

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant,

vs.

SCHOOL DISTRICT OF LADYSMITH-HAWKINS, Respondent.

Case 31
No. 54475
MP-3217

Decision No. 29026-B

Appearances:

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

Weld, Riley, Prenz & Ricci, S.C., by **Attorney Kathryn J. Prenz**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators filed a complaint with the Wisconsin Employment Relations Commission on September 13, 1996, alleging that the Ladysmith-Hawkins School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act, by rescinding an agreement over an employee's vacation benefits and by allowing other employees to affect the District's decision to rescind that agreement. The Commission appointed Thomas L. Yaeger, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter. On May 15, 1997, a hearing on the complaint was held in Ladysmith, Wisconsin, and the parties thereafter filed post-hearing briefs, the last of which was received on March 18, 1998.

Based upon the record and the arguments of the parties, the Examiner makes and issues the following

FINDINGS OF FACT

1. Northwest United Educators, hereinafter NUE, is a labor organization under Sec. 111.70(1)(h), Stats., and has its principal office at 16 West John Street, Rice Lake, Wisconsin 54868. At all times material hereto, it has been the exclusive collective bargaining representative of all regular full-time and regular part-time educational support employees, including secretaries, aides, food service, custodial and maintenance employees, and bus drivers employed by the School District of Ladysmith-Hawkins, but excluding supervisory, managerial, professional, confidential, and all other employees.

2. The Ladysmith-Hawkins School District, hereinafter the District, is a municipal employer under Sec. 111.70(1)(j), Stats., and has its principal office at 1700 Edgewood Avenue, East, Ladysmith, Wisconsin 54848. At all times material hereto, it has operated a public school system in Ladysmith and Hawkins, Wisconsin.

3. The District and NUE were parties to a collective bargaining agreement from July 1, 1995 through June 30, 1997. It provided, in pertinent part, as follows:

ARTICLE 9 – GENERAL PROVISIONS

A. This Agreement may be altered, changed, added to, deleted from, or modified only through the voluntary mutual consent of the parties in written and signed amendment to this Agreement.

. . .

ARTICLE 16 – VACATIONS AND HOLIDAYS

A. All twelve-month employees are entitled to paid vacations under the following schedule:

1. Two (2) weeks vacation per year after the completion of one full year of service.
2. Three (3) weeks vacation per year after the completion of six (6) full years of service.
3. After completion of ten (10) years of service four (4) weeks.

. . .

4. Ms. Lisa Lee began her employment with the District as a kindergarten teacher's aide in October of 1984. She was a member of the bargaining unit at all times since her date of hire. In May of 1989, Lee transferred to a 237 workday per year position as a secretary at the District's High School. In that position, Lee was not considered a twelve-month employee under Article 16 and did not receive any paid vacation.

5. Ms. Barbara Lundgren has been the Principal of the District's High School since the summer of 1995. As such, Lundgren was Lee's immediate supervisor during the 1995-1996 school year. Mr. Jann J. Peterson was the District Administrator for the District during the 1995-1996 school year. At the hearing, the title "District Administrator" was sometimes referred to as Superintendent and sometimes as District Superintendent. As such, Peterson was Lundgren's immediate supervisor during the 1995-1996 school year and until Peterson left his position on June 30, 1996.

6. In the spring of 1996, the District made plans for a Network Manager/Office Manager secretarial position at the High School to begin on June 14, 1996. Principal Lundgren would be the immediate supervisor of that position. During this time, Lee was working in Lundgren's offices.

7. In early May, 1996, Lundgren asked Peterson how the issue of eligibility for vacation time would be handled if Lee were to apply for the Network Manager/Office Manager position. Lee wanted her employment since May of 1989 to be considered as a twelve-month employee, as opposed to a 237 workday per year employee, and to have that credited toward her eligibility for vacation in the new position. If so, Lee would be eligible for three weeks of paid vacation at the start of the new position. If not, contractually Lee would not be eligible for any vacation until she had completed two full years in the new position, at which point she would become eligible for two weeks of vacation. Peterson directed Lundgren to work through the Union on that issue. On May 14, 1996, Lee took the issue to NUE's executive/grievance committee. The committee supported what Lee wanted, i.e., to be immediately eligible for three weeks of vacation in the new position.

