

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHLAND PINES EDUCATION ASSOCIATION, Complainant,

vs.

NORTHLAND PINES BOARD OF EDUCATION, Respondent.

Case 44
No. 58550
MP-3606

Decision No. 29935-A

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier UniServ – Central, P.O. Box 1400, Rhineland, Wisconsin 54501, on behalf of the Association.

Davis & Kuelthau, S.C., by **Mr. Gregory B. Ladewski**, and **Mr. Robert J. Simandl**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, on behalf of the District.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: The Northland Pines Education Association (“Association”), on February 15, 2000, filed a prohibited practices complaint with the Wisconsin Employment Relations Commission (“Commission”), alleging that the Northland Pines School District (“District”), had committed a prohibited practice by violating its duty to bargain during a contractual hiatus. On June 30, 2000, the Commission appointed the undersigned to make and issue Findings of Fact, Conclusion of Law and Order as provided for in Sections 111.70(4)(a) and 111.07, Stats. The District subsequently filed an Answer that was received on August 15, 2000. Hearing was held in Eagle River, Wisconsin, on August 23, 2000. Both sides filed briefs and reply briefs that were received by December 4, 2000.

No. 29935-A

Having considered the arguments of the parties and the entire record, I make and file the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Association, a labor organization within the meaning of Section 111.70(1)(h), Stats., represents for collective bargaining purposes certain teaching personnel employed by the District and maintains an office at 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin. At all times material herein, Gene Degner, the Executive Director of the Northern Tier UniServ – Central, has served as the Association’s agent.

2. The District, a municipal employer within the meaning of Section 111.70(1)(J), Wis. Stats., operates a school system in Eagle River, Wisconsin, and maintains its office at 1780 Pleasure Island Road, Eagle River, Wisconsin. At all times material herein, Linda L. Kunelius has served as the District’s Superintendent and has served as its agent.

3. The Association and the District were parties to a 1997-1999 collective bargaining agreement that expired on June 30, 1999. Section VIII of that agreement, entitled “Faculty Substitutions”, provided:

Absences about which the administration has received adequate notice will be covered by substitute teachers if available. If an elementary art, music or physical education special teacher is absent, a substitute shall be used if available during the period of the special teacher’s absence. However, it is recognized that the administration may assign a regular teacher to substitute for an absent teacher. If a teacher is so required, the teacher shall be reimbursed at the rate of \$10.00 per period, if such substitution results in lost regular preparation.

4. Pursuant to that language, teachers before the 1999-2000 school year received extra compensation when they gave up their prep periods to fill in for absent teachers, and when they gave up their duty-free lunch period to perform lunch room duties. They did not receive extra compensation when they gave up all or part of their prep periods to attend parent-teacher conferences, IEP meetings and committee meetings, and when they performed study hall duties, hall supervision, playground duties, supervised bathrooms and lockers, attended student assemblies, and participated in lockdowns.

5. The parties in 1999 engaged in collective bargaining negotiations for a successor contract to cover the 1999-2001 school years and they ultimately agreed to modify Section VIII, entitled “Faculty Substitutions”, so that it provided:

Absences about which the administration has received adequate notice will be covered by substitute teachers if available. If an elementary art, music, or physical education special teacher is absent, a substitute shall be used if available during the period of the special teacher's absence. However, it is recognized that the administration may assign a regular teacher to substitute for an absent teacher. If a teacher is so required, subject to the provisions of Section XII, I, the teacher shall be reimbursed at the rate of \$10.00 per period at the K-8 level and \$20.00 per block at the high school level, if such substitution results in lost regular preparation time.

6. The parties then also agreed to the following contract language:

SECTION XII – POLICIES RELATING TO SALARIES

. . .

I. Professional Preparation Time

1. All teachers shall be provided with professional preparation periods as follows:
 - a. Elementary Teachers B preparatory time during art, physical education and music in an amount no less than that which was provided during the 1998-99 school year.
 - b. Middle School Teachers B two periods per day.
 - c. High School Teachers B one block per day.
2. Without regard to the professional preparation time set forth above, the District may assign teachers, if volunteers are not obtained, within the District for student supervision and substitute teaching, subject to the following limitations in a two week period, without incurring responsibility for compensation under Section VIII.
 - a. Elementary B one period per two calendar week period.
 - b. Middle School B two periods per two calendar week period.

