STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC, Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT,
and THE BOARD OF EDUCATION
OF THE MADISON METROPOLITAN SCHOOL DISTRICT, Respondent,

Case 310
No. 67340
MP-4386

Decision No. 32419-A

Appearances:

Lawton & Cates, S.C., by **Attorney Richard Thal**, Ten East Doty, Suite 400, Madison, Wisconsin 53701, appeared on behalf of the Union.

Attorney Malina Piontek, Labor Attorney, Madison Metropolitan School District, 545 West Dayton, Madison, Wisconsin 53703, appeared on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING THE COMPAINT

On October 8, 2007, Madison Teachers, Inc., hereafter "Union," filed a complaint with the Wisconsin Employment Relations Commission (herein "WERC") in which it alleged that Madison Metropolitan School District and The Board of Education of the Madison Metropolitan School District, hereafter referred to as "District," engaged in a prohibited practice in violation of Sec. 11170(3)(a)1,and 5, Stats., by assigning various elementary specials teachers more than 1350 contact minutes. The Commission appointed Stanley H. Michelstetter II, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. On September 4, 2008, the Examiner held a hearing in Madison, Wisconsin. Each party filed a post-hearing brief and reply brief, the last of which was received November 6, 2008. The Examiner has considered the evidence and arguments of the parties and now makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Madison Teachers, Inc. is labor organization with its offices at 821 Williamson Street, in the City of Madison, Wisconsin.

2. Respondent Madison Metropolitan School District and Board of Education of the Madison Metropolitan School District collectively are a municipal employer with offices at 545 West Dayton Street, in the City of Madison, Wisconsin.

3. The Union represents various certified teaching and other related professional employees of the District including, but not limited to teachers who teach subjects such as music, art and other special subjects in the elementary schools (herein collectively referred to as "elementary specials" or "specials." The Union has represented these employees at all material times and the District and Union have been party to successive comprehensive collective bargaining agreements at all martial times.

4. The District and the Union are party to a comprehensive collective bargaining agreement for the period July 1, 2007, to June 30, 2009, which provides in relevant part as follows:

I - Recognition – A

A. MANAGEMENT RIGHTS CLAUSE

1. The Board of Education on its own behalf hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including, (but without limitation because of enumeration), the right:

   a. To the executive management and administrative control of the school system and its properties, programs and facilities.

   b. To employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion and their work assignment.

   c. To establish and supervise the program of instruction and to establish and provide supervision under agreed upon rules for such programs of an extracurricular nature as the Board of Education feels are of benefit to students.

d. To determine means and methods of instructions, selection of textbooks, and other teaching materials, the use of teaching aids, class schedules, hours of instruction, length of school year, and terms and conditions of employment.

2. The exercise of the foregoing powers, right, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited by the terms of this agreement and Wisconsin Municipal Employment Relations Act

3. The Board further recognizes the unique value of the teaching staff and the administrative officers of the Board of Education to advise the Board on matters of policies relating to pupils, the building construction and maintenance of schools, and especially the instruction of pupils; and instructs the Superintendent to seek the advice and counsel of the teaching staff and the administrative staff whenever the Superintendent deems the advice and counsel pertinent.

I - Recognition – B

B. COLLECTIVE BARGAINING REPRESENTATIVE

1. The Board of Education recognizes Madison Teachers Incorporated as the exclusive collective bargaining representative for:

a. All regular full-time and regular part-time certificated teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by Madison Metropolitan School District including psychologists, psychometrists, social workers, school nurses, attendants and visitation workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, guidance counselor, project assistant, principal investigators, researchers, photographer technician, teachers on leave of absence, and teachers under temporary contract, but excluding supervisor - cataloging and processing, on-call substitute teachers, interns and all other employees, principals, supervisors and administrators.

b. All staff, including paraprofessionals employed at Shabazz High School and Charter Schools, but excluding regularly contracted "teachers," clerical/technical employees, educational assistants and supervisors as defined in Section 111.70, Wis. Stats.

1) The wages, hours and conditions of employment for those employed as paraprofessionals at Shabazz High School and Charter Schools are specified in Addendum A.

c. All employees identified as therapy assistants, interpreters, science materials specialists and special needs nurses.

1) The wages, hours, and conditions of employment for those employed as therapy assistants, interpreters, science materials specialists and/or special needs nurses are specified in Addendum B.

d. All employees identified as non-faculty personnel in the capacity of athletic directors, athletic coaches, dramatics coaches, newspaper advisors, yearbook advisors, band directors, bookstore managers, choir directors, orchestra directors, cheerleading advisors, pom pon advisors and drama assistants, pursuant to WERC Certification of the Results of an Election Decision 26881A.