8. On May 23, 1996, the District posted a notice of vacancy for the Network Manager/Office Manager secretarial position at the High School. Lundgren called NUE's Alan Manson and told Manson that Lee was the only bargaining unit candidate to apply, that Lee was well qualified, and that Lundgren would recommend Lee for the job. Lundgren then asked Manson whether NUE would object if an offer included credit for Lee's prior work for purposes of vacation. Manson responded that the Union would not object.

9. On June 4, 1996, Principal Lundgren wrote the following memo to District Administrator Peterson:

Lisa Lee will be the Network Manager/Office Manager for the high school next year. Her present position ends on June 13, 1996. As the high school needs a the (sic) person hired for the network/office manager position to work twelve months, I need to work out the arrangements for her starting date and vacation time. I recommend the following:

1. Lisa Lee's starting date for her new position is June 14, 1996.
2. Prior to assuming this position, Lisa held a unique position within the district. Most secretarial positions in this district are either nine month positions or 188 days (some with ten additional days to 198 days) or twelve month positions, working 260 including their paid vacation time. She was the only 237 day secretary in the district.

Persons in the twelve month positions earned paid vacation time. (sic) up to a month's vacation. Lisa has been employed 237 days per school year since 1989. This did not entitle her to any paid vacation time. What it amounted to was that she worked the number of days close to a twelve month employee, but while they then had paid vacation time, she earned no pay for her vacation time. In fact, she worked very close to the number of days the other employee in our office worked, but that employee was paid for her time off.

I would like to consider Lisa's time since she was employed 237 days per year as counting towards determining years of service. That would place her at three weeks of paid vacation time per year.

I have consulted with Al Manson, NUE, on this issue. He felt this was a fair and equitable recommendation and was in support of this agreement.

c.
Al Manson
Lisa Lee
(Emphasis in original)

10. On June 5, 1996, Peterson met with Manson and the District's Business Manager, Larry Dalton. Peterson presented Manson with the agreement that Lee would start her position on June 14 and that she would be eligible for three weeks of vacation. Peterson stated that Lee's prior work schedule of 237 days a year made it seem that she had sufficient years to qualify for three weeks of vacation by the time she started her job on June 14, and Peterson asked Manson if Manson had any problem with that agreement. Manson said that there were

none. Dalton then expressed concern that such an agreement would set a precedent. Manson responded that he (Manson) would write a letter establishing that this was a non-precedential agreement. Manson also said that his letter would address their discussion of when Lee would become eligible for her fourth week of vacation.

11. Also on June 5, 1996, Lundgren called Lee into Lundgren's office. Lundgren informed Lee that Lundgren had met with Peterson, that Lundgren had spoken with Manson, and that everyone agreed. The events of June 5 establish that an agreement was reached between Peterson, Lundgren and Manson regarding Lee's vacation eligibility in the new position. Lundgren then told Lee that Lee had the position, including eligibility for three weeks of vacation in the first year, and that Lee would begin working in the new position on June 14, 1996.

12. On June 6, 1996, Manson wrote the following letter to Peterson:

RE: Network Manager/Office Manager Position

Dear Jann,

This letter is a follow-up to our recent conversation regarding the June 4, 1996 memo from Principal Barb Lundgren on the above topic.

As indicated in that memo, NUE is in agreement with the arrangements and recommendations set forth by Principal Lundgren.

In our conversation on this topic, we agreed that NUE would provide a letter stating that the vacation arrangements for this position would not be precedential. This letter can serve as a statement by NUE that agreement of the District to provide Lisa Lee with three weeks of paid vacation time as she assumes the twelve-month Network/Office Manager position shall not be used as a precedent by either side.

We further agreed that it would be a good idea to identify at what point in the future Ms. Lee is entitled to four weeks of paid vacation per year. It is the understanding of NUE that Principal Lundgren is recommending that Ms. Lee and NUE agree that a fourth week of vacation will be available after ten years of service (in accordance with Article 16 of the NUE-ESP Ladysmith contract) and that Ms. Lee will be considered to have completed seven years of service as of May 19, 1996.

