STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WONEWOC-CENTER EDUCATION ASSOCIATION, Complainant,

vs.

WONEWOC-UNION CENTER SCHOOL DISTRICT, Respondent.

Case 25
No. 57962
MP-3550

Decision No. 29849-A

Appearances:

Attorney Laura Amundson, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainant Association.

Attorney Linda Hale, Attorney at Law, Hale's Legal Services, 433 Linn Street, P.O. Box 114, Baraboo, Wisconsin 53913-0114, appearing on behalf of the Respondent District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 10, 1999, Wonewoc-Center Education Association filed a complaint with the Wisconsin Employment Relations Commission which alleged that the Wonewoc-Union Center School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats., by violating the terms of the parties' existing collective bargaining agreement. Thereafter, hearing on the complaint was held in abeyance pending efforts to settle the dispute. These efforts were ultimately unsuccessful. On March 6, 2000, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. The hearing on this matter was held on July 21, 2000 in Wonewoc, Wisconsin, at which time the District orally answered the complaint. During the hearing, the parties were given full

opportunity to present their evidence and arguments. The parties later filed briefs and the Association filed a reply brief, whereupon the record was closed on September 28, 2000. Having considered the record evidence and arguments of the parties, I make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wonewoc-Center Education Association, hereinafter referred to as the Association, is a labor organization with its offices located at Coulee Region United Educators, 2020 Caroline Street, LaCrosse, Wisconsin 54602-0684. At all times material herein, Deborah Byers and Gerald Roethel have been Executive Directors with Coulee Region United Educators.

2. Wonewoc-Union Center School District, hereinafter referred to as the District, is a municipal employer with its offices located at 101 School Road, Wonewoc, Wisconsin 53968. The School Board is an agent of the District and is charged with possession, control and management of the property and affairs of the District. Ron Benish was the District's Administrator from July 1, 1996 to August, 1998, and in that capacity acted on behalf of the District. Mike Manning has been the District's Administrator from August, 1998 to date and in that capacity acts on behalf of the District.

3. The Association is the exclusive collective bargaining representative for the District's regular teaching personnel. At all times material herein, Marilyn Champlin was a member of that collective bargaining unit.

4. The Association and the District have been parties to a series of collective bargaining agreements (hereinafter CBA) which govern the wages, hours, and working conditions of the employees in the bargaining unit referenced in Finding 3. The parties' 1997-99 CBA contained the following pertinent provisions:

ARTICLE V. GRIEVANCE PROCEDURE

> A grievance shall be defined as any question raised by an Aggrieved Person concerning the interpretation or application of this Agreement.
>
> Level One: The Aggrieved Person will first discuss his/her grievance with his/her principal or immediate supervisor and/or the Superintendent and put it in writing. The grievance must be filed within ten (10) days of the occurrence, and it must be based on the provisions of this Agreement.
>
> Level Two: If the Aggrieved Person is not satisfied with the disposition of his/her grievance of Level One, or if no decision has been rendered within ten (10) school days after presentation of the grievance, he/she may submit his/her receipt of a

written grievance by the Superintendent. The Superintendent will meet with the Aggrieved Person, and if the Aggrieved Person so desires, with Association representative in an effort to resolve it. The Superintendent will make his/her recommendation in writing.

Level Three: If the Aggrieved Person is not satisfied with the discipline of his/her grievance at Level Two, or if no decision has been rendered within ten (10) school days after he/she first presented his/her written grievance, he/she may file the grievance in writing to the Board. At the next regularly scheduled Board meeting, the Aggrieved Person will discuss his/her written grievance with the Board and, if the Aggrieved Person so desires, association representatives. The Board will respond within ten (10) days of the hearing. If the Board does not respond, the grievance can be assumed to be denied.

. . .

ARTICLE XIV. TEACHER WORKDAY

1. Teachers will be expected to be in the building at 8:00 a.m. and remain until 4:00 p.m. except on Fridays and days prior to a recess when the teachers may leave when the buses leave. A teacher may modify the eight hours he/she is expected in the building. Teachers may elect a 7:30 a.m. to 3:30 p.m. day. The teacher shall notify the principal of his/her intentions by the first face-to-face contact day with students. This option is in effect for the duration of the school year, and any teacher electing this option shall attend all staff and IEP meetings scheduled for that year. Tardies, student/parent conferences, and after-school suspension caused by sending students to the office will require the teacher to be at school until 4:00 p.m. even if the teacher selects a 7:30 to 3:30 work schedule.

2. The normal secondary load begins at 8:25 a.m. and ends at 3:30 p.m. and will include six (6) periods of instruction, one (1) period of supervision, and one (1) period of preparation, or five (5) periods of instruction, two (2) periods of supervision, and one (1) period of preparation. Teaching five (5) classes will be used as a basis in determining full-time status.