The language of Section 1(B)(1) herein is only to be interpreted as describing the bargaining representative and the bargaining unit covered by the terms of this Agreement.

2. Hereinafter the term "teacher" refers to anyone in the collective bargaining unit.

3.

a. The parties recognizing the value of a qualified teaching staff as it relates to the instructional process, hereby agree that instructional duties where the Wisconsin Department of Public Instruction requires that such be performed by a certificated teacher, shall be performed only by "teachers."

b. Substitutes are excepted and may take the place of absent "teachers" pursuant to Section IV-B. In an emergency and/or when a substitute is not available, certificated administrators may serve as substitutes.

4. Administrators, may under the terms of this agreement, perform work under Section III-I.

II - Procedure – A

A. CONFERENCE AND NEGOTIATION

1. This agreement effective upon execution between the BOARD OF EDUCATION OF THE MADISON METROPOLITAN SCHOOL DISTRICT hereinafter referred to as the "Board of Education", and also referred to as "the Employer", or "Madison Public Schools", or "the District"; and MADISON TEACHERS INCORPORATED, hereinafter referred to as "Madison Teachers", and also referred to as "MTI", or "the Union".

2. The Board of Education and Madison Teachers each recognize its legal obligation imposed by Section 111.70 of the Wisconsin Statutes to meet for the purposes of negotiating in good faith at reasonable times in a bona fide effort to arrive at a settlement on questions of wages, hours and conditions of employment. Without limiting this legal obligation, the parties to this agreement agree as follows:

   a. All terms initially proposed to be negotiated for the contract period commencing July 1, 2009 shall be submitted to the duly authorized agent of the other party in writing and according to the timetable set forth in this Agreement The limitation of initially proposed items for negotiation to those in written form and in accordance with the attached timetable shall not prevent the unilateral introduction of new items by either party from time to time during the period of negotiation.

   b. Timetable - All items initially proposed for negotiations shall be presented as follows:

      1) The presentation of initial proposal for the succeeding Agreement shall be made on or about the forty-fifth (45th) day prior to the expiration of the Agreement and shall be open to the public. Subsequent sessions shall be closed unless the parties mutually agree otherwise.

      2) Ideally, agreement by the agents should be reached by June 15 preceding the expiration of the contract at which such time ratification by the principal parties will be

considered. At such time as the Agreement is reached, the economic benefits agreed upon will be retroactively provided teachers to the beginning of the then current school year.

c. Each party to this agreement desiring to be represented by agents for negotiating agrees to furnish to the other party a list of its duly authorized agents for such purposes. Each party agrees to negotiate only with said agents and no others, including their principals, namely, the Board of Education or Madison Teachers, as the case may be, unless the latter as principals authorize negotiations with others or themselves.

d. If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the attention of either of the parties to this agreement by any individual, group of individuals or organization other than the other party to this agreement or its duly authorized agents, such latter party shall be punctually informed of such action.

e. Each party to this agreement, at its own expense, may utilize the service of legal counsel, professional negotiators and other such expert persons, as well as clerical assistants, at negotiations.

f. The Board of Education agrees to furnish to Madison Teachers, upon reasonable request, all available public information concerning its financial resources.

g. Individual teacher contracts shall be deemed to incorporate all of the terms of agreements concerning wages, hours and conditions of employment made between the Board of Education and Madison Teachers, and no other terms except those imposed by law.

h. Madison Teachers recognize the legal obligation of the Board of Education to give to each teacher employed by it a written notice of renewal or refusal of his or her contract for the ensuing school year on or before March 15 of the school year during which said teacher holds a contract, pursuant to Section 118.22of the Wisconsin Statutes. Preliminary notice shall be given at least fifteen (15) days prior should the Board be considering nonrenewal. Such teachers have five (5) days from the date of receipt of such notice to request a conference. In the event an agreement concerning wages, hours and conditions of

employment has not been reached by the Board of Education and Madison Teachers by the date teacher contracts are given to said teachers, all such contracts shall be governed by the terms of any agreement concerning wages, hours and conditions of employment for said ensuing year subsequently reached by the parties to this agreement.