- c. High School B one block or two (2) half blocks per two calendar week period.

In the event volunteers for student supervision or substitute teaching time cannot be found, the District shall pay teachers assigned during their professional preparation periods for such assignments pursuant to the rates set forth at Section VIII. For purposes of this Section, the preparatory entitlements under this Section shall only be applicable during regular school days and not, by way of illustration and not limitation, in-service days or days for staff development.

- 7. That Agreement also stated in Section 1, entitled "Board Responsibilities":

The Board of the Northland Pines School District, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself, except as herein otherwise specifically provided and agreed to, all powers, rights, authority, duties and responsibilities.

- 8. The 1999-2001 agreement stated in Section XXII, entitled "Duration":

- A. This agreement shall supersede any rules, regulations, or practices of the Board which are contrary to or inconsistent with its terms.

- B. This agreement shall be in effect July 1, 1999, and shall remain in effect through June 30, 2001.

9. In the negotiations leading to the 1999-2001 agreement, the parties did not discuss whether the language provisions of the agreement would be retroactive to July 1, 1999. They did discuss, and agree, that wages and salary would be retroactive to July 1, 1999. The parties reached a tentative agreement on the entire contract on or about July 6, 1999.

10. At the beginning of the 1999-2000 school year, the District implemented parts of the tentative agreement, including Section VIII and Section XII above dealing with prep time, along with increased bereavement leave for parent in-laws, the merging of duties for certain co-curricular teachers, and health insurance changes. The Association did not then object to the District's implementation of those items.

11. The Association ratified the tentative contract at a September 6, 1999, membership meeting. The District's Board of Education refused to ratify the tentative contract at a September 20, 1999, Board meeting because it was concerned that some Association representatives were claiming that teachers were free under the newly-agreed contract language in Section VIII to do anything they wanted during their preparation periods. The District's Board refused to accept that claim and the parties subsequently bargained over exactly what the new tentative contract language meant.

12. The District's Board of Education ultimately ratified the tentative contract in March, 2000, and the contract was executed by both parties on March 20, 2000. The Association and the District earlier executed two separate Letters of Understanding detailing how the newly-revised language would be implemented in the high school and the middle school.

13. After the District's Board initially refused to ratify the contract in September, 1999, the Association on November 1, 1999, filed a grievance which protested the District's implementation of Section VIII of the contract before the tentative contract was ratified by the District's Board. The grievance stated:

...

STATEMENT OF GRIEVANCE:

The Northland Pines School District has previously paid staff for volunteering to supervise lunch duty, noon-hour, and after school detention. We presently have staff members who are required to supervise lunch-hour and supervise during various resource (study hall) times. We feel this is a change in working conditions from the 1998-1999 school year and these individuals should be compensated at \$10.00 per period of supervision.

AREA OF CONTRACT VIOLATED: (Articles/Sections)

Section VIII Faculty Substitutions

ACTION REQUESTED:

That the Northland Pines School District compensate teachers who are required to supervise lunch duty or resource time at the rate of \$10.00 per period.

...

The District denied the grievance throughout all steps of the grievance procedure. That procedure does not provide for arbitration.

Upon the basis of the aforementioned Findings of Fact, I hereby make and issue the following

CONCLUSION OF LAW

The District did not violate Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act when it assigned certain duties during teacher preparation periods without providing any additional compensation during the contractual hiatus covering the 1999-2000 school year before the parties agreed upon and executed a new contract in March, 2000.

