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-B

Appearances:

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

Hale's Legal Services, by **Attorney Linda Hale**, 433 Linn Street, P.O. Box 114, Baraboo, Wisconsin 53913-0114, appearing on behalf of Wonewoc-Union Center School District.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

On October 20, 2000, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Wonewoc-Union Center School District had violated a collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats. To remedy the violation, the Examiner ordered Respondent to cease and desist from committing such violations and to make the affected employee whole.

Respondent filed a petition with the Wisconsin Employment Relations Commission on November 9, 2000 seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition and the matter became ripe for Commission action on January 8, 2001 when the time for filing a reply brief expired.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact are affirmed.

B. The Examiner's Conclusions of Law are affirmed.

C. The Examiner's Order is affirmed as modified below:

ORDER

Wonewoc-Union Center School District, its officers and agents, shall immediately take the following action that the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from violating the collective bargaining agreement between the Wonewoc-Union Center School District and the Wonewoc Center Education Association.

2. Take the following affirmative action:

A. Make Marilyn Champlin whole for all wages and fringe benefits lost during the 1998-1999 school year plus interest at the statutory rate of 12% per annum established by Sec. 814.04(4), Stats. The interest calculation begins on September 14, 1998 when Champlin first suffered lost wages and benefits and continues until the monies owed are paid.

B. Notify all employees represented for the purposes of collective bargaining by the Wonewoc Center Education Association by posting copies of the Notice attached hereto as Appendix A in conspicuous places on its premises where said employees work. The Notice shall be signed by an official of the District and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

C. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT violate the collective bargaining agreement between the District and the Wonewoc Center Education Association.

WE WILL make Marilyn Champlin whole with interest for all wages and fringe benefits lost by her during the 1998-1999 school year.

Dated this _____ day of _____, 2001

_____
Wonewoc-Union Center School District

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

Wonewoc-Union Center School District

**MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER**

The Pleadings

The complaint alleges that Respondent District violated the collective bargaining agreement between the District and the Wonewoc Center Education Association by requiring Speech Therapist Marilyn Champlin to work 22.5 hours per week while paying her for only 20 hours per week.

Respondent orally answered the complaint at hearing and denied that it had violated the contract. Respondent further asserted that Champlin did not timely file a grievance raising the issue.

The Examiner' s Decision

The Examiner concluded that the grievance challenging the level of Champlin's compensation was timely filed and that the Respondent District violated the parties' contract by paying Champlin at a 50% level instead of a 56.25% level. He reasoned as follows:

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.

THE PARTIES' POSITIONS ON REVIEW

Respondent

Respondent District contends the Examiner's decision should be overturned.

Respondent first asserts the Examiner erred by amending the contract when finding that the grievance was timely filed. The contract requires that a grievance be filed within 10 days of the occurrence. The District argues that in June 1998, Champlin knew that she would have a 4 ½ hour schedule and would be compensated at a 50% level. In that factual context, the District argues that a mid-September, 1998 grievance is not timely.

Turning to the merits, the Respondent asserts that the Examiner failed to consider the contractual provision in Article XIV, Section 3(a) requiring that all part-time teachers teaching half time or more must be present for an additional one-half hour before or after their classes. Under this contractual provision, Champlin was appropriately compensated.

The extent the Examiner relied on past practice to support his decision, the District contends that there is no applicable practice because no part-time employee had ever worked a mid-day schedule. Respondent further argues the Examiner wrongly concluded that there is a practice of paying part-time teachers for a one-half hour lunch period. Respondent contends there is no such practice.

Respondent argues that the mid-day schedule was an effort to accommodate Champlin's desire to avoid driving early in the morning or late in the afternoon. Respondent asserts that under the Examiner's reasoning, the District should have required Champlin to work from 10:00 a.m. to 2:00 p.m. without a lunch break. The District contends that such a schedule is not realistic and further argues that the Examiner's decision penalizes it for attempting to meet the needs of an employee.