Teachers who have instructional assignments beginning before 8 a.m. and/or ending after 4 p.m., causing the teacher to exceed eight (8) consecutive hours for an entire semester or assigned more than the normal load, shall receive additional compensation at a rate equal to the individual's contracted teaching salary.

3. Part-time teachers.

a. Teachers contracted to teach part of the day shall be paid an amount according to the following formula: (class + supervision + SH) (4 classes or less)

Duties + (If not full-time)	Prorated Prep = In School	
6/8 75% +	9.37% =	84.375%
5/8 62.5% +	7.8125% =	70.3125%
4/8 50% +	7.8125% =	57.8125%
3/8 37.5% +	4.46875% =	41.96875%
2/8 25% +	3.125% =	28.125%
1/8 12.5% +	1.5625% =	14.0625%

Teachers teaching ½ time or more shall be required to be in school either ½ hour before or ½ hour after their classes begin or end. Teachers teaching less than ½ time shall be required to be in school 15 minutes before or 15 minutes after their classes begin or end.

b. Except by request of the teacher, no full-time teacher can be reduced to part-time status unless their teaching load is reduced to ½ time.

c. This paragraph does not affect the speech therapist's 50% status or the school psychologist.

4. The elementary student day will begin at 8:30 a.m. and will end at 3:25 p.m.

5. During the elementary student day, full-time teachers will be provided with 250 minutes per week for preparation. The kindergarten teacher may volunteer to accept 200 minutes of prep time per week, and the Association will not object to this decision. Elementary teachers who are assigned split classes shall receive an additional $2,000.00 per year.

6. In the event that a teacher does not receive the allotted amount of preparation time, the District will pay $10.00 per class. Comp time may be redeemed at the end of the day (leave at the end of the student's day), or may accumulate. Accumulated comp time may be used as Personal Leave in units no less than one-half day or more than one full day. Comp time shall not be redeemed in May or carried over to the next school year.

The District will make every effort to seek substitute teachers and will not use this payment provision to assign additional responsibilities.

5. The grievance procedure referenced in Finding 4 does not contain a provision for the arbitration of unresolved grievances. Thus, the grievance procedure does not end in final and binding arbitration. Instead, the grievance procedure ends with a decision by the School Board.

6. The work schedule for teachers is organized around the teaching of classes. The basis for determining full-time teacher status is teaching five (5) classes. As a result, the salary paid to part-time teachers is prorated based on the number of classes taught. The work schedule for speech therapists is not organized around the teaching of classes; instead, it is organized around working one-on-one with students. The parties' collective bargaining agreement defines a full teacher workday as eight hours. The salary paid to part-time speech therapists is prorated based on the number of hours the speech therapist is scheduled to work in an eight-hour day.

7. In the 1998-99 school year, the District had a small number of part-time employees besides Marilyn Champlin. Champlin's part-time work schedule is addressed below. Other than Champlin, the other part-time employees worked either a morning schedule of 8:00 a.m. to 12:00 Noon, or an afternoon schedule of 12:00 Noon to 4:00 p.m. The part-time employees who worked these four-hour schedules did not have a lunch break included in their daily scheduled work hours.

8. Marilyn Champlin worked as a speech and language therapist in the District from the fall of 1985 until January, 1999. She worked on a part-time basis during that entire time period. When she began her employment with the District in 1985, she worked half-time and was paid 50% of the salary a full-time employee at her level of education and experience would earn. Beginning in 1985, her work schedule was this: she worked two full days every other week, and three full days on the alternate weeks. Thus, she alternated working two full days one week and three full days the next. Each of Champlin's workdays was scheduled as an eight-hour day, which included a half-hour lunch break as part of the eight scheduled hours. Champlin's half-time work schedule therefore consisted of 40 hours in each two-week pay period: 16 hours one week and 24 hours the next, with five half-hour lunch periods within those 40 hours. This schedule was accepted by the District, the Association and Champlin as being a half-time (i.e. 50%) schedule.

9. When Champlin began working in the District in 1985, there was no provision in the parties' collective bargaining agreement defining the length of the teacher workday. That changed in 1990, when language was inserted into the parties' 1990-92 collective bargaining agreement which specified that the length of the teacher workday was eight hours (either 8:00 a.m. to 4:00 p.m. or 7:30 a.m. to 3:30 p.m.). After this language was inserted in the parties' collective bargaining agreement, Champlin's work schedule and half-time status did not change. Thus, she continued to be paid 50% of a full-time salary for a work schedule which consisted of an average of 20 scheduled hours per week (i.e. 16 hours one week and 24 hours the next for an average of 20 hours per week.). This schedule included a half-hour lunch break every day that she worked. Champlin worked the half-time schedule just noted through the end of the 1997-98 school year.