Assuming that this letter accurately reflects the understanding between NUE and the District regarding this position, if I do not hear from you I will take that as agreement that this communication serves to complete the record on this agreement.

Sincerely,

NORTHWEST UNITED EDUCATORS

Alan D. Manson (jah) /s/

Alan D. Manson
Executive Director

. . .

cc: Barb Lundgren
Lisa Lee

Peterson did not communicate with or respond to Manson that the above letter did not reflect their understanding.

13. On June 7, 1996, Peterson went to Lundgren's offices where Lee was working and congratulated Lee. Peterson, in the presence of Lundgren, shook Lee's hand, told her that she had earned it, and said that everything was approved as Lundgren had proposed it. Peterson informed Lee that she was so deserving, both in having the new job and the increased vacation eligibility. Lee thanked Peterson for working the vacation issue through the Union.

14. From June 6, 1996 until June 14, 1996, neither Peterson, nor any other District representative contacted NUE or Lee regarding Manson's letter of June 6, 1996, or Lee's vacation eligibility. On June 14, 1996, Lisa Lee started her new position.

15. On June 16, 1996, Douglas A. Walker unofficially began his employment with the District as part of an orientation process. Walker was hired as the new District Administrator for the 1996-1997 school year. Although he was "working cooperatively" with Peterson from June 16, 1996 to June 30, 1996, Walker did not officially begin his duties until July 1, 1996.

16. On or about June 21, 1996, Peterson called Lundgren into his office and told Lundgren that Peterson was having difficulty getting the District's Larry Dalton on board regarding Lee's vacation. Peterson told Lundgren that Dalton was investigating past practices, and that Lundgren should not say anything about this to Lee. Peterson informed Lundgren that

the problem was other secretaries' animosity towards Lee. A few days later, in a meeting between Peterson, Dalton and Lundgren, Peterson tried to explain to Dalton why it was fair for Lee to receive three weeks' eligibility for vacation. At that point, Dalton was not concerned over Lee receiving three weeks of eligibility, but rather whether and when she would be eligible for four weeks of vacation.

17. On June 25, 1996, Peterson told Lundgren that Peterson was hearing from other secretaries in the District and that the situation was causing an uproar. Peterson informed Lundgren that the issue needed to be sent back to NUE and Manson for further clarification.

18. On June 26, 1996, Douglas A. Walker wrote the following letter on the District's letterhead stationary to NUE:

Dear Mr. Manson:

Jann Peterson has forwarded to me a letter of June 6, 1996 regarding a proposed side agreement affecting Lisa Lee's vacation.

This arrangement deviates from the negotiated Master Contract and therefore is not acceptable.

Please contact me if you wish to discuss this matter further.

I look forward to meeting with you on the ninth regarding the groundskeeper issue.

Sincerely,

Douglas A. Walker /s/

Douglas A. Walker
District Administrator

cc: Barb Lundgren, High School Principal
Lisa Lee

The letterhead stationary lists Jann Peterson as the District Administrator and Lawrence Dalton as Business Manager. It does not list Douglas A. Walker.

19. On June 27, 1996, Lee and NUE representative Rod Marinucci met with Peterson and Walker. Lee reminded Peterson that Peterson had already congratulated Lee on her vacation eligibility. Peterson apologized numerous times for what had happened and said that

it was his fault. When Lee suggested to Peterson that Peterson could still resolve the issue, Walker responded that Peterson would not and that Walker had made the decision. Lee made reference to other instances she was aware of where the Union had made similar agreements with the District. Lee was NUE's Unit Director, or chief elected official, for the bargaining unit in the District. Lee's reference to other instances had no effect on any further conversation on this subject.

20. Also on June 27, 1996, the District held its regular Board of Education meeting. At that meeting, the Board welcomed Doug Walker, District Administrator, who would officially begin his duties on July 1, 1996. The Board also heard a report from Jann Peterson on the orientation time with Doug Walker. In addition, a motion carried to approve the transfer of Lisa Lee to a twelve-month Office/Network Manager at the High School. The minutes for that meeting do not mention Lee's eligibility for vacation.

