held, where a party's position is found to demonstrate "extraordinary bad

faith," attorney fees and costs are available from the Commission. Hayward Schools, supra. In his concurring opinion in Madison School District, Dec. No. 16471-D (WERC, 5/81), Commissioner Torosian more fully stated our present view on the general availability of attorney fees and on how the "extraordinary bad faith" test can be met. He held:

> While I concur with the majority that attorney fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorney fees in all future cases. I agree that, for some of the policy reasons stated in the United Contractors case, the Commission should be reluctant to grant attorney fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorney fees in exceptional cases where an extraordinary remedy is justified. In this regard I would adopt the reasoning of the National Labor Relations Board stated in Heck's Inc., 88 LRRM 1049, wherein the National Labor Relations Board stated its intention ". . . to refrain from assessing litigation expenses against a respondent, not-withstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."
>
> In my opinion limiting the granting of attorney fees to such cases would best balance some of the policy considerations cited in United Contractors and the interest of the Commission in discouraging

> frivolous litigation and to protect the integrity of our process. (Emphasis added.)

The Examiner does not deem the instant complaint to be in bad faith or so frivolous as to warrant the imposition of costs and attorneys' fees. As a result, the District's request for the same is hereby denied.

Dated at Madison, Wisconsin, this 27th day of October, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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