Complainant

Complainant urges affirmance of the Examiner. It contends that the Examiner properly found the grievance to be timely filed and correctly focused on past practice when determining how the Speech Therapist should be compensated. Complainant argues that the Examiner properly determined that Champlin was entitled to 4 ½ hours of pay for her 4 ½ hour work schedule.

DISCUSSION

We affirm the Examiner.

As to timeliness, the contract requires that a grievance be filed within ten days of "the occurrence." The District argues that in April, 1998, Champlin received a 50% contract and in June 1998 she received her 10:00 a.m. to 2:30 p.m. schedule which included a one-half hour lunch. If Champlin believed the 4 ½ hour schedule was inconsistent with her 50% contract, the District argues she should have grieved in June – not September. From the District's perspective, the "occurrence" was not the September receipt of Chamber's first paycheck but rather the June receipt of her schedule.

In our view, the issue of timeliness presents a close question. While the Examiner and the Complainant argue that Champlin's September receipt of her first check is the "occurrence" because the grievance is over her level of pay, it can well be argued that in June she knew or should have known what her pay (50%) was going to be in the context of the 4 ½ hour work schedule. However, the record also establishes that there were ongoing discussions between the parties from June to mid-September as to whether the schedule announced in June should be changed. Those discussions created uncertainty over whether Champlin's shift would be maintained at 4 ½ hours. Until this uncertainty was definitively resolved, the legitimacy of a 50% compensation level was also uncertain. Although Champlin admittedly began the semester working a 4 ½ hour schedule, it was not until the September 14, 2000 School Board meeting that the 4 ½ hour schedule was confirmed on a permanent basis. Under these factual circumstances, the September 21 grievance was timely filed within the ten day contractual limit.

Turning to the merits, the Examiner correctly concluded that past practice is the best means of determining the District's contractual obligations when compensating the Speech Therapist. Compensation for part-time teachers is generally governed by Article XIV, Section 3(a). However, Article XIV, Section 3(c) states that "This paragraph does not affect the speech therapist's 50% status . . ." The Examiner correctly concluded that the language of Section 3(c) renders Article XIV, Section 3(a) inapplicable to the determination of the Speech Therapist's compensation. In the absence of contract language, past practice becomes the best indicator of the parties' intent as to the Speech Therapist's compensation. When examining the practice as to the Speech Therapist, the Examiner concluded that her 50% status/50% pay had always been based on an average of 20 scheduled hours per week which included 2 ½ hours of paid lunch time. Thus, when the District altered Champlin's schedule to 22 ½ hours per week, the Examiner concluded that the District had increased Champlin's status to 56.25% and must pay her accordingly. We find the Examiner's reasoning persuasive.

The District correctly notes that under Article XIV, Section 3(a), half time teachers must be in school an additional one-half hour before or after school. The District argues that this additional half hour is an obligation which the Speech Therapist must also meet. However, as

previously discussed, Section 3(c) makes Section 3(a) inapplicable to the Speech Therapist and thus we reject this argument has a valid basis for reversing the Examiner.

The District also contends that there is no applicable practice because no employee has ever worked a mid-day schedule before. However, as persuasively analyzed by the Examiner, the practice to be considered focuses not on when during the day an employee is scheduled but rather how many hours an employee's work schedule obligates him/her to be present at work and how that schedule has previously been compensated. The Examiner correctly analyzed this work schedule/compensation practice and determined that the Speech Therapist was entitled to be paid for her entire 4 ½ hour work schedule – including her one-half hour lunch.

Given all of the foregoing, we have affirmed the Examiner's Findings of Fact and Conclusions of Law. We have modified the Examiner's remedial Order to include the notice posting sought by Complainant in the complaint and to have the computation of interest begin with the date on which Champlin first suffered a loss of compensation.

Dated at Madison, Wisconsin this 2nd day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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