10. In April of 1998, Champlin signed an individual employment contract for the upcoming 1998-99 school year. That individual contract listed the same terms as her contract had for the previous year and years preceding: a half-time contract, with a yearly salary equivalent to one-half the salary a full-time speech therapist at Champlin's education and step level would receive.

11. About the same time Champlin returned her individual employment contract, the School Board was considering changing Champlin's work schedule for the upcoming year. Their stated reason for doing so was that they thought Champlin's existing work schedule was not adequately serving the needs of her students. After considering same, the Board decided that to better serve her student's needs, Champlin should be present at school on a daily basis in either the mornings or the afternoons. Implicit in the Board's decision was that Champlin's existing work schedule would change. District Administrator Ron Benish subsequently relayed the Board's decision to Champlin and inquired whether she wanted to work mornings between 8:00 a.m. and 12:00 Noon, or afternoons between 12:00 Noon and 4:00 p.m. Champlin objected to both proposed schedules. Her stated reason for objecting to them was that glare from the sun made it difficult for her to drive a car in either early mornings or late afternoons. After Champlin objected to working either a morning schedule or an afternoon schedule, District representatives formulated the following schedule which was a variation on the two previously-noted schedules: 10:00 a.m. to 2:30 p.m. daily. This schedule envisioned four hours of work with an unpaid half-hour lunch break in the middle of the shift. According to District officials, this schedule "accommodated" Champlin's "visual difficulties" because it allowed her to avoid the sun glare associated with driving in the early morning and the late afternoon.

12. On June 12, 1998, District Administrator Ron Benish sent the following letter to Champlin:

> Dear Marilyn:
>
> The Wonewoc-Center School Board took into consideration your doctor's letter, the CRUE letter, and a letter from the Wonewoc-Center School's attorney. The School Board has decided to make a change in your contract to better meet the needs of the students in the district and to have you available on a daily basis.
>
> After taking into consideration your disabilities, the district will rearrange your schedule as first proposed from 12:00 to 4:00 p.m. to 10:00 a.m. until 2:30 p.m. daily with one half hour for lunch. This way you will not have to drive in the early morning or in the afternoon when it gets dark early. This should also help with early morning and late afternoon glare.

The plan was suggested by our school attorney as it addressed the issue and concerns of Charles J. Anderson, M.D. This will give students and parents more availability to you as a speech and language pathologist, for IEP meetings, and so forth.

Enclosed is a copy of our school attorney's letter to the School Board. If you have questions, feel free to call (608) 464-3165.

Sincerely,

Ronald Benish /s/
Ronald Benish
District Administrator

The enclosure referenced above is not contained in the record.

13. Association representative Deborah Byers subsequently discussed Champlin's work schedule with Benish on several occasions. Their discussions centered on whether Champlin's work schedule would be changed, and if so, what her new work schedule would be. Their discussions did not address how much Champlin would be paid if she worked a 10:00 a.m. to 2:30 p.m. schedule.

14. On August 5, 1998, Champlin sent the following letter to Benish:

Dear Mr. Benish,

The purpose of this note is to alert you to scheduling problems for August 17, 1998 and August 18, 1998. As I will be travelling between now & then, I would appreciate it if you would please clarify by return mail when you expect me to be present at W-C on those days.

In the letter I received from you earlier this summer, you informed me that you expect me to be in the building from 10:00 A.M. until 2:30 P.M. Mon.-Fri. with a half hour for lunch. The schedule for the 17th states that Polly Benish's in-service is scheduled from 8:30 – 9:00 A.M. It also lists me in group #3 for Intro to the Network – Basic word processing with Microsoft Word. That group meets from 2:00 P.M. - 4:00 P.M. The schedule for the 18th lists a meeting for all employees from 8:30 – 9:30 A.M. Which meetings do you expect me to attend and what time will I have to work in my room?

Deb Byers advised me to remind you that if you occasionally require my presence outside the 10:00 A.M. – 2:30 P.M. hours, the district has several options. One is to pay me for extra time. Another is to allow me comp time off. Alternately, we could return to the all day Tues, Thurs. and alternate Wed. schedule I worked under for the past 13 years.

Please respond as soon as possible so that I might plan accordingly for August 17th & 18th.

Thank you.

Marilyn Champlin /s/
Marilyn Champlin

15. On August 12, 1998, Benish replied to Champlin with the following letter:

Dear Marilyn:

In response to your letter dated August 5, 1998, you may come in at your scheduled time. If you do come in extra, you will not be paid for this; however, it may be to your advantage knowledge wise to be here. Many of the staff members have already voluntarily come in to work in their rooms without pay.

Your schedule is set for 10:00 a.m. – 2:30 p.m. Monday through Friday. I hope you had a good summer.

