STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DODGELAND EDUCATION ASSOCIATION and TIM MCKEON, Complainants,

vs.

DODGELAND SCHOOL DISTRICT and JOSEPH G. REED, Respondents.

Case 29
No. 63359
MP-4030

Decision No. 31098-B

Appearances:

Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Complainants.

Michael J. Julka and **Richard Verstegan,** Attorneys at Law, Lathrop & Clark, 740 Regent Street, Suite 400, Madison, Wisconsin 53715, on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 16, 2004, Complainant McKeon filed a complaint with the Wisconsin Employment Relations Commission wherein he alleged that during the hiatus period following the expiration of the 2001-03 labor agreement ". . . by revoking the established standard for calculating full and part time positions, the District unilaterally changed the status quo on wages, hours, and conditions of employment . . ." On October 1, 2004, a Notice of Hearing issued setting the hearing herein for November 16 and 17, 2004.

On October 13, 2004, Respondent filed an Answer admitting and denying the complaint allegations and pleading certain affirmative defenses, including a request to defer the complaint allegations to arbitration but not asserting the statute of limitations as an affirmative defense.

On November 5, 2004, Respondent filed a Motion to Dismiss and to stay the hearings along with a brief in support thereof. The Examiner (who had been appointed by the Commission on October 1, 2004) requested that Complainant file a brief in response to Respondent's Motion, which it filed on November 30, 2004. On November 23, 2004, Respondent also filed a letter stating it would not waive any procedural or other defenses related to any underlying grievances relevant to this case.

On February 22, 2005, the Examiner issued an Order Denying Motion to Dismiss. The Complainant filed an amended Complaint on May 6, 2005, again alleging violations of Sec. 111.70(3)(a)4 and 1, Wis. Stats.

Hearing on the amended complaint was held and concluded on June 2, 2005, at Juneau, Wisconsin. The transcript of the proceedings was received on June 13, 2005. The parties' written briefs, including their reply briefs, were received by September 12, 2005.

The Examiner having considered the evidence and arguments herein and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Dodgeland Education Association, hereafter Association or Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has offices c/o Paula Voelker, Winnebagoland UniServ Unit-South, 325 Trowbridge Drive, P.O. Box 1195, Fond du Lac, Wisconsin 54936-1195.

2. Dodgeland School District, hereafter District or Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), and has its offices at 401 South Western Avenue, Juneau, Wisconsin 53039-1013.

3. The Association has been the exclusive collective bargaining representative for "all certified professional teaching personnel not to include substitute teachers," an appropriate collective bargaining unit for many years.

4. Employees employed in the unit described in Finding No. 3 are municipal employees within the meaning of Sec. 11.70(1)(i), Wis. Stats.

5. The following persons were agents of the District and occupied the position set forth opposite their names for the periods of time stated:

Joseph Reed, District Administrator, June, 2003 to June 2, 2005;
Howard Moon, District Administrator, 1999 to June, 2003;
Terry McLeod, District Administrator, 1997-1999.

6. Beginning with the 1990-92 labor agreement between the parties, the parties' agreements contained the following provision in Article III-Salary Schedule for Teaching Employees:

. . .

E. Extra-Pay Schedule

Teachers shall be renumerated above and beyond their basic salary for performing certain duties specified on the Extra-Curricular Pay Schedule (see Appendix B). Payments shall be at the rates scheduled.

F. Grade School Preparation Period

In the event that the art, music or physical education instructor is unable to hold the regularly scheduled class said classroom teacher shall be paid at the same rate as high school teachers who substitute during their preparation period. Teachers are expected to teach art, music or physical education during the period when they substitute for art, music, or physical education teachers (see Appendix B).

G. Preparation Period Assignments

Teachers may be assigned to cover other classes during their regularly assigned preparation periods or other unassigned time and will be compensated in accordance with Appendix B Section C (Extra-Duty Activities) paragraph 7. (Substitute Pay).

. . .

Appendix B

EXTRA-CURRICULAR ASSIGNMENTS

. . .

C. Extra-Duty Activities

	1995-1996	1996-1997
. . .		
7. Substitute Pay		
Per Period/first 5 days work For one teacher	$13.73	$13.73
Per Period for all consecutive Days after 5	$19.57	$19.57

. . .

7. Prior to 1997, the parties codified their past practice concerning "Preparation Time" in a Memorandum of Understanding executed on or before April 1, 1996, which read as follows:

> The parties agree that the current practice as set forth below concerning preparation periods shall continue in effect until June 30, 1997, absent mutual agreement by the parties to modify the number of preparation periods. The recognized part practice shall be as follows:
>
> | | |
> |---|---|
> | High School | Two preparation periods |
> | Middle School | Two preparation periods |
> | Grades 1 – 5 | Art, Music, Phy. Ed. And 30 minutes at lunch |
> | Kindergarten | One-half time or Art and Music that is applicable to grades 1 – 5 plus 30 minutes at lunch and 30 minutes every six days during library time so long as students are assigned to library aide. |
> | Traveling Teachers | Equivalent of two preparation periods |
>
> Although agreed upon as a practice to continue through June 30, 1997, the Collective Bargaining Agreement will not reflect the above references to preparation periods.

At all times relevant, the High School has had an eight period day, and one period at the High School has been 42 minutes in duration; the District's Middle and Elementary Schools have had contract hours from 7:30 a.m. to 3:30 p.m. (an eight hour day), for a work day of 480 minutes per day or 2370 minutes per week for a full-time Middle/Elementary teacher.

8. From 1997 and continuing until August, 2003, six period assignments have been considered full-time at the Elementary School and Elementary School teachers who were assigned more than 6 periods of assignments (either teaching or supervisor) were paid 1/6 their regular daily rate for each assignment beyond six periods per day.

9. From 1997 and continuing until August, 2003, Middle/High School teachers who were assigned six teaching or supervisory assignments were considered full-time. If a full-time Middle/High School teacher was assigned a 7th period assignment (either supervisory or teaching), the teacher could refuse the 7th period assignment. Full-time Middle/High School teachers who accepted a 7th period assignment were paid overload pay of 1/6 of their regular daily rate for the 7th period assignment. Also prior to 1997 and continuing until May, 2003, part-time Middle/High School teachers were paid for each period they taught or supervised, based upon a percentage of full-time, equal to 1/6 their daily rates for each class at the High School.

An example of the manner in which overload pay was calculated in 1996-97 for Middle/High School teachers Saugstad and Miller who received same is as follows:

Employee: Kent Saugstad

(1/2) period overload for one semester

Calculation was based on taking Kent's base salary, in the appropriate position on the salary schedule, and multiplying it by 104.17%. (MA+18 w/Exp. 17.5 yrs.)

$35,526 x 108.03% = $38,474.66

8.3% was arrived at by taking (1/6) multiplying it by (1/2)

(1/6) x (1/2) = (1/12) which has a decimal approximation of .083 (rounded)

The use of (1/6) again comes from the fact that full-time staff at the middle and high school level are paid to work 6 of the 8 periods per day in our assignment and have 2 assignment-free periods for class preparation and student tutorial assistance.

The use of the first (1/2) is because the overload was for only the second semester or one-half the year.

All calculations above are in agreement with the book keepers (sic) calculations and methods used during her tenure as a book keeper at Dodgeland.

