

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,

Complainant,

vs.

HAYWARD COMMUNITY SCHOOL DISTRICT,

Respondent.

Case 60

No. 53162 MP-3078

Decision No. 28619-A

Appearances:

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

Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, #205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030 by Mr. Stevens Riley, appearing on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 2, 1995, Northwest United Educators filed with the Wisconsin Employment Relations Commission a complaint of prohibited practices against the Hayward Community School District, alleging that the District violated Sec. 111.70(3)(a)5, Stats., by not making every reasonable effort to maintain class sizes at levels referred to in the parties' collective bargaining agreement. On December 28, 1995, the Commission appointed Coleen A. Burns, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided for in Secs. 111.70(4)(a) and 111.07, Stats. Hearing in the matter was held before Examiner Burns in Hayward, Wisconsin, on January 25, 1996. The hearing was transcribed and the record was closed on May 31, 1996, when the parties waived their right to file reply briefs. The Examiner, having considered the evidence and the arguments of the parties, hereby makes and issues the following

FINDINGS OF FACT

1. Northwest United Educators, hereafter NUE or Complainant, is a labor organization with offices at 16 West John Street, Rice Lake, Wisconsin. NUE is the exclusive collective bargaining representative for all certified personnel of the District, excluding the

following: certified personnel who devote more than fifty percent of their time to administration, supervision and non-teaching principal duties; persons employed on a substitute basis; Middle School Principal; Elementary and High School Principals; Federal Program Supervisor; Instructional Supervisor; Assistant Superintendent; Superintendent; and interns and student teachers who function within their university guidelines.

2. The Hayward Community School District, hereafter the District or Respondent, is a municipal employer with offices at 316 West Fifth Street, Hayward, Wisconsin.

3. The District and NUE are parties to a collective bargaining agreement which, by its terms, commences on August 18, 1995 and ends on August 17, 1997.

4. The collective bargaining agreement referred to in Finding of Fact 3 does not contain a grievance procedure.

5. Article III of the collective bargaining agreement referred to in Finding of Fact 3 contains the following language:

ARTICLE III - CLASS LOADS AND TEACHING HOURS

A. Class Size

1. Every reasonable effort will be made to maintain an optimum class size of 25, and a maximum class size of 30, in academic subjects, at the elementary level.
2. Every reasonable effort will be made to maintain an optimum class size of 25, and a maximum class size of 30 in academic subjects at the secondary level.
3. The foregoing standards are subject to modification for educational purposes or specialized or experimental instruction.
4. The parties agree, that in the event the legislature enacts a law making all provisions in an agreement mandatory subjects of bargaining, the provisions of this agreement relating to class size shall remain a permissive subject in future contract negotiations between these parties.

...

6. The middle school experienced class size problems during the 1994-95 school year. In response to these problems, the District scheduled two extra sessions of 8th grade and an extra teacher was assigned to the seventh grade. In a memo to District Superintendent Wayne Reid, dated March 23, 1995, Middle School Principal Douglas Beck stated the following:

This is to bring you up to date regarding projected enrollments and class sizes for next year, 1995/96.

Based on this year's reduction of staff at the Middle School (two one-year contracted teachers) the projected enrollment and class sizes will be as follows:

<u>Grade</u>	<u>Projected Enrollment</u>	<u>Projected No. of Sessions</u>	<u>Average Class Size</u>
5	154	5	30.8
6	147	5	29.4
7	154	5	30.8
8	157	6	26.16
	—		
	612		

As you can see, each grade level is at or near 30 student per class size except for the 8th grade, which has the additional section.

I will keep you updated regarding this matter. Should we have an unexpected influx of students which would drastically increase the class size of grades 5, 6 or 7 we would need to address those needs together.

Thereafter, the Board of Education hired an additional teacher for the fifth grade. Concerned about potential class size problems, Beck issued a second memo to Reid, dated September 22, 1995, which contained, inter alia, the following:

MIDDLE SCHOOL ENROLLMENT BY CLASS

By Grade - 5th - 161
6th - 150

7th - 156
8th - 159

TOTAL STUDENTS 626

In October of 1995, Superintendent Reid advised the Board of Education of the following enrollments: Grade 5 - 161; Grade 6 - 150; Grade 7 - 154; Grade 8 - 159; Grade 9 - 197; Grade 10 - 162; Grade 11 - 140; and Grade 12 - 129 for a total secondary school student enrollment of 1252.