Sincerely,

Ronald Benish /s/
Ronald Benish

16. In late August, 1998, Byers discussed Champlin's work schedule with Mike Manning who had just been hired as district administrator to replace Benish who had left the District. Their discussions centered on whether Champlin's work schedule would be changed, and if so, what her new work schedule would be. Their discussion did not address how much Champlin would be paid if she worked a 10:00 a.m. to 2:30 p.m. schedule. As a result of their discussion, Manning told Byers he would raise the matter of Champlin's work schedule with the School Board at their next meeting.

17. When the 1998-99 school year commenced, Champlin began working a 10:00 a.m. to 2:30 p.m. daily schedule. As previously noted, this schedule included a half-hour lunch break in the middle of the shift.

18. On September 14, 1998, at the first School Board meeting of the 1998-99 school year, the Board again considered Champlin's work schedule. After doing so, the Board decided that Champlin's work schedule for the remainder of the 1998-99 school year would be 10:00 a.m. to 2:30 p.m. daily. Manning informed Byers of the Board's decision the next day.

19. When Champlin received her first paycheck for the 1998-99 school year on September 14, 1998, she was paid for 20 hours per week. Champlin believed this figure was incorrect and that she should be paid for 22.5 hours per week – not 20 hours per week.

20. On September 21, 1998, the Association filed the following grievance on Champlin's behalf:

> Please consider this a Step 1 grievance filed on behalf of Marilyn Champlin. Marilyn Champlin has been assigned, and this assignment was reaffirmed by the Board at its September 14 Board meeting, to work from 10:00 a.m. until 2:30 p.m. daily. She works a total of 4.5 hours each day. All other teachers are required to work 8 hours per day.
>
> Based on the time other teachers have to put in, Marilyn is working a 56.25 percent contract rather than a 50 percent contract as she is being paid. We believe the District has violated XIV, Teacher Workday.
>
> We are requesting that Marilyn be reimbursed at the rate of 56.25 percent for her contract from the beginning of the 1998-99 school year. We further request that all of her benefits be prorated at 56.25 percent rather than the 50 percent as has been done in past years.
>
> If you have any questions or would like to discuss this with me before you render your decision, please do not hesitate to call me.
>
> Sincerely,
>
> COULEE REGION UNITED EDUCATORS
>
> Deb Byers /s/
> Deborah K. Byers, Executive Director
>
> DKB/jfw
>
> copy: Marilyn Champlin

21. The grievance was processed through the steps of the grievance procedure noted in Finding 4 and was denied by the School Board on October 16, 1998. With this decision, the parties completed all the steps of the contractual grievance procedure.

22. Champlin worked the new schedule until January 4, 1999 when she went on extended sick leave. She remained on sick leave until April 5, at which point she went on disability for the remainder of the 1998-99 school year.

23. The half-hour lunch break which was in the middle of Champlin's 10:00 a.m. to 2:30 p.m. work schedule counted as paid work time. As a result, the District scheduled Champlin to work 4.5 hours per day and 22.5 hours per week in the 1998-99 school year. The District paid Champlin that year for a 50% work schedule. The District should have paid her for a 56.25% work schedule.

24. On September 10, 1999, the Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission to have the grievance referenced in Finding 20 heard and decided in the instant proceeding.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Since the parties' collective bargaining agreement referenced in Finding of Fact 4 does not contain a provision for the arbitration of unresolved grievances, the Examiner exercises the Commission's jurisdiction to decide whether said agreement was violated in violation of Sec. 111.70(3)(a)5, Stats.

2. The District violated the collective bargaining agreement when it paid Marilyn Champlin in the 1998-99 school year for a 50% work schedule while it required her to work a 56.25% work schedule. By violating the collective bargaining agreement, the District violated Sec. 111.70(3)(a)5, Stats.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. The Wonewoc-Union Center School District shall:

(a) Cease and desist from violating the parties' collective bargaining agreement by not counting the half-hour lunch break as paid work time for those employees in the teacher bargaining unit who work a daily 10:00 a.m. to 2:30 p.m. schedule.

(b) Pay Marilyn Champlin an additional 6.25% on her wages, sick leave and disability payments for the 1998-99 school year, plus interest at the statutory rate of 12% (twelve percent) per year. 1/ The interest runs from September 21, 1998 (the date of the grievance) through the date this money is paid.

Dated at Madison, Wisconsin this 20th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

1/ The rate set forth in Sec. 814.04(4), Stats., at the time the instant complaint was filed.

WONEWOC-UNION CENTER SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the Association alleged that the District committed a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats. when it paid Champlin for 20 hours per week while requiring her to work at least 22.5 hours per week. The District denied it committed a prohibited practice by its conduct herein.