11 - Procedure – B

B. GRIEVANCE PROCEDURE

1. The Board of Education and Madison Teachers each recognize the legal right of any individual employee or any minority group of employees at any time, within the following terms, to present grievances to their employer in person or through representatives of their own choosing and the corresponding legal duty of the employer to confer with them in relation thereto, provided that Madison Teachers has been afforded the opportunity to be present in conferences concerning grievances and that any adjustment resulting from such conferences is not inconsistent with the conditions of employment established in any procedures, policies or agreements then in effect between the parties to this Agreement. The District will send, on a timely basis, to the Executive Director of Madison Teachers, notice of any adjustment resulting from said conference. Without limiting the preceding legal right and duty, the parties to this Agreement agree as follows:

2. The following grievance procedure is designed to ensure prompt consideration and appropriate solution of grievances as hereafter defined at the lowest possible administrative level.

3. Definition;

   a. A "Grievance" is defined to be a dispute concerning the interpretation or application of any of the terms of any "written" agreement establishing salaries, hours, or other conditions of employment for the employees of the Board of Education for whom Madison Teachers is the collective bargaining representative. Aggrieved parties may be Madison Teachers or any such employees.

   b. "School Day" used herein shall mean weekdays during the summer months.

4. The time limits indicated at each level of the Grievance Procedure shall be considered maximum. However, the time limits may be extended or reduced in any case by mutual agreement, in writing, signed by the duly authorized representatives of the Board and Madison Teachers. If denied at a specific level, grievances not appealed to the next level within the prescribed time limits shall be considered withdrawn.

5. An aggrieved party must submit to the principal the alleged grievances within sixty (60) days after the aggrieved party knew of the act or condition on which the grievance is based, or the grievance will be deemed waived. If the act or condition reoccurs, the time limits will be renewed.

6. The procedural steps for Madison Teachers shall commence at Level 3. Organizational (Class) Grievance: Madison Teachers must submit the alleged grievance within sixty (60) days after Madison Teachers knew of the act or condition on which the grievance is based, or the grievance will be deemed waived. If the act or condition reoccurs the time limit will be renewed.

LEVEL 1:

a. An aggrieved party shall identify the grievance and attempt to resolve same through discussion with the principal or supervisor either by himself/herself or with a representative of Madison Teachers or anyone else of his/her own choosing.

LEVEL 2

:

a. If the grievance is not settled, Madison Teachers Incorporated may then act on behalf of the aggrieved party or the teacher, acting on his/her own, shall submit a written grievance to the principal. The written grievance shall, to the extent possible, include the facts upon which the grievance is based, the Contract sections alleged to be violated, and the relief sought.

b. Within ten (10) school days after receiving the written grievance the principal or supervisor shall deliver the written answer to the aggrieved and the Executive Director of Madison Teachers. The answer shall be reasonably clear and concise and shall contain the reasons therefore. Should the response not be made within the

above period, the grievance will automatically proceed to the next level.

LEVEL 3

:

a. Should the matter remain unresolved at the conclusion of Level 2, then Madison Teachers and only Madison Teachers may present grievances in writing on behalf of an aggrieved party or itself to the Superintendent or his/her designee.

b. The Superintendent or his/her designee shall meet with a representative of Madison Teachers within ten (10) school days from the date of receipt of the written grievance in an attempt to resolve same. The meeting shall be at a time and place mutually acceptable.

c. The Superintendent or his designee shall respond in writing within ten (10) school days after the aforementioned meeting to the Executive Director of Madison Teachers and the aggrieved party. The answer shall be reasonably clear and concise and shall contain the reasons therefore. Should the response not be made within the above period, the grievance will automatically proceed to the next level.

d. Any grievance not so referred to Level 3 within fifteen (15) school days after the receipt of the Level 2 answer shall be considered withdrawn.

e. Grievances initiated by Madison Teachers on behalf of bargaining unit members as a class or in an organizational grievance are commenced at this level of the procedure. Grievances as a result of alleged action/inaction by a principal/immediate supervisor and affecting only one teacher will be filed at Level 1. Grievances as a result of alleged action/inaction by principal and affecting only teachers in that principal's school building will also be filed at Level 1.