7. The District employs approximately 45 teachers with full class loads at the High School and 22 teachers with full class loads at the Middle School. Student enrollments fluctuate significantly throughout the school year due to students transferring in and out of District schools. At the time of hearing, the following middle school teachers taught classes in academic subjects which contained more than 30 students: Pat McConnell - two sections of 7th grade geography; Colin Hoogland - one section of 7th grade science; Linda Kewith - one section of Reading/Spelling; Brenda Thompson - one section of 6th grade science; and Judy Albrecht - two sections of 6th grade social studies. Not one of these middle school teachers had a class which exceeded 31 students. At the time of hearing, the following high school teachers taught classes in academic subjects which contained more than 30 students: Rick Waski - two sections of biology and one section of physiology; Diane Tremblay - one section of pre-algebra; Ed Zalewski - one section; and Tom Langham - two sections of algebra. During the first semester, the following high school teachers taught classes in academic subjects which contained more than 30 students: Ed Zalewski - two sections of social studies; Tom Langham - one section of algebra; Rick Waski - one section of biology; Tom Kuziej two sections of social studies; Chris Phillips - one section of high academic American literature; and Diane Hedin - one section of health. One of Zalewski's first semester classes had 35 students, of whom five were special education students for which a special education aide was provided. Phillip's high academic American Literature class, which contained 31 students, was the only section of this course. At the time of hearing, McConnell taught five classes of 7th grade geography with a total enrollment of 145; Hoogland taught five classes of 7th grade science with a total enrollment of 146; Thompson taught two classes of 6th grade science with a total enrollment of 59; and Albrecht taught five classes of 6th grade social studies with a total enrollment of 146. During the 1995-96 school year, high school and middle school teachers have had classes in non-academic subjects, e.g., physical education, home room, developmental guidance/study, which contained more than 30 students.

8. Tom Langham has been a District high school math teacher for eight years. The 1995-96 school year was the first school year in which Langham had any math class which exceeded thirty students. In the 1994-95 school year, the District offered five sections of Algebra I. In the 1995-96 school year, the District offered four sections of Algebra I. The 1995-96 ninth grade class was larger than the 1994-95 ninth grade class. Ed Zalewski has been a District high school teacher for twenty-seven years. Prior to the 1995-96 school year, Zalewski did not have more than 30 students in an academic class. Patrick McConnell, who has been a District teacher for

24 years, generally teaches seventh grade geography. Dean Rowe, who has been a District teacher for thirty-four years, generally teaches middle school math and science. During the five year period preceding the 1995-96 school year, Rowe's classes in academic subjects did not exceed 30 students. It is unusual for McConnell to teach an academic class which contains more than 30 students. During the first semester of the 1995-96 school year, McConnell and Rowe had classes in academic subjects which, at times, contained more than 30 students, but did not have any class which consistently contained more than 30 students.

9. William Mestelle has been the District's High School Principal for two years. Prior to that time, Mestelle was the District's Assistant High School Principal for fifteen years. The day of hearing was the second day of the second semester of the 1995-96 school year. Historically, class size fluctuates during the first two weeks of a semester. In April of 1995, the Board of Education decided to move from a seven period day to a four period day at the high school. As a result of this change, the same number of teachers provide fewer course sections and, over the course of the day, teach fewer students. The change to the four period day created class scheduling problems. The alternative school for at-risk students, scheduled to open on Monday, January 29, 1996, will remove 40 to 45 students from the high school. The District hired three new teachers to staff the alternative school. At the time of hearing, Mestelle anticipated that transfers to the at-risk school would reduce Langham's enrollments and Tremblay's enrollments to 30, or below, per class. At certain periods of the day, the high school does not have any available classrooms. The high school biology classroom and science classroom are scheduled every period of the day. When possible, the District's administrators shift students out of larger classes into smaller classes. The equivalency of one and one-half high school teachers were hired for the 1995-96 school year to address enrollment problems in Spanish, Math and Business Education. The District had the financial capability to hire additional teaching staff at the secondary level for the 1995-96 school year.

10. When scheduling classes in academic subjects at the secondary level for the 1995-96 school year, District administrators used a benchmark of 30 students per class. If additional teachers were hired and the additional teachers had access to appropriate classrooms at time periods in which students could be scheduled into the classrooms, then the District could maintain class sizes of 30 or below in all academic subjects at the secondary level.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following:

CONCLUSIONS OF LAW

1. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.
2. NUE is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. The parties' collective bargaining agreement does not contain a grievance procedure culminating in final and binding arbitration, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine whether said agreement has been violated in violation of Sec. 111.70(3)(a)5, Stats.

4. By using a benchmark of 30 students per class, rather than a benchmark of 25 students per class, when scheduling classes in academic subjects at the secondary level, the District has failed to make every reasonable effort to maintain an optimum class size of 25, and a maximum class size of 30 in academic subjects at the secondary level and, thus, the District has violated Article III, Section A(2), of the parties' collective bargaining agreement.

5. By violating the parties' collective bargaining agreement, the District has violated Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

IT IS ORDERED that Respondent Hayward Community School District, its officers and agents, shall immediately:

Cease and desist from violating the parties' collective bargaining agreement by using a benchmark of 30 students per class, rather than 25 students per class, when scheduling classes in academic subjects at the secondary level.

Dated at Madison, Wisconsin, this 8th day of November, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

HAYWARD SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

NUE

As the testimony demonstrates, the District and NUE agree that small class sizes have a positive effect on the educational process. The 25 student optimum is ignored when the District considers 30 students to be the norm. The District's conduct in providing special education aides and creating an alternative school is not sufficient to meet its contractual obligations.