POSITIONS OF THE PARTIES

Association

The Association initially challenges the District's assertion that the grievance was untimely filed. In its view, the grievance was filed in accordance with the timelines contained in the contractual grievance procedure. It asserts that the District's contention to the contrary is not persuasive. In arguing that the grievance was timely, the Association maintains that the "occurrence" in this case was not when Champlin was notified that she was going to be working a new schedule for the 1998-99 school year; instead, the "occurrence" was the District's failure to pay Champlin for working the extra hours it had added to her work schedule for the 1998-99 school year. Building on that premise, the Association avers that the first time Champlin was paid for less time than she was scheduled to work was when she received her first paycheck for the 1998-99 school year on September 14, 1998. Since this grievance was filed on September 21, 1998, the Association submits that it was filed within the ten-day time period specified in the grievance procedure, and thus is timely. The Association essentially argues in the alternative that if for some reason the Examiner finds that the grievance should have been filed earlier than September 21, the District's failure to pay Champlin at the appropriate percentage for her 1998-99 work schedule constitutes a continuing violation of the CBA, and thus the continuing violation theory applies to the grievance. The Association therefore believes the grievance is properly before the Examiner for a decision on the merits.

Next, prior to addressing the merits, the Association responds to certain arguments made by the District. First, as has already been alluded to, the Association emphasizes that the instant grievance does not challenge the schedule which Champlin was directed to work in the 1998-99 school year. The Association acknowledges in this regard that the District has the authority under the contractual Management Rights clause to change an employee's work schedule. Instead, in the Association's view, this case only involves Champlin's rate of pay for working that schedule. Second, the Association argues that the District's attempt to characterize the instant grievance as "retaliatory" should not be accepted by the Examiner. As the Association sees it, there is no evidence in the record which will support such a finding. Third, the Association disputes the District's claim that the 10:00 a.m. to 2:30 p.m. schedule was created as an "accommodation" to Champlin. In its view, that claim is not only unfounded and false, but it should have no relevance to the outcome of this particular grievance.

With regard to the merits, the Association contends that while management had the right to have Champlin work the 10:00 a.m. to 2:30 p.m. schedule in the 1998-99 school year, it had to pay her for the schedule which it required her to work. According to the Association, that did not happen here. This argument is premised on the contention that a 10:00 a.m. to 2:30 p.m. work schedule is not a 50% (half-time) work schedule, but rather is more than that. The Association asserts that for many years, the parties had by their practice "defined" 50% employment for the speech therapist as being five, eight-hour days in each two-week period, including a half-hour lunch break within each eight-hour work day. The Association believes this practice established what the parties considered 50% employment for the speech therapist's position. The Association further maintains that this practice is consistent with Article XIV. The Association avers that when the District increased Champlin's scheduled hours to 22.5 hours per week in the 1998-99 school year, it should have increased her pay accordingly to 56.25% of a full-time salary. The Association submits that did not happen; instead, the District simply increased her scheduled work hours, but not her pay. According to the Association, there is no basis in the CBA, the parties' past practice, or any agreement between the parties which allows the District to increase Champlin's work hours by 6.25% without commensurately increasing her pay. The Association therefore argues that since Champlin was directed and required to work a 56.25% schedule for the 1998-99 school year, that is the percentage of a full-time salary which she should have been paid for the year. The Association also maintains that her sick leave and disability payments for that year should likewise have been based on a 56.25% schedule rather than a 50% schedule.

In order to remedy the District's contractual breach, the Association asks that the District be ordered to compensate Champlin for the difference between the amount of pay and benefits Champlin received during the 1998-99 school year (which were based on a 50% schedule) and the amount she would have been paid for 56.25% of a full-time schedule during the 1998-99 school year.

District

The District initially contends that the Examiner should not address the merits of the grievance because it was not timely filed. According to the District, the grievance is untimely and should therefore be dismissed. This contention is based on the premise that since Champlin was informed in writing on June 12, 1998 that she would be working a new schedule beginning at the start of the 1998-99 school year, she should have filed her grievance at that time. In the District's view, the Association did not offer a reasonable explanation for waiting until September 21, 1998, three months later, to file the grievance. As the District sees it, the grievance should have been filed earlier because harm is not a prerequisite under this contract language for filing a grievance. The District submits that the instant grievance far exceeds the time limitation contained in the contractual grievance procedure because that language specifies that a "grievance must be filed within ten (10) days of the occurrence." The District believes this timeline is mandatory, and that a grievance filed beyond that time frame is invalid. The District therefore asserts that the Examiner should enforce the agreed-upon timetable for filing grievances and dismiss the instant grievance as untimely.

Next, prior to addressing the merits, the District calls the Examiner's attention to what it feels is some background pertinent to this dispute. First, it notes that the School Board decided it was necessary to change Champlin's work schedule to better meet the needs of her students. It defends that decision by citing the contractual Management Rights clause which gives it the right to control the school system. Second, it notes that after the School Board made that decision, Champlin turned down both of the schedules proposed by the District, namely a morning schedule of 8:00 a.m. to 12:00 Noon or an afternoon schedule of 12:00 Noon to 4:00 p.m. The District asserts that it was only then that the District created the 10:00 a.m. to 2:30 p.m. schedule for Champlin to work. As the District sees it, that schedule (i.e., the 10:00 a.m. to 2:30 p.m. schedule) "accommodated" Champlin's "visual difficulties" because it (i.e. that schedule) allowed her to avoid the sun glare associated with driving in the early morning and the late afternoon. Third, the District noted in their opening statement that this case "is just one small piece" of a large amount of litigation presently ongoing between the parties involving Champlin.