Upon the basis of the aforementioned Findings of Fact and Conclusion of Law, I hereby make and issue the following

ORDER

IT IS ORDERED that the Association's complaint alleging the District violated Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act when, during the contractual hiatus, it assigned certain duties during teacher preparation periods without providing any additional compensation be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 30th day of March, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

NORTHLAND PINES BOARD OF EDUCATION

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

POSITIONS OF THE PARTIES

The Association claims that the District violated its duty to bargain in violation of Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act and the *status quo* doctrine by “not keeping the hours, wages and conditions of employment that were covered under Section VIII of the [prior] collective bargaining agreement in a status quo condition until the new contract was ratified for the 1999-2001 school years and by not paying teachers when they gave up their prep time to perform various duties.” It thus maintains that the “changes in contract language were not retroactive”; that the two Letters of Understanding relating to prep periods support its claim; that “Past practice would indicate the language change in working conditions was not to be retroactive”; that “General case law during the hiatus period” supports its claim; and that “The work done qualifies as payment” under the contract.

The District, in turn, contends that “The Association’s position is inconsistent with the plain facts of this case”; that past practice supports its position; that “The plain words” of the agreement demonstrate that the District was fully entitled to assign Middle School teachers to resource support duty every two weeks; that the Association’s contrary position is “illogical”; and that the exercise of “its assignment authority had no appreciable adverse impact upon the term and conditions of teacher’s employment.” It also argues that the parties understood Section VIII and Section XII were to be effective prior to ratification and that the doctrine of “unclean hands” must be applied because the Association tried to “leverage Section XII” into something that was never agreed to in negotiations.

DISCUSSION

The law is clear: but for arbitration and dues checkoff, and absent any contract language clearly stating otherwise, an employer during a contractual hiatus generally must maintain those mandatory subjects of bargaining covering wages, hours and conditions of employment that previously existed under the terms of an expired contract. See GREENFIELD SCHOOL DISTRICT NO. 6, DEC. NO. 14026-B (WERC, 11/77), pp. 5-6.

Here, Association President Steven Glandt testified that “other than pay, there were no discussions in the 1999 contract negotiations about whether any provisions of the contract would be retroactive.” Teacher Jerry Stadler, who also sat in on those negotiations, testified:

“There was no discussion of any language being retroactive. The only thing that would be retroactive would be salary.” District Administrator Linda Kunelius first answered, “I would not be able to say” when asked whether anything other than wages were to be retroactive , but she then added: “Health insurance and fringe benefits were retroactive.” She also said that the District at the beginning of the 1999-2000 school year merged the duties of certain co-curricular teachers and increased bereavement leave for parent in-laws, without any complaint from the Association that they were being implemented before the tentative contract was ratified and signed by both parties.

Based on this testimony, I therefore find, as related above at Finding of Fact 9, that the parties in their 1999 contract negotiations did not discuss, let alone agree, on whether language items would be retroactive to July 1, 1999, which is when the successor 1999-2001 contract took effect. As a result, it must be assumed that language items such as Section VIII and Section XII were not meant to be retroactive. (For purposes of this discussion, I am assuming that the loss of preparation periods represents a language item even though it can be argued that payment surrounding the loss of those periods falls under the broad rubric of “wages”.) The District therefore was required under the *status quo* doctrine to retain the prior practices surrounding payment for the loss of preparation periods that existed under the prior contract.

Various witnesses testified about those practices, along with the 1999 negotiations.

Association President Glandt testified that high school teachers in the past were paid for substituting for other teachers; that he was “partly” paid for hall supervision; and that, “I haven’t been asked to do anything for my prep periods other than sub.” On cross-examination, he testified that high school teachers who did not give up their prep periods in the past were not paid for lunch room supervision.

Teacher Stadler testified that certain middle school teachers before March, 2000, either supervised the resource room, the lunch room or the locker room without getting paid; that teachers in the past were paid \$10 per period for performing those activities; and that teachers in the beginning of the 1999-2000 school year had to give up a prep period to service the resource room and that they were not paid extra when they did so. On cross-examination, he stated that middle school teachers in the past were paid when they substituted for study hall.