21. On or about June 28, 1996, Manson called Walker and asked why Walker had sent his letter of June 26. Walker responded that he knew very little about the Lee vacation situation and suggested that Manson speak to Peterson about it. Manson called Peterson the next day. Peterson informed Manson that it was his mistake that the vacation benefit agreement had been approved, and that it was now not approved. Peterson declined to give any further reasons, but did tell Manson that there would be some unhappy people if Lee's vacation benefit agreement was kept in place.

22. Sometime after June 5, 1996, the secretaries in the bargaining unit had heard the news about Lisa Lee. The record is not clear as to what specific information was disseminated amongst the secretaries with regard to Lee. However, two of these individuals, Louise Warner and Ann Blakstad, spoke with the District's Principal Marsh Frillici and Jann Peterson, respectively. Both Warner and Blakstad were under the impression that the administrators were going to vote on Lee's situation. The record is not clear as to the purpose or effect of such an administrative vote since Peterson and Frillici were not members of the School Board. Nevertheless, one conversation occurred between Warner and Peterson, and another between Blakstad and Frillici. Both Warner and Blakstad were speaking as individuals and were not acting in any representative capacity on behalf of NUE.

23. Warner had pondered the Lee situation for quite some time before telling Frillici how she felt. There is nothing in the record to support that Frillici solicited Warner's opinion or that he otherwise initiated the conversation or engaged in negotiations with her. Warner reminded Frillici that Frillici's family and Lee's family were friends. Warner then advised Frillici that if there was going to be a vote on Lee's vacation, then he should consider that relationship. Warner also informed Frillici that she was opposed to Lee getting increased vacation eligibility because Warner did not get similar treatment when she started as a twelve-month secretary. Frillici responded that he knew nothing of the Lee situation, but if that were

the case, then he would abstain from a vote. There is nothing in the record indicating that Frillici had any involvement with Peterson's decision on Lee's vacation eligibility or that an administrative vote regarding Lee's situation ever occurred, and of what effect, if any, such a vote would have had upon the School Board.

24. Blakstad told Peterson that everyone should follow the contract, including Lee. There is nothing in the record to support that Peterson solicited Blakstad's opinion or that he otherwise initiated the conversation or engaged in negotiations with her. There is also nothing in the record showing what, if any, response was made by Peterson.

25. Peterson, on behalf of the District, made an agreement with NUE that Lisa Lee would be eligible for three weeks of vacation commencing on June 14, 1996. Peterson cloaked himself with authority, and exercised that authority to enter into the agreement with NUE regarding Lee's vacation eligibility. Peterson had the responsibility to put NUE on notice that his agreement with NUE was tentative, if that was his intent, following his receipt of Manson's June 6, 1996 letter and prior to Lee starting on June 14, 1996. Because Peterson failed to so notify NUE, NUE, in good faith, relied upon Peterson's representations. Consequently, the June 6 Manson letter to Peterson represents the written, binding and enforceable agreement between the parties regarding Ms. Lee's vacation eligibility effective June 14, 1996, when she began her new position as Network Manager/Office Manager.

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

CONCLUSIONS OF LAW

1. Respondent Ladysmith-Hawkins School District and its agents did commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and Sec. 111.70(3)(a)1, derivatively, of the Municipal Employment Relations Act by refusing to implement and to comply with a binding agreement establishing Lisa Lee's entitlement to vacation eligibility upon her transfer to the Network Manager/Office Manager secretarial position.

2. Respondent Ladysmith-Hawkins School and its agents did not commit a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act by allowing certain employees to express their personal disagreements with the District's decision regarding another employee's eligibility for vacation benefits.

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

ORDER

IT IS ORDERED that:

1. Those allegations of the complaint alleging that the District violated Secs. 111.70(3)(a)4 and 1, Stats., by allowing employes to express their personal disagreement over employe Lisa Lee's eligibility for vacation benefits and thereby affect its decision to rescind an agreement regarding that vacation eligibility, are hereby dismissed.