10. The provisions quoted above in Finding No. 6 appeared unchanged in all parts and times relevant in the parties' successor labor agreements until the parties amended Appendix B in the 1999-2001 agreement to read as follows:

Appendix B

This schedule will be calculated at the established rate which is the 1995-1996 base of $23,880 divided into the amount for each activity listed. That percent will be applied to subsequent years and be considered as part of the total package increase.

C. Extra-Duty Activities	1999-2000	2000-2001
	$25,725.00	$25,993.00

. . .

7. Substitute Pay			
Per Period/first 5 days work for one teacher	0.057%	$14.66	$14.82
Per Period for all consecutive Days after 5	0.82%	$21.09	$21.31

. . .

11. On December 22, 1997, Superintendent McLeod issued the following letter to Association President Sweeney (and the Association representatives) regarding preparation time:

. . .

As you know, the issue of teacher preparation time has been the subject of much discussion between the School Board and the Dodgeland Education Association (DEA) for quite some time, including negotiations for the 1997-99 Master Contract between the District and DEA.

On November 3, 1997, I communicated with all DEA members regarding prep time, stating that since the Memorandum of Understanding regarding teacher preparation time ended June 30, 1997, there is no longer any guarantee of prep time.

> I am writing at this time to inform you, as the president of the DEA, that the District hereby disavows any alleged past practice relating to guaranteed teacher prep time and to notify you of the District's intention to discontinue the alleged teacher prep time past practice commencing with the next semester. At that time, teacher prep time, as a permissive subject of bargaining, shall be reserved to management and will fall within the parameters of Article 1 of the Master Contract.
>
> Should you have any questions regarding this notification, please feel free to stop in and visit with me in the near future. Should the DEA wish to continue to negotiate on this issue, the appropriate form (sic) for that would be with the mediator and the School District.

This memo did not address the District's method of calculating workload and overload.

12. On December 30, 1997, the District filed a Declaratory Ruling Petition with the Wisconsin Employment Relations Commission, hereafter Commission, to have the Commission declare the "Preparation Time" MOU quoted above in Finding No. 7 permissive. On January 14, 1999, the Commission held that the "Preparation Time" MOU ". . . is related primarily to educational policy" and "is a permissive subject of bargaining," and the District did not have a duty to bargain with the Association ". . . over inclusion in the parties' 1997-99 contract of the preparation time memorandum. . . ." DODGELAND SCHOOL DISTRICT, DEC. NO. 29490 (WERC, 1/99), SLIP OP. AT 10.

13. Beginning with the 1997-99 labor agreement, the parties appended the following "Settlement Agreement" (dated January 13, 2000) to all agreements (until they deleted same from the 2001-03 and 2003-05 agreements), as follows:

> The parties to this Agreement, the Dodgeland School District and the Dodgeland Education Association are involved in a dispute involving preparation time. The parties recognize that a final resolution of this dispute will take a substantial amount of time. The purpose of this Agreement is to permit the parties to move forward in implementing all other terms and conditions of employment for 1997-99 and 1999-2001. To further this end the parties hereby agree:
>
> 1. The Association waives any monetary or other retroactive remedy it may have for loss of preparation time for the period July 1, 1997 through June 30, 2001;

2. The preparation time dispute will be resolved by the Wisconsin Court System. Except as provided in paragraph 1, the parties reserve all rights that they have under law and as a result of the decision;

3. The parties shall implement their negotiated agreements for 1997-99 which consists of and will be confined to the 3.8 QEO provided by the School Board at the April 12, 1999 Board meeting;

4. The parties agree to negotiate for 1999-2001 and implement any agreements reached; and

5. If the Association prevails in the preparation time dispute, the parties agree to negotiate, pursuant to Section 111.70 of the Wisconsin Statutes, a new preparation time provision.

14. On May 27, 1998, Superintendent McLeod sent Association President Kay Coates the following memorandum regarding "Overload":

. . .

Last evening, while meeting in special session, I asked the School Board to react to your request for overload compensation. In denying your request, they asked that I remind you of a communiqué sent to Bob Sweeney on December 22, 1997. Copies were also provided to all certified staff members.

The following excerpt is provided as a reference:

{On November 3, 1997, I communicated with all DEA members regarding prep time, stating that since the Memorandum of Understanding regarding teacher preparation time ended June 30, 1997, there is no longer any guarantee of prep time.

I am writing at this time to inform you, as the president of the DEA, that the District hereby disavows any alleged past practice relating to guaranteed teacher prep time and to notify you of the District's intention to discontinue the alleged teacher prep time past practice commencing with the next semester. At that time, teacher prep time, as a permissive subject of bargaining, shall be reserved to management and will fall within the parameters of Article 1 of the Master Contract.}

> The purpose of this letter is to notify you that as the Memorandum of Understanding dealing with prep time expired on June 30, 1997, the District no longer has a commitment to provide prep time as in the past. Since your overload request is for a loss of prep time, and for a non-academic function, the Board will not consider an overload payment.

15. The December 22, 1997 letter from McLeod to Association President Sweeney (Finding No. 13) did not clearly notify the Association that the District intended to change the manner of calculating overload for full-time teachers and the manner of calculating workload for part-time teachers. McLeod's May 27, 1998 memo to Association President Coates (Finding No. 14) merely quoted McLeod's December 22, 1997 memo and did not mention the District's method of calculating workload and overload and it did not make clear that the District by McLeod's memo, intended to change the manner of calculating overload and workload for full and part-time teachers.

16. On May 25, 1999, the Association filed a complaint (Case 23, No. 57585, MP-3524) in which it alleged that the District violated MERA and the labor agreement by McLeod's memo of May 27, 1998, and by its refusal to arbitrate two grievances concerning the issue of preparation time (filed in 1998 during a contract hiatus period and while the District's Declaratory Ruling Petition was pending before the Commission). WERC Mediator Houlihan met with the parties to try to settle this complaint, but he was unable to do so. The grievances were never arbitrated or pursued further and the Association withdrew its 1999 complaint. These grievances and complaint did not address the method of calculating workload or overload. The Association never further pursued these grievances/issues.

17. From 1999 until August, 2003, despite its letter of December 22, 1997, and memo of May 27, 1998, the District continued to pay teachers assigned to a 7th period assignment (either supervisory or teaching) 1/6 their regular daily rate of pay for the 7th period assignment. The only full-time teachers who were offered a 7th period assignment after January, 1999, were Ron Miller and Roni Roth and they received 1/6 their daily rates for the overload each school year until the 2003-04 school year. Part-time teachers Melissa Schall, Lori Henthorne, Sue Beyler and Andrea Schulle were paid a percentage based upon six periods being considered full-time, or approximately 1/6 of their regular daily rate for each period they were employed until the 2003-04 school year.

18. During the fourth quarter of the 2001-02 school year, the District realized that in the 2002-03 school year, the District would be short coverage for K-12 physical education classes. Two teachers agreed to perform overload duties without receiving 1/6 overload pay under the following circumstances:

. . .