Set against the backdrop just noted, the District avers that what this case is really about is retaliation by Champlin against the District. The District knows that Champlin does not like the new schedule which she was directed to work, and she wants to return to her old work schedule. The District claims that when it did not comply with Champlin's demand and give her back her old work schedule, Champlin retaliated with the instant grievance. The District cites the fact that Champlin did not appear at the hearing herein as proof "that her actions are simply retaliatory in nature." The District opines in their brief that "such rebellious action" by Champlin and the Association "must not be supported."

Turning now to the merits, the District asserts that Champlin was paid the correct amount for the 1998-99 school year, so no additional pay is owed her. It makes the following arguments to support this contention. First, for background purposes, the District notes that the individual employment contract which Champlin signed specified that she was a half-time employee who was to be paid a salary of $18,738 for the school year. According to the District, the schedule which it created for Champlin to work in the 1998-99 school year was for half-time employment. Second, in their opening statement, the District averred that the part-time employees who work a morning schedule of 8:00 a.m. to 12:00 Noon or an afternoon schedule of 12:00 Noon to 4:00 p.m. do not get a paid lunch break. Building on that premise, the District asserts it was only being consistent when it made Champlin's lunch break unpaid as well. Third, the District submits that since teachers are salaried employees and not paid on an hourly basis, Champlin should not get paid for what the District characterizes as "additional time [which she] spends at work." Finally, the District argues that since extra prep time was built into her Friday work schedule, she "actually worked less than 50% and was overpaid."

The District therefore asks that the grievance be denied and the complaint dismissed.

DISCUSSION

I. Jurisdiction

The instant complaint contends that the District violated Sec. 111.70(3)(a)5, Stats., by its conduct herein. That section provides that it is 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 employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . .

Simply put, this provision makes it a prohibited practice for a municipal employer to violate a CBA. The traditional mechanism for enforcing a CBA is via grievance arbitration. Given the existence of that traditional mechanism for resolving grievances and enforcing the CBA, the Commission does not usually exercise its jurisdiction to determine the merits of a Sec. 111.70(3)(a)5 breach of contract claim where the parties' CBA provides for arbitration of unresolved grievances. Here, though, it is undisputed that the parties' CBA does not provide for arbitration of unresolved grievances, so the Examiner will exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5 and act as a *de facto* arbitrator to determine if the District's conduct breached the CBA. 2/

2/ See, for example, HAYWARD COMMUNITY SCHOOL DISTRICT, DECISION NO. 28619-A (Burns, 11/96) and WINTER JOINT SCHOOL DISTRICT NO. 1, DECISION NO. 17867-C (WERC, 5/81).

II. Timeliness

Since the District contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance was timely filed.

Like most contractual grievance procedures, the one involved here contains a timeline for filing grievances. The timeline is found in Level One of Article V wherein it specifies that "the grievance must be filed within ten (10) days of the occurrence." Thus, for a grievance to be timely, it must be filed within ten days of the "occurrence" upon which the grievance is based.

The question here is what "occurrence" triggered the running of the ten-day time limitation referenced in Level One of the grievance procedure. Was it, as the District argues, when Champlin was notified that she would be working the new schedule (i.e. June 12, 1998), or was it, as the Association contends, when Champlin received her first paycheck of the 1998-99 school year?

The answer to this question depends on what conduct the grievance challenged. If the grievance had challenged Champlin's new work schedule for the 1998-99 school year, then the June 12, 1998 notice of same could have been an "occurrence" for purposes of applying the contractual time limits. However, that is not what the grievance challenged. The following shows why. The grievance involved here did not allege that Champlin's new work schedule violated the CBA, nor did it request as a remedy that her old work schedule be restored. Instead, the grievance said that what the Association was grieving was that Champlin "is working a 56.25 percent contract rather than a 50 percent contract as she is being paid." The grievance further provided that as for a remedy, "we are requesting that [Champlin] be reimbursed at the rate of 56.25 percent for her contract from the beginning of the 1998-99 school year." In the Examiner's opinion, this wording clearly establishes that this grievance relates to the rate of pay Champlin was paid for working her new schedule. It logically follows from that finding that the "occurrence" for this grievance was the District's alleged failure to pay Champlin at the appropriate rate for the 1998-99 school year. The first time Champlin was paid for working her new schedule was September 14, 1998, so that payday/event triggered the running of the ten-day timetable for filing a timely grievance. The instant grievance was filed seven calendar days later on September 21, 1998. It was therefore timely filed. Having found that the grievance was timely filed, there is no need to address the Association's alternative contention that the grievance was timely under the continuing violation theory. Consequently, no comments are made concerning same.