2. The Respondent Ladysmith-Hawkins School District, its officers and agents, shall immediately cease and desist from refusing to implement its binding agreement with NUE establishing Lisa Lee's entitlement to vacation eligibility upon her transfer to the Network Manager/Office Manager secretarial position.

3. The Respondent Ladysmith-Hawkins School District, its officers and agents, shall take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(a) Date the seniority of Lisa Lee as a twelve-month employe under Article 16 of the parties' collective bargaining agreement from May 19, 1989;

(b) Calculate Lisa Lee's accrual of vacation benefits as a bargaining unit member from May 19, 1989;

(c) Pay Lisa Lee for any earned, but not used, vacation from June 14, 1996 to the date of this Order; and

(d) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to what steps the District has taken to comply with this Order.

Dated at Madison, Wisconsin, this 22nd day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Thomas L. Yaeger /s/

Thomas L. Yaeger, Examiner

LADYSMITH-HAWKINS SCHOOL DISTRICT

MEMORANDUM ACOOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

NUE's Position

NUE argues that the parties established an agreement regarding eligibility for Lisa Lee's vacation benefits upon her transfer to a twelve-month position on June 14, 1996. It submits its letter dated June 6, 1996, as evidence of a good faith agreement between authorized representatives. By refusing to honor and comply with this agreement, it alleges violations of Sec. 111.70(3)(a)4 and 5, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats. It notes that there were numerous written and spoken confirmations of the parties' offer and acceptance, including a face-to-face meeting between the District Administrator and NUE's Executive Director. It contends that the District's attempt to rescind its agreement by letter dated June 26, 1996, is a nullity since that was done after the effective date of Lee's transfer. It urges that the District had the opportunity to reject the terms of the agreement if it had timely responded, but that the District acted too late by trying to withdraw the agreement after Lee started her new position.

NUE also argues that the District listened to complaints by bargaining unit secretaries after the agreement regarding Lee's vacation was made and allowed those secretaries to influence the District's decision to revoke that agreement. It submits that such acts violated Sec. 111.70(3)(a)1, Stats. It notes that Principal Frillici said he would abstain from any vote on the Lisa Lee matter following a conversation with his secretary. In addition, NUE maintains that various secretaries compelled District Administrator Peterson not to inform Lee or the Union that there were problems with the agreement. Moreover, NUE points to the example of Blakstad, a non-authorized bargaining unit member, telling Peterson that she did not approve of the situation. NUE argues as a result of the District listening to these expressions of dissatisfaction that the District took actions, or indicated that it would take action, to undo the Lee agreement or otherwise interfere with the completion of good faith negotiations between NUE and the District regarding the Lee vacation agreement.

District's Position

The District argues that there was no binding agreement to amend the parties' collective bargaining agreement with respect to the vacation accrual for Lisa Lee. It maintains that since Article 9 requires any enforceable amendment to be in writing and signed by the parties, that

there was no formally approved and finalized deal. It contends that NUE's letter of June 6, 1996, falls short of meeting Article 9's prerequisites in that that letter only invited a response. Even if the alleged agreement did not require a signed, written authorization, the District claims that it consistently treated the Lee issue as a recommendation or a proposal, and not a final deal. It asserts that Interim District Administrator Peterson deferred the final decision to incoming District Administrator Walker. Under either scenario, according to the District, there were no violations of Secs. 111.70(3)(a)1, 4 or 5, Stats.

With respect to NUE's second allegation, i.e., allowing complaints to affect the District's decision to rescind, the District counters that such complaints are normal in the work place and are not indicative of a violation of Sec. 111.70(3)(a)1, Stats. The District maintains that it was the employees who approached the District to voice their concern and that there is a lack of evidence to support a finding that the District negotiated with someone other than the appropriate Union representative or that it otherwise engaged employees in unlawful communication.