The District's revenue cap was nearly 10 percent greater in 1995-96 than in 1994-95. Moreover, the total fund balance at the end of the 1994-95 school year was more than \$2,000,000, or almost 20% greater than the fund balance at the end of the 1993-94 school year. The District had the financial capability to hire additional staff for the 1995-96 school year.

Since the District did not hire additional staff, the District failed to make every reasonable effort to keep class size below 30 and, thus, violated the parties' collective bargaining agreement. As a remedy for this violation, the Examiner should order the District to take appropriate action to insure future compliance with the contractual standard.

District

The District has made a good faith effort to keep class size under 30, including employing additional teachers and creating an alternative school. Class size is impacted by such factors as movement by students to and from the district; student choices regarding classes; and lack of physical space. Additionally, the movement from a seven period day to a four period day at the high school has created scheduling problems.

By employing the words "every reasonable effort", the parties have anticipated that

situations will occur when a class size exceeds 30. The District's efforts to avoid overly large class size comply with the contractual requirements.

The right to make staffing decisions is a management prerogative. While the Examiner can determine whether the District violated the parties' bargaining agreement by failing to make "every reasonable effort" to maintain specified class size, the Examiner lacks the authority to order that an academic class contain no more than 30 students.

DISCUSSION

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

Generally, the Commission does not exercise its jurisdiction to determine the merits of a breach of contract allegation in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement contains a grievance procedure culminating in final and binding arbitration. Since the parties' collective bargaining agreement does not contain a grievance procedure, it is appropriate to assert the jurisdiction of the Wisconsin Employment Relations Commission to determine whether said agreement has been breached in violation of Sec. 111.70(3)(a)5, Stats.

NUE alleges that the District has violated Article III, Section A (2), of the parties collective bargaining agreement. This provision states that "Every reasonable effort will be made to maintain an optimum class size of 25, and a maximum class size of 30 in academic subjects at the secondary level." 2/

By adopting an optimum class size of 25, the parties have demonstrated that a class size of 25 is the appropriate standard to be used when scheduling classes in academic subjects at the secondary level. By using the benchmark of 30 students per class as the standard for scheduling classes in academic subjects at the secondary level, the District has not used the standard required by the contract language and, thus, has acted unreasonably.

A standard of 25 students per class does not mean that the District must schedule an additional class whenever enrollments exceed 25 students per class. As the District argues, by using the phrase "every reasonable effort", the parties have recognized that there may be instances in which it is not reasonable to apply the contractual class size standards.

For example, Chris Phillip's section of high academic American Literature contained 31 students. It is reasonable for the District to schedule 31 students in this class because the enrollment is insufficient to produce two classes of a reasonable size, i.e., at least one class would have an enrollment which is significantly below the 25 students per class standard.

2/ While a similar provision is applicable to the elementary level, the elementary level is not at issue.

At the time of hearing, Pat McConnell taught five 7th grade geography classes with a total enrollment of 145. An enrollment of 145 is sufficient to produce six classes of a reasonable size, *i.e.*, one that would not exceed the maximum class size of 30 and would not be significantly below the contractual standard of 25 students per class. However, the fact that McConnell has sufficient enrollments to produce six reasonably sized classes of 7th grade geography does not necessarily lead to the conclusion that it is reasonable for the District to schedule six classes of 7th grade geography.

For a sixth class to be effective in reducing McConnell's 7th grade geography classes below 30 students per class, an appropriate classroom and teacher must be available at a time period in which McConnell's students can be scheduled into the class. Absent such factors, scheduling a sixth class of 7th grade geography would not be a "reasonable effort" to maintain an optimum class size of 25, and a maximum class size of 30 in academic subjects at the secondary level.

Moreover, the language of Article III, Section A (3), expressly recognizes that the class size standards referenced in Article III, Section A(2), are subject to modification "for educational purposes or specialized or experimental instruction." Thus, assuming arguendo, that an appropriate classroom and teacher were available at a time period in which an appropriate number of McConnell's students could be scheduled into the sixth class, there could be "educational purposes or specialized or experimental instruction" which would provide the District with the right to schedule more than 30 students per class.

McConnell is not the only secondary teacher to have sufficient enrollments to produce an additional class of a reasonable size. It is not evident, however, that appropriate classrooms were available at a time period in which students enrolled in these classes could be scheduled into an additional class. Thus, the record does not warrant the conclusion that "every reasonable effort to maintain an optimum class size of 25, and a maximum class size of 30 in academic subjects at the secondary level" includes hiring additional teachers.

In summary, by using a benchmark of 30 students per class, rather than a benchmark of 25 students per class, when scheduling classes in academic subjects at the secondary level, the District has failed to make every reasonable effort to maintain an optimum class size of 25, and a maximum class size of 30 in academic subjects at the secondary level. By this failure, the District has violated Article III, Section A(2), of the parties' collective bargaining agreement. By violating the parties' collective bargaining agreement, the District has violated

Sec. 111.70(3)(a)5, Stats. As remedy for this statutory violation, the District has been ordered to cease and desist from using a benchmark of 30 students per class, rather than a benchmark of 25 students per class, when scheduling classes in academic subjects at the secondary level.

Dated at Madison, Wisconsin, this 8th day of November, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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