> (Teachers) Susan Kuhn and Marcia Modaff agreed to an overload teaching assignment for the 2002-2003 school year with specific conditions being met by the administration. Since the teaching overload resulted in a partial period, administration agreed that neither teacher would be assigned AM or PM supervisory roles, that neither teacher would be assigned lunch supervision and that neither teacher would be assigned staff coverage if a teacher was needed to cover a class. This agreement was based on calculations of minutes lost for preparation compared to other district teaching assignments.
>
> Susan Kuhn and Marcia Modaff agreed to this teaching assignment for **ONLY** the 2002-2003 school year. The administration acknowledged that the scheduling would need to be readdressed for future school years.

Also during 2001-02 and 2002-03 school years, the District and the Association agreed that the District could employ non-teachers to cover study halls as all District full-time teachers were working with a full load of six assignments and the District would have had to pay assigned teachers a 1/6 overload had they been assigned a 7th period study hall.

19. For the 2002-2003 school year, Henthorne had five assignments. As a result, her contract was for a five-sixth contract. In the 2002-2003 school year Andrea Schulte was given three periods of assignment and was paid as a 50-percent teacher. Also, in the summer of 2003, the District approved a resolution to allow Melissa Schall to work a 50-percent contract for the '03-'04 school year, for teaching three assignment periods, and in March, 2003, the School Board approved 50-percent positions for social studies, language arts, science, and at-risk for teaching three assignment periods out of six.

20. On May 2, 2003, District Administrator Moon issued the following memo to all certified staff regarding "Staff Schedules," which read as follows:

> The administration is making every effort to inform all staff as to their status and assignment for next year so that appropriate planning can take place. We recognize that some placements will be changed when openings occur, but you can be assured that those changes will be communicated as soon as possible to the people affected.
>
> One change for middle and high school teachers will be the assignment of all staff to a small study hall in lieu of one of two preparation periods. The reasons for this change are several:

- The reduction of all study halls to a fewer number of students makes it possible for even more individualized attention to be provided to students. This will address in a more direct way the needs of our growing population of at-risk and low-achieving students. Extra help provided by trained professionals will be available by this means to all students. These are sound educational reasons for assignment staff in this manner.
- If no direct interaction with students is needed during the study hall period, or if the students are otherwise occupied in other parts of the facility, the staff member will be able to carry out planning, professional reading, or other class preparation that will contribute to improved instruction.
- The school board has been able to maintain two preparation periods as a matter of policy in the best interests of good education until such time as budget considerations dictate otherwise. That time has come. Removing study hall educational assistants from the budget comes at a savings of more than $34,000. There has been no reduction of certified staff as a result of this change.
- Your representative stated at the lay-off hearing held on 21 April 2003 that non-certified staff cannot provide the quality of interaction with students in a study hall setting that certified staff can provide. The school board and administration agree with that assessment.

These reasons have contributed to the decision to staff study halls for middle and high school students in this manner.

One change for elementary staff will include the regular assignment of certified staff to recess supervision to implement a playground plan that requires certified staff for its success.

. . .

21. On August 6, 2003, Association President Coates sent the following memo regarding "Questions regarding the 7th period assignment:"

. . .

The salary schedule is based off of a 6 period assignment for the middle/high school staff and the equivalent amount of minutes for the elementary staff to be considered a full-time employee. If a staff member had a 7th period assignment this was considered an overload, thus the staff member was paid overload pay.

The overload rate was 1/6th of their daily rate. Overload was paid during the 2001/02 school year to supervise the gym during lunch hour; 02/03 school year as AODA coordinator; and during the 02/03 school year an agreement was reached with 2 physical education staff members who had a small overload each week. These 2 staff members did not have to cover any morning, lunch, after school duties/supervisions or cover classes for other staff members.

Study halls have been considered an assignment. During the 97-98 school year a staff member had 4 classes, 2 study halls, 2 planning periods; another staff was hired that year to teach 2 social study classes, 4 study halls, 2 planning periods. During the 98/99 school year a staff member had 4 world history classes, 2 study halls, 2 planning periods. During the 99/00 school year a staff member had 3 classes, FFA advisor, 2 study halls, 2 planning periods. During the 00/01 school year a staff member had 4 classes, 2 study halls, 2 planning periods. All of the above examples were considered full time positions.

Based on the above information the DEA has the following questions:

*What is now considered a full-time assignment/equivalent minutes for the 4K-12 staff: See the attachment of minutes that has been used.
*What constitutes an overload assignment?
*Past practice-staff had the right to accept or deny an overload assignment. How will this be handled during the 02/03 school year?
*Will the staff be expected to cover another teachers (sic) class during their only planning period if a substitute teacher cannot be found?

*If the 7th period study hall is transferred to another teacher, so that teacher is free to cover the absent teachers (sic) class. Are both of the teachers then paid according to Appendix B for covering a staff members (sic) class?
*Will staff members be expected to cover lunch duty? In the past 2-3 staff members had one of their 2 planning periods before or after lunch.
*Using the basis of being paid off of a 6 period a day assignment – Staff members who have to cover 2 study halls are paid for one and not for the other.
*How much planning time will part-time employees receive? On the current master schedule all middle and high school staff are scheduled for 42 minutes of planning time. In the past a 50% or less position had 1 planning period/equivalent minutes and a position greater than 50% received 2 planning periods/equivalent minutes.
*Will the staff be expected to serve voluntarily on the district committees and as club advisors? All staff resigned from these committees last year due to contract issues, but if issues were settled, the staff was planning on becoming involved again.

22. Attached to the above-quoted memo were the following tables showing the Association's view of the District practice concerning Elementary and Middle/High School contractual minute:

Elementary School Contractual Minutes

7:30-3:30 Contract Hours	8 hours per day	480 minutes per day	2370 minutes per week
Before School		30 minutes per day	150 minutes per week
Lunch		30 minutes per day	150 minutes per week
After School		30 minutes per day	120 minutes per week
	Mid Day/ Lunch Recess	30 minutes per day	150 minutes per week
	Art	60 minutes per class	60 minutes per week
	Music	30 minutes per class	60 minutes per week
	Physical Education	30 minutes per class	90 minutes per week
Recess			
	1 minutes both AM & PM Except days when they have PE	10 recesses – 3 for PE classes 7 recesses/15 minutes each	105 minutes
Hall Passing Time			
	5 minutes to and from specials	Art	10 minutes
		Music	20 minutes
		Physical Education	30 minutes
		Library	30 minutes
		Computers	10 minutes
		Recess	35 minutes
Regular Classroom Teacher			**1360**
Total Minutes			**2370**

Middle/High School Contractual Minutes

7:30-3:30 Contract Hours	8 hours per day	480 minutes per day	2370 minutes per week
Before School		30 minutes per day	150 minutes per week
Lunch		30 minutes per day	150 minutes per week
After School		30 minutes per day	120 minutes per week
Assignments	6 periods per day/ 30 per week	45 minutes per period	1350 minutes per week
Preparation	2 periods per day/ 10 per week	45 minutes per period	450 minutes per week
Hall Passing Time	4 minutes x 7 Periods per day		140 minutes
Additional 2nd Hour minutes	2 minutes per day	For student announcements	10 minutes
Total Minutes			**2370**