NUE's Reply

NUE asserts that even if Peterson informed Walker that he (Peterson) was not going to act on the matter referred to in Manson's letter of June 6, 1996, that nothing was said to NUE about this until Walker's letter of June 26, 1996. NUE contends that the District knew of the situation and approved Lee starting her work on June 14, 1996. NUE maintains, therefore, that Walker's response was too late and, as of June 14, 1996, the District had committed itself and was obligated to consummate the agreement. Moreover, NUE points to other side letter agreements, both before and after the instant situation, which did not contain the signatures of both parties and which were considered valid by the District.

NUE considers the District's interpretation of the closing paragraph of Manson's June 6 letter as "inviting a response" to be an unreasonable interpretation. The most reasonable interpretation, according to NUE, was that the District, if it wanted to cancel the accord, needed to reply in the negative prior to Lee's starting date of June 14. Alternatively, NUE maintains, if the District wanted more time to reply to the June 6 letter, then it should have delayed Lee's effective transfer date of June 14, 1996, when she began her new position. NUE argues that the most logical conclusion is that Peterson had no problem with the Lisa Lee agreement as he had communicated directly to Manson, Lundgren and Lee. Initially, Peterson had no intention of responding to Manson's June 6 letter because Peterson agreed with it. NUE surmises that it was only after Lee arrived in her new position on June 14, 1996, and after the other secretaries found out about Lee's agreement and had complained, that the District decided to renege.

NUE contends that the District did more than just listen to employee's complaints. In this situation, NUE maintains, the District engaged the employees in conversation and agreed to take action, or avoid taking action, so as to influence the outcome of matters involving the negotiations and the enforcement of the collective bargaining agreement. NUE asserts that the District's decision to reject the Lisa Lee agreement was the result of the District's improper contacts with unauthorized bargaining unit employees.

District's Reply

The District asserts that since there is no evidence that an agreement was ratified by the parties, i.e., the School Board and the Union, then there was no agreement from which a violation of Sec. 111.70(3)(a)5 can be found. The District concedes there may have been discussions between the parties which resulted in an agreed-upon recommendation, but that such a recommendation was still subject to the Board's approval. The District makes an analogy to an oral agreement and infers that this situation is at best an unenforceable agreement until it is ratified by the parties.

In the alternative, the District asserts that Peterson's role and authority had no particular relationship to the issue of ratification obligations. It contends that any apparent authority held out by Interim District Administrator Peterson does not bind the Board to support and ratify the alleged agreement.

The District also argues that there is no evidence of it initiating any negotiations or bargaining of the Lee proposal with anyone other than NUE's Executive Director Manson. The District insists that its remarks to persons other than Manson must be considered under the circumstances in which they were made. Since the remarks in question were neither solicited nor encouraged by the District, the District submits that these are not prohibited practices. The District notes that District Administrator Walker reached his decision with regard to Lee without communicating with any of the other secretaries on the matter. Thus, the District concludes, the alleged interference is even one more step removed from any direct communications with other bargaining unit members or other third parties regarding the matter.

The District claims that NUE attempts to "muddy the waters" by linking Lee's transfer to the issue of whether Lee would receive credit for her prior service for purposes of vacation accrual. It points out that this was a promotion for Lee, that Lee was the only person posting for the position, and that Lee knew as early as June 4, 1996, that she would be awarded the position. Therefore, the District argues, there is nothing to show that Lee would have declined the position but for the additional vacation days. It further contends that there was no harm or disadvantage to Lee by the Board's refusal to grant her more vacation time, since she received the same deal as had been bargained for by other unit employees in the collective bargaining agreement.

Finally, the District characterizes the alleged agreement as preliminary discussions between the parties which ultimately did not result in a binding and ratified agreement. If these are determined to be unlawful, the District concludes, the result will have a chilling effect on all preliminary discussions of this sort between members of the Administration and representatives of the Union. The District requests that the complaint be dismissed in its entirety.

DISCUSSION

The District's argument that there was no binding agreement regarding Lisa Lee's eligibility for three weeks of vacation upon her promotion to Network Manager/Office Manager is not persuasive. Although Principal Lundgren may have had "preliminary discussions" with NUE in May of 1996, and Lundgren made a written recommendation to District Administrator Peterson on June 4, 1996, there is unrebutted testimony that Peterson presented Manson with a proposal for an agreement on June 5, 1996, that Lee would start her position on June 14, 1996, and that she would be eligible for three weeks of vacation beginning on that date. It is also unrebutted that Peterson asked Manson if Manson would enter into the agreement, and that Manson said that it was agreeable to NUE.