III. Other Matters

Next, the Examiner believes it is necessary to comment on the following three matters which were addressed by the parties at hearing and in their briefs. To begin with, as was just noted, the parties disagree about what the instant grievance involves. As the District sees it, the instant grievance challenges Champlin's new work schedule, while the Association views it as challenging the rate of pay which Champlin was paid for working her new schedule. As was just noted, the Association's view is supported by the plain meaning of the grievance itself, while the District's view is not. In my earlier finding of which "occurrence" triggered the running of the contractual time limits for filing a grievance, I found, after reviewing the language of the grievance itself, that "this grievance relates to the rate of pay Champlin was paid for working her new schedule." Implicit in that finding is that, notwithstanding the District's contention to the contrary, this grievance does not challenge whether the District was empowered to change Champlin's work schedule in the first place. That question is not before the Examiner, and the District's attempt to convert that into the issue herein is unpersuasive.

The focus now turns to the District's retaliation argument. According to the District, this case is really about retaliation by Champlin against the District because Champlin does not like the new schedule she was directed to work. The District avers that Champlin wants to return to her old work schedule, and when the District would not let her do so, she retaliated by filing the instant grievance. While motive and intent are legal issues in some complaint cases under the Municipal Employment Relations Act, particularly in cases alleging a violation of Sec. 111.70(3)(a)3, Stats., motive and intent are not legal issues in a Sec. 111.70(3)(a)5, Stats.

case alleging a contract violation. Since the instant case alleges a violation of Sec. 111.70(3)(a)5, Stats., it is unnecessary for the Examiner to make a finding concerning Champlin's motive and intent in filing the instant grievance. That being the case, none is made.

Finally, the focus turns to the question of whether the 10:00 a.m. to 2:30 p.m. work schedule which the District created for Champlin and directed her to work constituted an "accommodation" as that term is used and interpreted in the realm of employment discrimination law. The District contends that it was, while the Association disputes that contention. The issues underlying this particular contention are whether Champlin has a handicap and if so, whether the District has accommodated her concerning that handicap. The Examiner need not make those calls. The reason is this: the record indicates that those very issues are presently pending before another state administrative agency that has jurisdiction to hear and decide them. That being so, the Examiner need not comment further.

IV. Merits

Attention is now turned to the substantive merits of the grievance. At issue is whether Champlin was paid at the appropriate percentage for her work schedule in the 1998-99 school year. The District contends that she was while the Association disputes that assertion.

In deciding this contract dispute, the undersigned will focus first on the applicable contract language. If that language does not resolve the matter, attention will be given to evidence external to the agreement. The Examiner characterizes that evidence as involving an alleged past practice.

Both sides agree that the contract language applicable here is found in Article XIV which is entitled "Teacher Workday". The sections of that Article which are pertinent here are Sections 1, 2 and 3(a) and (c). An overview of those sections follow. Section 1 provides that teachers are expected to be in the building for eight hours a day, either 8:00 a.m. to 4:00 p.m. or 7:30 a.m. to 3:30 p.m. It is implicit from this that a full teacher workday is defined as eight hours. Section 2 provides that the basis for determining full-time teacher status is teaching five classes. It is implicit from this that the work schedule for teachers is organized around the teaching of classes. Section 3(a) provides that part-time teachers are paid prorated salaries based on the number of classes taught, and may range from 1/8 to 6/8 of full-time employment. Thus, part-time teachers are paid a varying amount which is prorated according to the amount of time for which they are scheduled to work. This section only defines how part-time teacher salaries are prorated. Finally, Section 3(c) then goes on to say that "this paragraph does not affect the speech therapist's 50% status." In all honesty, this Examiner is not sure exactly what the parties intended this sentence to mean. To begin with, it is unclear which paragraph is being referenced when the phrase begins "this paragraph". The Examiner surmises that it (i.e. the phrase "this paragraph") refers to Section 3(a) which, as previously noted, prorates part-time teacher salaries based on classes taught. If that is the case, and 3(c) exempts the speech therapist from 3(a), then 3(c) means that the speech therapist's part-time employment is not covered by 3(a). Such an

exemption makes sense if one considers that the speech therapist's daily schedule does not revolve around teaching classes (as is the case with part-time teachers), but rather revolves around working one-on-one with students.

Building on the premise that the method of prorating the speech therapist's part-time employment is not covered by Article XIV, Section 3(a), the Examiner has reviewed the remainder of that article to determine if it says anything else about how the speech therapist's part-time employment is determined. It does not. In fact, there is no contract provision which defines part-time employment for the speech therapist, or specifies a method for prorating the percentage of the part-time speech therapist's salary. Thus, the contract is silent on this specific point.