LEVEL 4:

a. To the extent the grievance remains unresolved at the conclusion of Level 3, Madison Teachers may call for

compulsory, final, and binding arbitration. Said call must be within thirty (30) school days after the receipt of the answer at Level 3.

b. If mutually agreeable between the parties to this contract, the Wisconsin Employment Relations Commission shall appoint an arbitrator from their staff upon receipt of the letter. If mutually agreeable between the parties to this contract, the Wisconsin Employment Relations Commission (WERC) will be requested to provide a panel of five (5) potential arbitrators from the WERC's staff. The panel of potential arbitrators shall be selected according to the arbitrator selection procedures set forth in section "b," below.

c. If it is not mutually agreeable to utilize the Wisconsin Employment Relations Commission to arbitrate the matter, a copy of the letter calling for arbitration shall be forwarded by Madison Teachers to the Wisconsin Employment Relations Commission with a request for the names of five (5) private arbitrators from which the parties may select a mutually acceptable arbitrator to hear and decide the issue, A copy of this letter shall be sent at the same time to the Board of Education. Said arbitrator shall be selected within five (5) school days after receiving suggestions from the Wisconsin Employment Relations Commission. Each party shall have the right to alternately strike two names from the list with the aggrieved party striking first

d. The parties agree to share equally the costs arising from the employment of the arbitrator mutually selected and all other costs of the arbitration proceedings.

e. The decision of the arbitrator shall be final and binding on all parties except as forbidden by law and shall be rendered within thirty (30) days following the final day of hearings or receipt of briefs, whichever is later. Any brief not postmarked on or before the date set by the parties at the conclusion of the arbitration hearing as the date for submission of briefs shall not be considered accepted by the arbitrator and shall be returned to the party submitting same with a letter transmittal. The other party shall receive a copy of the letter of transmittal.

V - Factors Relating to Employment -Classroom -**1**

I. HOURS OF SCHOOL

1. Itinerant, District-Wide as Directed and Teachers Assigned to Doyle Administration Building

Teachers assigned across elementary and secondary levels (itinerant), District-Wide as Directed, or assigned to the Doyle Administration Building shall be governed by Section V-I-3 below.

2. Elementary

a. Elementary teachers' work day shall conform to the fifth (5th) grade schedule with the teacher's day commencing fifteen (15) minutes prior to the start of the fifth (5th) grade student school day and terminating thirty (30) minutes following the end of the fifth (5th) grade dismissal as per Tuesday through Friday as set forth below.

The contract day for teacher's assigned responsibilities to elementary level programs at more than one elementary school shall conform to the school in which the teacher commenced his/her assigned workday.

b. Special education teachers who are assigned to non-school sites shall be governed by such hours as' the principal shall file with the Director of Special Education concerning their special duties in relation to the normal operation of the site. The length of the special education teachers' normal daily workday shall equal the length of the normal daily workday of regular education teachers and shall be a continuous time between 7:00 a.m. and 5:00 p.m.

c. Elementary principals, in setting student hours, shall conform to the following standards on minutes of the teacher's responsibility with students.

Grades	Monday	Tuesday through Friday
Half-Day K 1,2,3,4,5 &	285	337
Full Day K	285	377

The elementary student day is five (5) hours and fifteen (15) minutes (continuous time) on Mondays starting between 7:30 a.m. and 8:45 a.m.; and six (6) hours and forty-seven (47)

minutes (continuous time) on Tuesdays through Fridays starting between 7:30 a.m. and 8:45 a.m. Said times include the duty-free lunch period referenced in Section V-J. MTI will be notified of the starting and ending times of the elementary student day for elementary schools prior to May 15th of the school year proceeding the upcoming school year.

The Monday early dismissal time may be used, at the option of the teachers, for parent-teacher conferences, elementary teacher planning, and staff development (inservice) except as modified by Section V-K-5; and the monthly staff meeting when the principal deems such meeting necessary. In addition to the above, this Monday early release time may be designated as the team planning time referred to in Section V-P-2. Staff members shall be required to attend such meeting. Such meetings should conclude by the end of the regular school day.

Kindergarten teachers will be provided one (1) hour released time for each four (4) kindergarten pupils, or major fraction thereof. Such time shall be used for the purpose of conducting parent-teacher conferences. The early Monday afternoon dismissal will fulfill the afternoon required released time.

d. Except during his/her duty-free lunch period, a teacher is to be in his/her assigned building continuously when school is in session unless excused by the principal. Should a teacher leave the school/worksite during his/her duty-free lunch period, he/she shall first notify the office staff.

e. The District shall make every reasonable effort to schedule elementary specials teachers in such a manner as to cluster the assignment of sections by similar grade level (i.e., first grades scheduled consecutively, second grades scheduled consecutively, etc.) and to insure that no specials teacher is assigned more than two (2) consecutive hours without a planning period, duty-free lunch or at least ten (10) minutes of non-student contact time.