23. The District's 2003-04 calculation regarding part-time teacher pay was as follows:

FULL-TIME TEACHER MINUTES
03-04

PART-TIME TEACHERS

MIDDLE-HIGH SCHOOL TEACHERS

		Schall & Henthorne	Beyler	Schulte
Full Week	2220 4 Days @ 7.5 hrs; 7 hrs Friday			
Before & After School	-270 4 Days @ 60 min; 30 min Friday	140	124	135
Prep Period	-210 5 Days @ 42 minutes	109	97	105
	1740 Instructional/Supervisory Minutes Weekly	900	800	870
		1149	1021	1110
		51.76%	45.99%	50.00%
	Original %	51.88	46.05	50
	Paid at	52	46	50

ELEMENTARY SCHOOL TEACHERS

		Haertel
Full Week	2220 4 Days @ 7.5 hrs; 7 hrs Friday	
Before & After School	-270 4 Days @ 60 min; 30 min Friday	240
Prep During Specials	-210 60 min. art, 60 min. music, 90 min. Phy Ed	187
	1740 Instructional/Supervisory Minutes Weekly	1303
	Additional minutes	252
		1092
		89.28%
	Original %	89.00
	Paid at	89

24. On August 22, 2003, District Administrator Reed replied to Association President Coates' memo as follows:

> By memorandum from Dr. Moon to all certified staff dated 2 May 2003, members of the bargaining unit represented by the Dodgeland Education Association (DEA) were notified of staff schedule changes for elementary, middle and high school teachers to be effective during the 2003-04 school year. Elementary staff schedules will include the regular assignment of certified staff to recess supervision to implement a playground plan that requires certified staff for its success. Middle and high school teachers will be assigned to a study hall in lieu of one of two preparation periods. The reasons for the latter change were spelled out in the memorandum.
>
> Since the issuance of that memorandum, various issues have been raised by representatives of the DEA, including yourself, with respect to staff scheduling for 2003-04. Having begun my position as district administrator in the District on 7 July 2003, it has taken me some time to coalesce the issues, research the underlying facts, and prepare a response. The purpose of this letter is to address many of the issues regarding staff schedules that have come to my attention.
>
> First, the assertion was made by DEA representatives that the assignment of a study hall to middle and high school teachers in lieu of a preparation period would result in extra pay per Article III, Section G. and/or Appendix B, Section C of the Master Contract. My review of those provisions leads me to conclude that neither applies to the middle or high school assignments.
>
> Second, prior to my official engagement as district administrator, you advised me that it is your position that the Wisconsin supreme Court "order" regarding preparation time requires that the District engage in negotiations prior to implementation of a change in the number of preparation periods assigned middle and/or high school teachers. To the contrary, the Wisconsin Supreme Court order contains absolutely no requirement that the district engage in negotiating prior to implementing a change in the number of preparation periods assigned to middle or high school teachers. However, as always, the Board will comply with any legal obligations associated with the implementation of the change in the number of preparation periods.
>
> Third, at a personnel committee meeting on 14 July 2003, you asserted that the current salary schedule is based on six periods of work. As a result, you stated if a seventh period is assigned, the DEA will expect compensation to be at one-sixth of the employee's pay-rate. My research suggests that there are several things wrong with your assertions. First, the salary schedule is not based on six periods of work. Second, I believe that the "teacher overloads" to which you

are referring over the last year and one-half reflect assignments very different than that of a study hall. Without conceding that any binding practice exists, and recognizing that the Master Contract is completely silent with respect to overload pay, please be advised that the Board has no intention of paying an additional stipend to the middle school and high school teachers assigned to a study hall in lieu of one of two preparation periods. This letter shall serve as notice in that regard if such notice is of any legal or practical value (it may be of little practical value since I am certain that you are well aware that the Board does not intend to pay additional stipends). Although I have been unable to discern any binding practice with respect to overloads, this letter is notice that the Board hereby repudiates such a practice if one exists; however, the Board will comply with any legal obligations associated with doing so.

Similarly, by memo to me dated 6 August 2003, you, on behalf of the DEA, pose a series of questions regarding the seventh period assignment. Again, leaving aside the fact that your premise that the salary schedule is based off of a six period assignment scheme is inaccurate, and acknowledging that in the past there have been study halls that have been assigned to help fill out a teacher's duty day (although your attempt at recounting that history may not be accurate), as stated above, the assignment of a study hall to middle school and high school teachers in 2003-04 will not be considered an overload for compensation purposes. However, the Board, the DEA, and the staff member involved in a part-time physical education overload will discuss and attempt to arrive at a scheduling scheme the staff member will be relieved from certain other duties. Hopefully that will successfully resolve the only instance of a staff member having an additional academic assignment in place of the study hall. If agreement cannot be reached, as stated above, the Board intends to pay no additional stipend, but will comply with any legal obligations associated with the making of such an assignments.

Specifically answering the nine questions in the 6 August 2003 memo:

1. What is now considered a full-time assignment/equivalent minutes for the 4K-12 staff:

   Article VIII., Section B., sets forth the regularly scheduled workday.

2. What constitutes an overload assignment?

   As noted above, the Master Contract does not recognize overload assignments other than those specified at Article III., Sections F. and G. In addition, one of the purposes of this letter is to repudiate any such recognition if there is an argument that past practice has recognized an overload assignment.

3. Past practice-staff had the right to accept or deny an overload assignment. How will this be handled during the 02-03 school year? (sic 03-04)

   See answer to question 2, above.

4. Will the staff be expected to cover another teacher's class during their only planning period if a substitute teacher cannot be found?

   Yes.

5. If the 7th period study hall is transferred to another teacher, so that teacher is free to cover the absent teacher's class, are both of the teachers then paid according to Appendix B for covering a staff member's class?

   Appendix B Compensation is restricted to circumstances identified in Article III., Sections F. and G. Section F. is unique to classroom teachers who are otherwise released during art, music, and physical education instruction. Section G. pertains only to circumstances where a teacher is assigned to cover other classes "during their regularly assigned preparation periods or other unassigned times."

6. Will staff members be expected to cover lunch duty? In the past 2-3 staff members covered the middle school lunch and 2-3 staff members covered the high school lunch.

   Not at the present time.

7. Using the basis of being paid off of a 6 period day assignment – staff members who have to cover 2 study halls are paid for one and not for the other.

   The premise that teachers are paid on the basis of a six period day is inaccurate.

8. How much planning time will part-time employees receive? On the current master schedule all middle and high school staff are scheduled for 42 minutes of planning time. In the past a 50% or less position had 1 planning period/equivalent minutes and a position greater than 50% received 2 planning periods/equivalent minutes.

   Article III., Section B.2. addresses part-time teachers and the basis for calculating their full-time equivalency.

9. Will the staff be expected to serve voluntarily on the district committees and as club advisors? All staff resigned from these committees last year due to contract issues, but if issues were settled, the staff was planning on becoming involved again.

Article III., Section B.3.e. notes that curriculum and committee work "shall be assigned by administration." Article V., Section B. reserves unto the administration the right to make "reasonable assignments of teachers to co-curricular responsibilities," with a stated preference that such responsibilities be assigned to the teaching staff. Obviously volunteers are preferable to having to assign such duties. Moreover, if, as you state, staff is planning on becoming involved again since the Master Contract issues are resolved, I am hopeful that all necessary positions will be staffed by volunteers.

. . .

25. In September and November, 2003, the Association filed five grievances alleging that the District violated the labor agreement and past practice by failing to pay teachers who were assigned a 7th assignment 1/6 their daily rate for the overload. These grievances were filed during a contract hiatus period. Mediation of the grievances was held by Mediator Houlihan which did not result in settlement. These grievances were never taken to arbitration.