When a contract does not address a particular item, arbitrators commonly look beyond the contract itself for guidance in filling contractual gaps. In doing so, they sometimes consider the parties' past practice. Past practice is a form of evidence commonly used to fill contractual gaps. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. In other words, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning. In order for a practice to be considered binding, the conduct must be clear and consistent, of long duration and mutually accepted by both sides. Said another way, the practice must be shown to be the understood and accepted way of doing something over an extended period of time.

Based on the following, the Examiner finds that a practice exists concerning how 50% employment for the speech therapist had come to be defined. First, the record indicates that when Champlin began her half-time (50%) employment with the District in 1985, she worked a schedule of two full days one week and three full days the next week. Each of her workdays consisted of eight scheduled hours, which included a half-hour lunch break within each eight hour workday, for a total of 40 scheduled hours in each two-week period. Second, this part-time schedule continued unchanged for 13 years, from 1985 until 1998, under different administrators. Throughout that time period, each of Champlin's workdays included a one-half hour lunch break as part of her eight-hour workday. Third, while the District has other part-time employees, none of them worked this particular schedule. The other part-time employees worked four hours in the morning (i.e. from 8:00 a.m. to 12:00 Noon) or in the afternoon (i.e. from 12:00 Noon to 4:00 p.m.). These part-time employes did not have a lunch break included in their daily scheduled work hours. In the Examiner's opinion, the foregoing established a longstanding definition of how 50% employment for the speech therapist position had come to be defined, namely five, eight-hour days in each two week period, including a half-hour lunch break within each eight hour scheduled workday.

In the context of this case, the important part of the practice is the part that relates to the lunch period. The reason is this: the basic question in this case is whether the half-hour lunch break in Champlin's 1998-99 work schedule counted as paid work time. Simply put, was the lunch break paid work time or unpaid work time? The practice supplies a definitive answer to that question. For 13 straight years, Champlin's lunch break had always been included in, and been a part of, her workday. Thus, the lunch break always counted as paid work time.

This practice does not conflict with any language contained in Article XIV. To the contrary, it is consistent with what is contained in Article XIV, Section 1. The following shows this. As previously noted, Section 1 defines a full teacher workday as eight hours. Since the eight-hour period referenced in Section 1 covers lunch, it logically follows that a lunch break is included in, and is part of, the eight-hour workday. It is therefore implicit in Section 1 that the lunch break counts as time worked. Since the lunch break counts as time worked, it is paid time as opposed to unpaid time.

Application of that practice here means that when the District directed Champlin to work a 10:00 a.m. to 2:30 p.m. schedule, it should have counted the half-hour lunch break as paid work time. It did not. Specifically, the District did not count the half-hour lunch break as time worked for pay purposes. This violated Article XIV as interpreted by the parties themselves via their past practice. When the half-hour lunch break is counted as paid work time, Champlin's work schedule for the 1998-99 school year was not 4 hours per day and 20 hours per week, but rather 4.5 hours per day and 22.5 hours per week. The latter figures translate into a 56.25% work schedule, so the District should have paid her at that rate (i.e. 56.25% of a full-time salary). Since the District only paid her at the rate of 50% of a full-time salary for that year, it owes her the 6.25% difference.

In this Examiner's opinion, this finding can be summarized thus: if an employer increases an employee's scheduled work hours, it has to compensate the employee accordingly for the augmented work schedule.

To summarize, it has been held that Article XIV, Section 3 does not address how 50% employment for the speech therapist is determined; that given that contractual silence, it is appropriate to review the record evidence concerning an applicable past practice; that a past practice exists concerning same; and that the practice shows that 50% employment for the speech therapist had historically been defined as five, eight-hour days in each two-week period, including a half-hour lunch break within each eight hour scheduled workday. In the context of this case, the part of the practice that is pertinent here is the part relating to the lunch break. Specifically, the lunch break was included in the eight-hour workday. This meant that it (i.e. the lunch break) counted as time worked and was paid time. This past practice establishes how Article XIV had come to be interpreted, namely that in this bargaining unit the lunch break counts as time worked and paid time. Applying that interpretation here, it is held that when the District directed Champlin to work a 10:00 a.m. to 2:30 p.m. schedule in the 1998-99 school year, the half-hour daily lunch break should have been counted as paid work time. Since that did not happen, the District violated Article XIV as it had come to be interpreted via the parties' own practice.

In order to remedy this contractual breach, the District is directed to pay Champlin for the wages and benefits she would have received for working a 56.25% schedule during the 1998-99 school year. Since the District paid her at the 50% level for that school year, she is due an additional 6.25% on her wages, sick leave and disability payments for that year, plus interest at the statutory rate of 12% per year.

Dated at Madison, Wisconsin this 20th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

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