The actions of Peterson and Manson at their June 5 meeting support a finding that both individuals had apparent and actual authority to bind their principals to such an agreement and had done so in the past. Clearly, both left the meeting believing the situation was a done deal. The only thing left to do was for Manson to get back to Peterson, in writing, with confirmation that the Union agreed this was not a precedential agreement. Also, Manson wanted to address, in that letter, the parties' understanding of when Lee would be eligible for a fourth week of vacation. These items did not place contingencies on the basic agreement that Lee would start on a date certain and that she would be eligible for three weeks of vacation on that date. This understanding is further supported when Peterson personally congratulated Lee on June 7 for the increased vacation eligibility and when Lee thanked Peterson for working the issue through the Union. If this understanding with NUE and Lee required formal Board ratification, Peterson could not have presented it to NUE as final and was obliged to confirm so with both Manson and Lee. That he never did.

The letter from Manson to Peterson dated June 6, 1996, must be viewed in the context in which it was written. As indicated above, it confirmed that agreement had been reached and addressed the non-precedential nature of the agreement, and the timing of Lee's fourth week of eligibility. The June 6 letter bears this out: it is "a follow-up" to the June 5 meeting. Nothing in that letter indicates or can reasonably be read to infer that Peterson was merely engaged in preliminary discussions with Manson over Lee's three weeks of vacation eligibility at the start of her new position. Further, Manson's letter was written confirmation of agreements reached between the representative of NUE and the District. No response was

required if Peterson concurred that the letter accurately set forth the agreement. It is unreasonable, in view of the aforementioned circumstances, to conclude that after June 6, Lee's start date and three weeks of vacation eligibility was still up in the air and further negotiations required. Because Peterson failed to communicate with or respond to Manson's letter prior to June 14, 1996, he acquiesced to Manson's written understanding of their agreement.

That an agreement was reached and was later unilaterally rescinded is further supported by unrebutted testimony regarding Peterson's admissions on June 27 and 28, 1996, when he apologized to Lee, when he told Manson that it was his (Peterson's) mistake an agreement had been approved, and that it was now unapproved, and when he told Manson that there would be some unhappy people if Lee's vacation benefit agreement was kept in place.

Clearly, Peterson intended to bind the District to the agreement and the agreement is binding. Walker conceded at the hearing that he had authority to enter into agreements on behalf of the District which deviate from the parties' collective bargaining agreement. Moreover, Walker admitted that he had made three side letter agreements with NUE (re: Ernst, Rozak and Schwaab) in good faith and that it was Walker's intent that these three agreements be honored by the District. Although Walker opined that these three agreements were not legally binding, such a conclusion is untenable. If the District Administrator has actual and apparent authority to enter into an agreement concerning application of the collective bargaining agreement, and he does enter into such an agreement with NUE, then the District is precluded from unilaterally rescinding that agreement and it is legally binding and enforceable. There is no evidence in this record to suggest that the District's administrator lacked either apparent or actual authority to bind the District in such matters.

Thus, Peterson had authority to enter into an agreement with NUE regarding Lee. It is not enough to assert that this agreement was not ratified by the School Board to escape its enforceability. Lee was prejudiced by the District's refusal to abide by its agreement giving her an additional three weeks of vacation eligibility. The District's argument that Lee was not harmed or disadvantaged by this refusal is not convincing. The District's agreement was that Lee's prior service dating back to May 19, 1989, would be considered as that of a twelve-month employe under Article 16 of the parties' collective bargaining agreement. Absent this agreement, Lee would not have been treated as though she were a twelve-month employe prior to June 14, 1996, and thus she would not have been eligible to receive three weeks of paid vacation in June, 1996.