26. The Association requested to bargain regarding the 7th period assignments some time in September, 2003, after the first of the grievances was filed, but it never submitted any proposals regarding overload payment for the 7th period study hall assignments made by the District in 2003 because the District declined to discuss these topics, taking the position that preparation time had been found a permissive subject of bargaining and the Board of Education was not interested in discussing that topic and that the 7th period assignments, preparation time and overload were tied up with the grievances filed by the Association and the Board wanted to allow the grievance process to work.

27. McLeod's December 22, 1997 letter was sent to Association President Sweeney and to Winnebagoland UniServ Director Blaufuss; McLeod sent his May 27, 1998 memorandum only to Association President Coates. Moon's May 2, 2003 memorandum was sent only to all certified staff; Reed's August 22, 2003 Memorandum was sent only to Association President Coates.

28. When Moon's May 3, 2003 memorandum issued, the parties were in contract hiatus; the 2001-03 agreement was not executed until June 16, 2003. When Reed issued the August 22, 2003 memorandum, and thereafter when the Association filed grievances regarding

that memorandum (Dist. 12-16), the parties had not entered into a 2003-05 agreement and a contract hiatus existed. No District representative contacted the Association to discuss the content of these memoranda prior to their being issued. Nor did any agent of the District notify the Association that it intended to change the manner in which it calculated part-time teacher pay or full-time teacher overload pay prior to changing the number of periods considered to be full-time from six to seven.

29. Complainant did not clearly request to bargain regarding the impact of Respondent's change in the manner in which it calculated full-time teacher overload and part-time teacher pay percentages.

30. Respondent's decision to begin calculating full-time teacher overload pay based on a seven-period (not a six-period) day and its decision to change the basis for calculating part-time teacher pay (from a seven-period day to a six-period day), constituting a full-time schedule primarily related to the wages, hours and working conditions of employees represented by Complainant.

31. The Respondent's decisions to change the manner in which it calculated part-time teacher pay and full-time teacher overload pay were separate and distinct from Respondent's prior decision to eliminate one preparation period, a decision primarily related to educational policy, school management and operation, and the management and direction of the school district.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Prior to the issuance of District Administrator Reed's August 22, 2003 memorandum, the *status quo* regarding the calculation of overload pay and the calculation of pay for part-time teachers was based on full-time status constituting six periods of assignment, either instructional or supervisory

4. By issuing the August 22, 2003 memorandum, which implemented the use of seven periods of assignment as a full-time schedule for purposes of calculating part-time teacher pay and full-time teacher overload pay, Respondent unilaterally changed the *status quo* on wages, a mandatory subject of bargaining.

5. By unilaterally changing the manner in which it calculated full-time teacher overload pay and part-time teacher pay, which is a mandatory subject of bargaining, during a contract hiatus period without a valid defense, Respondent has committed prohibited practices within the meaning of Sec. 111.70(3)(a) 4, Stats., and derivatively Sec. 111.70(3)(a) 1, Stats.

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

ORDER

Respondent Dodgeland School District, its officers and agents, shall immediately cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by unilaterally changing the manner in which it has calculated overload pay for full-time teachers and pay for part-time teachers, employees in the bargaining unit represented by Complainant Winnebagoland Education Association, by compensating full-time employees entitled to overload and part-time employees based upon six periods of assignment (either instructional or supervisory) as full-time.

1. Respondent Dodgeland School District, its officers and agents, shall immediately take the following action which the Examiner finds will effectuate the purpose of the Municipal Employment Relations Act:

a. Make whole all employees in the bargaining unit represented by Complainant who have been affected by the unilateral change in the manner of calculating full-time teacher overload pay and of calculating part-time teacher pay based on full-time status being seven periods of assignment by paying them backpay based upon six periods of assigning constituting full-time status for overload pay and part-time teacher pay, less the amounts already paid therefor; and immediately restore the *status quo ante* of basing overload pay and part-time teacher pay on six periods of assignment, either instructional or supervisory, and calculating pay for employees entitled to overload pay and part-time teacher pay based upon six periods of assignment constituting full-time status.

b. Notify all of its employees in the bargaining unit represented by Complainant by posting, in conspicuous places in its place of business where such employees are employed, copies of the notice attached hereto and marked "Appendix A". The notice shall be signed by the District Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. 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 twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

Dated at Oshkosh, Wisconsin, this 27th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

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

1. WE WILL immediately reinstate the manner of calculating full-time teacher overload pay and part-time teacher pay using six periods of assignment (either instructional or supervisory) as constituting full-time status for employees in the bargaining unit of professional employees represented by Winnebagoland Education Association.

2. WE WILL immediately make any effected employees represented by Winnebagoland Education Association whole.

3. WE WILL NOT commit unlawful unilateral changes in the manner in which we calculate full-time teacher overload pay and part-time teacher pay, effecting employees in the professional bargaining unit represented by Winnebagoland Education Association.

4. WE WILL NOT in any other or related manner interfere with the rights of our employees, pursuant to the provisions of the Municipal Employment Relations Act.

_____
District Administrator,
Dodgeland 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.

Dodgeland School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Association:

The Association observed that in 1998 the District filed a declaratory ruling petition seeking to have the WERC declare permissive an MOU regarding a preparation time guarantee so that the District could legally unilaterally eliminate the guarantee without bargaining thereon with the Association and still have a QEO. The Commission agreed with the District and that decision was affirmed by the Wisconsin Supreme Court. The Association acknowledged that the result of the DR was that the guarantee of preparation time could be evaporated by the District and that the District then had the right to unilaterally assign District teachers additional periods. However, the Association urged that the DR decision did not authorize the District, more than five years later, to also unilaterally change its practice of paying employees for an additional (seventh) assignment, and to change the method it had traditionally used to calculate full- and part-time employee overloads and workloads.

The Association argued that in August, 2003 the District violated 111.70 when it unilaterally changed the way it calculated workload and assignment pay. The Association pointed out that the *status quo* prior to May, 2003 was that six periods of assignment (either supervisory or instructional) constituted full-time status. In this regard, the Association noted that the testimony of Association President Coates was corroborated by former District Administrator Moon and former District Bookkeeper Steffen who confirmed that even after the DR decisions issued, the District maintained its past practice of paying part-time teachers a percentage of full-time based upon six assignments being full-time, and it continued to pay full-time teachers 1/6 their daily rate for each assignment over six per day. Even the two examples the District asserted undercut the past practice (Hanlon and Kull) either supported the Association's assertions (Hanlon) or were insufficiently detailed or proved to actually undercut the Association's past practice arguments.

It was significant that the District's change in its calculation of workload for part-time teachers and overload for full-time teachers was done during a contract hiatus. For the first time, in 2003-04, teachers who received a seventh assignment were not compensated for it and part-time teachers who worked the same number of periods in 2003-04 as they had in 2002-03 were actually paid less in 2003-04 because the District changed its methods of calculating pay. The District took these actions assertedly to save money but it was nonetheless obliged to bargain these changes in the mandatory subject of wages before making them. As the District did not bargain regarding its methods of pay calculation, the Association was entitled to rely upon the *status quo* until a new agreement was entered into that reflected relevant changes in wages and working conditions.