Middle school teacher Paul Nemec testified that he did not expect to get paid at the beginning of the 1999-2000 school year when he served in the resource center; that his expectation about payment changed when “the Board failed to ratify the contract”; and that he in the past was never forced to give up his prep period without being paid unless he agreed to it. On cross-examination, he testified that he did not “know for sure” whether he ever had been paid for losing a prep period when he did not substitute for another teacher; that he sometimes volunteered and lost a prep period when he stayed at an assembly; and that he did not know of any teacher who got paid under those circumstances.

Middle school teacher Thomas Druschke testified that he was never asked to give up a prep period without compensation before the 1999-2000 school year. On cross-examination, he said he in the past was not paid when he gave up his prep time for parent/teacher conferences, lockdowns, assemblies, and school committees and that he received a back pay check covering his lost prep periods from the beginning of the 1999-2000 school year.

District Administrator Kunelius testified that except for when substituting for others, teachers over the last two years were not paid when they gave up their prep periods (District Exhibit 1); that teachers who did not give up their duty-free lunch were not paid when they supervised the lunchroom; and that teachers who gave up their prep periods were not paid for attending assemblies, for participation in lockdowns, and for hall supervision. She also said that it was her understanding that “other than the compensation when they substitute for an absent teacher, that we can ask them to do other duties related to their function – role and function as a teacher” – such as spending their prep time meeting with parents or administrators, attending I.P. meetings, and supervising halls and playgrounds.

She also stated that the Association in negotiations proposed its ten percent language because it wanted to limit how much time they could be asked to fill in for other teachers; that the “remaining 90 percent was to be provided for all of those other duties. . .”; and that the Association never contended at the beginning of the 1999-2000 school year that the tentative agreements could not be implemented. She also said that the September 20, 1999, Board meeting marked the first time the Association indicated that teachers were free to do anything they wanted during the 90 percent of their prep periods not spent filling in for other teachers, and that the parties subsequently executed two Letters of Understanding for the high school and middle school which governed how their prep periods were to be used. (Joint Exhibit 2)

Elementary principal Mary Niebuhr testified that when she was a teacher, she was never paid extra when she gave up part of her prep periods to supervise lunch, to attend meetings, or to supervise bathrooms. She said that as a principal, she assigned teachers to perform those duties during their prep periods without any additional compensation.

High School principal Mike D’Angelo testified that high school teachers before 1999 always gave up their prep periods and did not receive any extra compensation when they supervised the lunchroom, attended assemblies, participated in lockdowns, supervised halls, engaged in parent-teacher meetings, attended evaluation meetings, and supervised the locker rooms. He added that teachers got paid “Only if the teacher was gone and then we were replacing that teacher for that responsibility.”

Middle School principal Jacqueline Cogan testified that teachers before 1999 were paid for lunch room duty only if they gave up their own duty free lunch, and that they were not paid when they gave up parts of their prep periods for parent-teacher meetings, IEP conferences, lockdowns, assemblies and regular staff meetings.

I credit the combined testimony of Administrator Kunelius, Principal Niebuhr, Principal D'Angelo, and Principal Coglano to the effect that teachers in the past were paid extra only when they gave up their prep periods to fill in for absent teachers or when they gave up their duty-free lunch to perform lunchroom duties and that they were not paid when they gave up all or part of their prep periods to attend assemblies; to participate in lockdowns; to supervise halls, bathrooms, and playgrounds; to attend meetings and conferences; and to meet with students and parents. While some Association witnesses disputed some parts of the above testimony, Glandt acknowledged that he was not paid when he supervised the lunchroom, and Stadler, Nemec and Druschke testified in whole or in part that teachers were not paid when they supervised the resource room, the lunch room, the locker room, or the study hall, and when they attended parent/teacher conferences, lockdowns, assemblies and school committees.

I therefore find that teachers before the 1999-2000 school year were not paid extra when they gave up some or all of their prep periods to perform these duties. The District therefore was free during the contractual hiatus before the parties finally executed the 1999-2001 collective bargaining agreement in March, 2000, to assign such duties without making any extra payment – just as it had in the past. That is why there is no merit to the Association's contrary claim and that is why its complaint must be dismissed.

Dated at Madison, Wisconsin this 30th day of March, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