The District's reliance upon other cited WERC decisions is unpersuasive. It urges that VILLAGE OF KIMBERLY, DEC. NO. 28759-C (WERC, 11/18/97), supports the proposition that agreements are not enforceable until ratified. In that case the union filed a complaint that the employer violated Sec. 111.70(3)(a)5, Stats., by failing to comply with an oral agreement. However, it was found that the alleged oral agreement had *not* been made. The facts in VILLAGE OF KIMBERLY are distinguishable from the instant case in that both parties understood

that while they could enter into oral binding agreements they were subject to ratification, and they had a practice of reducing all tentative agreements to writing. No such understanding or practice was evident in this case. Peterson never gave any indication he could not bind the District and his agreement was subject to Board ratification. Peterson's agreement with NUE was not tentative.

The District also asserts that Peterson's apparent authority does not bind the School Board, citing WAUNAKEE COMMUNITY SCHOOL DISTRICT, DEC. NO. 27837-B (WERC, 6/15/95). In that case, the Commission affirmed Examiner Jones' Order dismissing the union's complaint that the employer and an absent employer's bargaining team member violated Sec. 111.70(3)(a)4, Stats., by failing to ratify a tentative collective bargaining agreement. The facts underlying that decision are clearly distinguishable from the instant case. The agreement Peterson reached with Manson was never submitted to the District's board for ratification. And, as noted earlier herein, Peterson gave every appearance he had authority to finally bind the district, without Board ratification. He met with the Union and never mentioned the agreement needed Board approval. He congratulated Lee on her promotion and vacation agreement two days after he reached the agreement with Manson. He never responded to Manson's written confirmation of the agreement. Indeed, Walker, not Peterson, ultimately wrote to Manson stating the "side agreement . . . deviates from the negotiated Master contract and therefore is not acceptable." Clearly, both Peterson and Manson believed he had the authority to bind the District to such an agreement. It was reasonable, in light of the facts present in this case, for the Union to conclude it had reached a binding agreement with the District.

The District waived the collective bargaining agreement's prerequisite that all modification and alterations to the collective bargaining agreement be in writing and signed by both parties. The doctrine of waiver involves an intentional or known relinquishment of a right, or such conduct of action, or non-action, as warrants an inference of giving up a party's intention to rely upon such right. In this case, Peterson's conduct of agreement with NUE, his confirmation of the agreement with Lee, and the District's non-action of setting the record straight prior to Ms. Lee starting her position on June 14, 1996, effectively waived the District's right to rely on Article 9 of the collective bargaining agreement.

There can be no doubt that Walker, as the new administrator coming into the District, was put into an uncomfortable situation when he learned several secretaries were upset with the agreement. However, at the time he began his orientation on June 16, 1996, the agreement had already been reached and Lisa Lee had already started in her new position. Whether or not Lee would have agreed to take the position without an increase is unknown. What is known is she did start her new position with an understanding as to what her vacation eligibility would be because of the agreement reached between the Union and the District.

With regard to NUE's contention, i.e., that the District violated Secs. 111.70(3)(a)1 and 4, Stats., by allowing bargaining unit employees to impact the District's decision to rescind the Lee agreement, the record does not support this conclusion. There is not sufficient evidence showing that the District was trying to renegotiate the terms of the Lee agreement with non-authorized bargaining unit members, that the District engaged such persons with individual bargaining, or that any communication between non-authorized unit members and District representatives had any causal connection to the District's decision to rescind the Lee agreement. The secretaries found some sympathetic ears and voiced their concern. This conduct did not constitute a prohibited practice.

In conclusion, NUE has not proven by a clear and satisfactory preponderance of the evidence that the District has violated Secs. 111.70(3)(a)1 and 4, Stats., by allowing employees to express their personal disagreements to District representatives over Lisa Lee's eligibility for vacation benefits. Accordingly, that part of the complaint is dismissed in its entirety. However, NUE has proven by a clear and satisfactory preponderance of the evidence that the District violated Sec. 111.70(3)(a)5 and 1, Stats., by refusing to implement and abide by a binding agreement establishing Lisa Lee's vacation entitlement upon her taking the Network Manager/Office Manager secretarial position.

Dated at Madison, Wisconsin, this 22nd day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Thomas L. Yaeger /s/

Thomas L. Yaeger, Examiner