As the DR case did not address or affect the methods of pay calculation or the entitlement to workload and overload payments, a mandatory subject of bargaining, the Association requested the Examiner find the District had made unlawful, unilateral changes and it asked the Examiner to order an appropriate remedy.

District:

In its initial brief, the District agreed with the Commission's holding that it "...must bargain over the amount of compensation, if any, which must be paid to employees who do not receive a specified amount of preparation time" (Dodgeland Ed. Assoc., Dec. No. 29490, slip op. at 21). The District also admitted that, prior to 2003-04, full-time teachers were assigned six instructional and/or supervisory assignments and two preparation periods within an eight-hour day, and that it did not reduce preparation periods for the 2002-03 school year despite the Wisconsin Supreme Court's ruling that the preparation time MOU was permissive and could be evaporated without affecting the District's QEO; that this was confirmed by District Administrator Moon on May 2, 2003 by his memo which issued during a contract hiatus. The District succinctly stated the issues and its position thereon in its initial brief as follows:

. . .

V. **ISSUES**

1. Did the District, during the 2003-2004 school year, unilaterally change a past practice of paying overload for a seventh assignment for full-time teachers when it replaced a period of preparation time with study hall duty and did not pay overload pay to full-time teachers as a result of this assignment?

   Answer: No. When the District reduced preparation time, the Association had a right to bargain, but failed to bargain, the impact of this decision. By failing to propose any language regarding the impact of this decision, the Association waived its right to compensation for its members as a result of the District's reduction of preparation time. Further, the Association has failed to meet its burden by a clear and satisfactory preponderance of the evidence to show that there existed a clear and unequivocal past practice of paying overload for a seventh assignment as a result of an reduction of preparation time. This claim, therefore, must be dismissed.

2. Did the District, during the 2003-2004 school year, unilaterally change a past practice of calculating pay for part-time teachers when it interpreted and applied the calculation set forth in the contract and adjusted the amount of teaching and supervisory time within this calculation based on the reduction of preparation time?

> Answer: No. During the 2003-2004 school year, the District reviewed, interpreted, and applied language in the contract relating to the calculation of part-time percentages. In its application of the contract, the District also adjusted the amount of teaching and/or supervisory time within this calculation based on the reduction of preparation time during the 2003-2004 school year. Before that time, there was no past practice in the District relating to the calculation of such part-time percentages, and the Association has failed to meet its burden to show by a clear and satisfactory preponderance of the evidence that such a past practice existed. Even if there was a past practice, this practice was repudiated and the District proceeded in applying the contract language addressing this issue. (ER. Br., p. 20)

Regarding Part 1 of Issue 1, the District argued that the Association failed to prove that the District had unilaterally changed a past practice because it failed to prove a past practice existed that full-time status was based on six periods of instruction or supervision and that part-time teacher pay was based upon a percentage of six assignments per day. However, the District urged that this case does not involve a unilateral change to an overload/workload past practice. Rather, this case involves the District's change in prep time, a permissive subject of bargaining during a contract hiatus which the law privileged the District to do.

The District noted that in his August 22, 2003 memorandum, McLeod offered to bargain with the Association. Because the Association never requested to impact bargain and it never proposed any impact language regarding the District's removal of preparation time, the Association waived its right to bargain and to object to the manner in which the District chose to remunerate teachers for a seventh period assignment in 2003-04. The Association's waiver, the District urged, constituted a valid defense (ER Br. 27-8).

In regard to Part 2 of Issue 1, the Association's past practice argument, the District argued that the evidence herein failed to show that overload payments were made to teachers for seventh period assignments frequently and over a long period of time as required by the precepts of past practice. In this regard, the District asserted that the evidence showed that overload payments were only made in the 2001-02 and 2002-03 school years: a total of three instances concerning two teachers, Roni Roth and Ron Miller. In other instances from 1995-2001 involving Henthorne, Kull, Hanlon, and Rettschlag, the District argued that no overload payments were made to these teachers. In addition, the argument that in 2002-03 when physical education teachers agreed to work additional minutes due to insufficient physical education staff, this showed that no overload payments were made for the extra work performed.

Furthermore, the evidence failed to show the mutuality necessary for a binding past practice. In this regard the District observed that in December, 1997 and May, 1998, District Administrator McLeod made it clear to the Association that the District no longer intended to

provide two preparation periods to teachers and this necessarily meant that the District did not intend to pay overload if and when the District decided to eliminate one preparation period. The fact that the parties entered into the 1997 settlement agreement (Dist. Exh. 4, App. D), which remained in effect through 2001, also showed there was no agreement/mutuality regarding the Association's past practice claims.

Indeed, the District urged that the record herein failed to show a "precise definition and requirement for any 'overload' payment," and the record showed that there was never any agreement regarding the type of assignment that would trigger overload pay. Even if the Commission found a past practice existed, the District urged that it should be limited in scope to individual teachers in situations "where the normal teaching load consisted of six periods" and not where the District uniformly assigns all teachers an additional assignment (ER Br. 38-9). In any event, the District lawfully repudiated any alleged past practice as the contract had expired when District Administrator Reed issued his August 22, 2003 memorandum and therefore the District did not unilaterally change the *status quo* regarding a mandatory subject of bargaining as the Association claimed.

Regarding Issue 2, the District argued that no clear practice was proven concerning how part-time teachers were paid at the District. In this regard the District noted that prior to 1992, part-time teachers were paid based upon the number of days they taught, but that beginning with the 1992-95 agreement, the parties agreed that the calculation for part-time teachers should be based upon a percentage of teaching and supervision time compared to that of a full-time teacher. The District argued as follows on this point:

> Despite this change in language included in the 1992-1995 Master Contract, there is no evidence to show that, after this change, the parties subsequently followed this language in the contract. There was also never any evidence presented to show that any part-time calculations were based on the number of periods assigned to a teacher. Instead, the facts show that there was never any clear manner in which part-time teachers' contract percentages were calculated. (ER Br. p. 43)

The District also noted that as former Bookkeeper Steffen stated, part-time percentage payments were set by the Board of Education and that for Henthorne and Haertel there was no clear pattern of payment. The District also reiterated its arguments that an alleged practice, if it existed, was not long-standing, frequent, and mutually agreed to and that the District was free to repudiate it with impunity during a contract hiatus. The District asserted that in 2003-04 no change was made in its method of calculating workload or overload, only in the number of periods that was considered full-time (ER Br. 52). Finally, the District contended that the Association waived the underlying claims made herein by failing to process several grievances regarding overload for full-time teachers and part-time teacher percentage payments which were filed in 2003.

REPLY BRIEFS

Association:

The Association argued that it clearly proved the *status quo* as to calculations for full-time teacher, overload compensation and part-time percentage compensation. The Association noted that both former District Administrator Moon and Bookkeeper Steffen acknowledged and confirmed the practice that Association President Coates described. Indeed, the District failed to submit any documents to refute Coates' testimony. Much of the District's "history" was from a time before the DR decisions issued, yet the practice of calculating and compensating part-time teacher pay and of paying full-time teachers for a seventh assignment remained the same before and after the DR decisions issued.

The Association urged that the District misstated the law in its brief; that the law required the District to maintain the *status quo* on wages, a mandatory subject of bargaining, during a contract hiatus, whether or not the Association demanded to bargain and made proposals to maintain the *status quo* practice. In this regard, the Association observed that it is not challenging the District's right to make a seventh period assignment to teachers or that the District has the right to evaporate preparation time, a permissive subject of bargaining, from the labor agreement. The Association cited NUE V. ST. CROIX FALLS, S.D., DEC. NO. 27215-D (WERC, 7/93), AFF'D 18 WIS. 2D 671, 522 NW 2D 507 (CT. APP., 1994) as the law in this area which clearly demonstrates that the District violated Sec. 111.70 (3)(a) 4 and 1, Stats., by unilaterally changing the method of calculating workload and overload pay which had been used both before and after the DR decisions issued.

District:

On reply, the District essentially repeated arguments it made in its lengthy initial brief. The only new assertions made by the District on reply were as follows:

1. One cannot discern what case the Association is referring to when it cites "Dodgeland 1";

2. The Association failed to address the District's repudiation defense in its initial brief;

3. Former Bookkeeper Steffen stated that only Sangstad and Miller were paid overload pay in 1996-97 for a seventh assignment and Steffen did not recall meeting with Association President Coates on part-time teacher percentages; and

4. Contrary to the Association's arguments, Dr. Moon's testimony did not support the Association's past practice claims, citing Tr. 113-4.

DISCUSSION

The original complaint as well as the amended complaint alleged that the Respondent violated Section 111.70(3)(a) 4 and 1, Stats., by unilaterally changing its practice of paying full-time teacher overload pay and part-time teacher pay based upon six periods of assignment, either instructional or supervisory, (1360 minutes per week, being full-time), to basing full-time status on seven instructional periods. The District's change in its methods of calculating pay resulted in a reduction in pay after August 22, 2003 to part-time teachers and to the denial of overload pay to full-time teachers assigned a seventh period assignment.

The District asserted in its amended answer, filed on May 20, 2004, that Complainant failed to prove a past practice regarding overload pay and part-time teacher pay calculations; and that Respondent timely repudiated any alleged past practice and by its actions, having evaporated the 1995 Prep Time Memo of Understanding (MOU) as a permissive subject of bargaining. Respondent also asserted that by its failure to timely pursue grievances regarding the calculation of overload and part-time teacher pay, and by its failure to impact bargain the Respondent's elimination of preparation time, Complainant waived its rights or is precluded from pursuing them by laches and estoppel. In any event, Respondent had valid, legitimate business reasons to do as it did and that therefore the complaint should be dismissed and Respondent should be awarded costs and fees herein.

Section 111.70(3)(a)4:

Section 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2), Stats., rights of bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats. GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. RACINE COUNTY, DEC. NO. 26288-A (SHAW, 1/92).

Absent a valid defense, a unilateral change in the *status quo* wages, hours or conditions of employment during the hiatus period between collective bargaining agreements, is a *per se* violation of the duty to bargain contained in Section 111. 70(3)(a) 4, Stats., SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85). The Commission has found that a unilateral change in *status quo* wages, hours and working conditions is tantamount to an outright refusal to bargain about a mandatory subject because it undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD V. WERC, 87 WIS. 2D 819 (1979); GREEN COUNTY, SUPRA. Such a unilateral change also evidences a disregard for the role and status of the majority representative which is also inherently inconsistent with good faith bargaining. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA.

The *status quo* is a dynamic concept and when determining it in the context of a contract hiatus period, the Commission considers relevant language, if any, from the expired labor agreement as historically applied or as clarified by bargaining history. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA. Under Wisconsin law, a matter which is primarily related to wages, hours and conditions of employment is a mandatory subject of bargaining, while a matter which is primarily related to the formation and choice of public policy is a permissive subject of bargaining. CITY OF BROOKFIELD, SUPRA. In the case of permissive subjects of bargaining, no duty to bargain exists so that there is no employer obligation to maintain the status quo during a contract hiatus or until a settlement or arbitration award is reached. In applying the "primary relationship test", the Wisconsin Supreme Court has concluded that bargaining is not required with regard to "educational policy and school management and operation" or the "management and direction of the school system." BELOIT ED. ASSOC. V. WERC, 73, WIS.2D 43 (1976).

The facts of record show that in 1998 and 1999, the WERC and the courts determined that preparation time was a permissive subject of bargaining and that therefore the MOU attached to the parties' 1995-97 labor agreement could be evaporated. Respondent has argued that this case is about preparation time—that when it evaporated the preparation time MOU in 1998, this action necessarily changed the manner in which it calculated overload and part-time teacher pay, requiring a conclusion that (1) Complainant waived its right, if any, to object to the change in the methods of calculation because it failed to request impact bargaining regarding the Prep Time MOU evaporation, and (2) Respondent had no obligation to discus the change in the methods of calculation because of Complainant's waiver and because preparation time is a permissive subject of bargaining.

However, the record in this case demonstrates that this case is not about preparation time. Rather, this case is about the separate and distinct subject of wages, a mandatory subject of bargaining, specifically about how overload pay and part-time teacher pay are calculated. The Commission has clearly held for many years that a union cannot waive its right to bargain regarding the loss of *status quo* items which are mandatory subjects of bargaining by inaction during an hiatus VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96). The union need not demand to bargain during an hiatus because the legal duty is upon the employer to maintain the *status quo*. Here, none of the notices given by Respondent to unit employees and Complainant put Complainant on notice that the District intended to change the percentage used to calculate part-time teacher pay and overload pay. Indeed, the November 3, 1997, December 22, 1997 and May 27, 1998 notices, and Moon's May 2, 2003 notice never referred to overload or part-time teacher pay or to the method of calculating pay. Also, the evidence clearly showed that even after the WERC and Wisconsin Supreme Court issued their decisions in 1998 and 1999, the District maintained its practice regarding how it calculated overload and part-time teacher pay, based upon a full-time schedule of six periods. It is also significant that the Preparation Time MOU did not refer to overload or part-time teacher pay. Therefore, in the circumstances of this case, a defense of waiver is neither legally effective nor has it been proved.

The District has essentially argued that because it had no obligation to bargain with the Association regarding preparation time, it also had no obligation to bargain with the Association regarding pay for teachers who were assigned to teach/supervise an additional period not normally previously assigned when the District did away with one preparation period as of August, 2003. The case law simply does not support the District's assertions in this area. See, e.g., SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; RACINE UNIFIED SCHOOL DISTRICT, SUPRA; GREEN COUNTY, SUPRA. In addition, the Districts assertion that there was no clear method of calculating overload and part-time teacher pay and that supervisory assignments were unpaid are belied by the testimony of former District Administrator (from 1999 to May, 2003) Howard Moon:

For example, Dr. Moon testified that a full load in 2001-02 was six periods of any kind of assignment:

(By Ms. Cherney):

Q Well, let me ask it this way. Within the six, when employees generally had six assignments, it appeared the term assignment meant - -

A Right.

Q - - anything?

A Sure.

Q It could mean study hall. It could mean AODA?

A Could.

Q Could be teaching, is that right?

A It could, yes. (Tr. 112)

Moon also stated that during his administration and specifically in 2001-02, the District continued to use six periods as a full-time schedule to make part-time and overload pay calculations, as it had done in the past:

(By Dr. Moon):

> It was to my recollection pretty much the way we had done it before. I had discussions only about certified staff that I can remember having with Caroline (Hintze) where some judgment had to be made about how you figure the pay based on what fraction, one-sixth, one-seventh, one-eighth.
>
> And we concluded that one-sixth would be the fairest under the conditions that we saw at the time. (Tr. 109).

Dr. Moon further stated that after the Supreme Court decision issued and specifically in 2002-03, he recalled that teachers who worked seven periods were paid overload, as follows:

(By Ms. Cherney):

Q But in '02-'03 you had the (Supreme Court) decision?

A Right.

Q And in those situations in which those people had a seventh assignment, they were paid one-sixth overload, is that right?

A Yes.

. . .

BY ATTORNEY CHERNEY:

Q But you do know of situations where someone had a seventh period and they were paid?

A Yes. (Tr. 113-114).

Furthermore, the testimony of long-time bookkeeper, Marlene Steffen (1965 to 2001) was consistent with Dr. Moon's testimony, quoted above. In this regard, Steffen clearly stated that any assignment counted toward six periods as full-time and that teachers were paid 1/6 their rate for a seventh assignment, as follows:

BY ATTORNEY CHERNEY:

Q And when you say six teaching over the years, that could mean any kind of assignment; it could mean teaching a class or being study hall supervisor or anything?

A (No answer).

THE ARBITRATOR:[1] Is that a yes, ma'am?

THE WITNESS: Yes.

THE ARBITRATOR: Thank you.

BY ATTORNEY CHERNEY:

Q In all those years as far as whether or not it was one of your six, was there – there was never any distinction between whether you were teaching a class or teaching a study hall or supervising a study hall, is that correct?

A No.

Q Let's see, no, there wasn't or no –

A No, there wasn't.

Q A difference?

A Right.

Q Okay, because I said it was correct at the end, so I didn't want it to be confusing.

And you remember a couple of people that you remember getting the additional – the one-sixth pay for the seventh assignment, you testified?

A One-sixth or one-twelfth.

[1] The court reporter and parties at times referred to the Examiner as the Arbitrator, in error.

Q When would it be one-twelfth?

A When it was one semester.

Q Okay, and do you ever remember anybody being assigned a seventh assignment and not getting paid an overload in the years you were here?

A I don't remember that.

Q Okay.

A And I wouldn't know it unless I was told.

Q Okay. With respect to calculation of part time with the middle school and high school, where there were periods, do you have any understanding of what was how you figured out a part-time percentage for those – for those people, like a part-timer at the middle school or high school?

A I would say usually the percentage would be approved by the board.

Q Okay, is it true that it would be like the percentage of six – like if they taught three classes, they would be half time; four would be two-thirds time or – if you know.

A I would say yes. (Tr. 180-182)

Steffen's testimony, above, that the Board set teacher pay percentages, does not require a different conclusion. It simply defies logic that the Board would have no consistent method of calculating teacher pay, as the District asserted herein. In any event, the above-quoted testimonial excerpts demonstrate that the Association has proved its past-practice argument herein by a clear and convincing preponderance of the evidence. The documentary evidence and Association President Coates' testimony also supported the Association's past-practice/*status quo* argument herein. The examples cited by the District which it urged undermined pas practice were based upon Hintze's research, not upon her personal experience.

In this regard, it is significant that during the 2001-02 and 2002-03 school years the District used non-teachers to cover study halls pursuant to an agreement between District Administrator Moon and the Association. That agreement was based upon the fact that all Association members were fully employed, with six periods of assignment being considered full-time and the District did not wish to pay teachers overload/extra pay to cover a seventh period study hall. In approximately 1997-98, the Association also agreed, on a one-time basis,

that the District did not have to pay teacher Larry Hanlon for a seventh period assignment based upon the fact that Hanlon had four (identical) World History classes and three Study Halls. In the Spring of 2002, the Association and the District also agreed that the District could avoid hiring another physical education teacher by assigning current physical education teachers to cover extra teaching time in exchange for their not being asked to do any substituting and that they would have decreased before and after school time. In addition, although the District asserted that for one semester in 1996-97 Teacher Kull did not receive overload pay for a seventh period study hall assignment, this example was insufficient to overcome the substantial contrary evidence of past practice submitted by the Association. Therefore, the Hanlon, 2002-03 physical education teaching time coverage, and the employment of non-certified staff to cover Study Halls in 2001 through 2002 actually supported the Association's past-practice/*status quo* argument submitted especially in the light of the fact that the District did not submit any payroll data for Kull.

The District argued that the Association failed to prove its past-practice/*status quo* claims by a clear and satisfactory preponderance of the evidence. This Examiner disagrees. Again, the testimonies of former District Administrator Moon and Bookkeeper Steffen showed that the Board made an affirmative decision after the issuance of the WERC and Supreme Court decisions on the DR not to change what would constitute a full-time schedule—six periods of assignment. After Dr. Moon left the District and District Administrator Reed was hired, Hintze also confirmed that part-time teacher Charlene Haertel's 2001-02 and 2002-03 pay was based upon six periods being full-time but that in 2003 after Reed came on board, Reed changed the method for calculating overload and part-time teacher pay, as follows:

(By Ms. Cherney):

Q Now you testified that you said you came up with these calculations that appear in the District Exhibit 19 and 20?

A Yes.

Q And these numbers you came up with based on what you thought the contract language says, is that correct?

A After discussing it with Joe, yes.

Q Okay. But these numbers had never been used in this way before, is that right?

A In '02- ' 03 - -

Q Let me rephrase the question so we will save some time.

A Okay.

Q These numbers were not - - were created in '03. They had not been created before that, is that right?

A That is right.

Q Okay. And now Mr. Reed was new to the District beginning in '03- '04, is that correct?

A Yes.

Q So suffice to say this was not based on numbers from the previous year?

A Correct.

THE ARBITRATIOR: Referring to District 19 and 20.

Q Yes. And you testified that you shared this with the DEA?

A Yes.

Q Then they did not agree that this was accurate, is that right?

A That's correct.

Q And then you said it was added to the bottom of the teacher's contract. You are talking about the individual contract, is that correct?

A Yes.

Q And that was done for the first time in '03- '04?

A Yes. (Tr. 141-2)

A comparison of the pay of affected teachers in 2002-03 with their pay in 2003-04 showed that teachers made less per minute because the District used seven periods as full-time for purposes of calculating both part-time teacher pay and overload pay. There is absolutely no record evidence to show that the District ever, in fact, notified the Association it intended to change how it calculated part-time teacher pay and on what basis an employee would be considered full-time/entitled to overload pay. This is classic proof of a unilateral change in the *status quo* during an hiatus period. In addition, the District admitted in its briefs that it knew it was obliged to bargain over compensation rates and that prior to the 2003-04 school year full-time teachers were assigned six periods. Finally, there was no record evidence submitted to show that the District ever repudiated its past practice of calculating full-time status for

overload pay and part-time teacher pay purposes in any of its various communications on prep time issued from 1997 through 2003. The complaint herein must therefore be remedied. Having found a violation by the District, Respondent would not be entitled to fees and costs herein in any event. See e.g., MATC, DEC. NO. 30254 (WERC, 1/02); STATE OF WISCONSIN, DEC. NO. 29177-C (WERC, 5/99).

Dated at Oshkosh, Wisconsin, this 27th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

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