. . .

V – Factors Relating to Employment – Classroom – P

P. PLANNING TIME

1. In addition to the hour of planning time provided by early dismissal on Mondays, all full-time elementary teachers and all full-time Special Education Services teachers assigned to elementary and middle schools shall have at least three and one-half hours per week of planning time within the established school day for pupils. Such planning hours shall be scheduled in at least one-half hour lots.

2. In addition to the plan time set out in the first paragraph of this sections (Section V-P-1), all full-time elementary classroom teachers (limited to full-day kindergarten and first through fifth grade teachers) and full-time special education classroom teachers shall have an additional one hour per week of planning time within the established school day for pupils. This additional one hour planning time per week shall be designated for team planning time – e.g., grade level team planning time. This one hour of team planning time may occur during the Monday early release time, at the discretion of the principal. The one hour of team planning shall be designated for instructional purposes only.

3. It shall not be a violation of this provision if a teacher loses planning time due to scheduled changes made necessary as a result of an emergency(ies) or has voluntarily surrendered such planning time.

. . .

VIII - Other Board and MTI Agreements – B

B. ADOPTION OF BOARD POLICIES

All policies of the Board of Education affecting teachers' wages, hours and conditions of employment shall remain in effect unless changed by mutual agreement by the Board of Education and Madison Teachers. This agreement shall be binding on each of the parties for the period July 1, 2007 to June 30, 2009, the duration of this Collective Bargaining Agreement.

. . .

5. The provisions of all relevant prior comprehensive collective bargaining agreements between the parties are substantively identical to the provisions stated in Finding of Fact 4, except the maximum amount of contact time for regular classroom teachers was increased from 1,506 minutes to 1,523 in an agreement subsequent to the one construed by Arbitrator Grenig in the Specials II arbitration award referenced in Finding of Fact 7.

6. On April 4, 2003, the Union filed a grievance alleging that the District violated the parties' 2001-2003 collective bargaining agreement by assigning three full-time elementary

special subjects teachers to a teaching load in excess of 1,260 minutes per week during the 2002-03 school year. "Teaching load" herein refers to the amount of time the District requires a teacher to actually have contact with students in an active teaching role. The "teaching load" for full-time elementary classroom teachers can be calculated by deducting the time allocations in Section V-P from those in Section V-I-2-c.

7. The grievance specified in Finding of Fact 6 was processed through all of the steps of the parties' grievance procedure without resolution and was submitted to arbitration before Arbitrator Jay Grenig. He issued an arbitration award (herein referred to as "Specials I") on February 9, 2004. That award states that the issue before Arbitrator Grenig was:

> Did the District violate the parties' collective bargaining agreement by assigning full-time elementary specials teachers to teach more than 1,260 minutes during the 2002-2003 school year?

Arbitrator Grenig recited the following facts. Shortly after 1973, the District established a maximum teaching load for physical education teachers of 1,350 minutes per week. During the 1998-1999 school year, the District conducted a survey and concluded that full-time elementary specials had a teaching load ranging from a minimum of 980 to a maximum of 1,400 minutes per week whereas elementary classroom teachers were assigned from1,455 to 1,565 student contact minutes per week. It also found in that survey that 1,350 student contact minutes had historically been used to allocate elementary specials to schools. It noted that elementary specials needed more non-student contact time than regular classroom teachers. In December, 1998, the Union filed a grievance on behalf of an elementary special teacher named Rumbelow. The grievance and its settlement is known between the parties as the "Rubelow grievance." The Rumbelow grievance alleged that Rumbelow should have been assigned to an 80% of full-time time teaching load but that the District had improperly required him to be at 100% of full-time. The District agreed with the Union's assertion in the grievance and directed that he be assigned to 80% of 1,350 minutes (1,080 minutes) of student contact time per week and to other remedies requested by the Union. The District met with the Union on March 15, 1999, and stated that it was going to allocate elementary specials on the basis of 1,350 student contact minutes. A dispute arose concerning a contention by the Union and members of the public that the Employer was unduly increasing the teaching load of elementary specials. The District Superintendent then met with the Union concerning the issue on May 11, 1999, and agreed to that for the 1999-2000 school year the District would allocate elementary specials on the basis of 1,260 student contact minutes and no more than 21 sections, rather than 22.5 sections and 1,350 minutes. The District, in fact, used this allocation formula for the 1999-2000 school year and the next two school years. At one point the District's Chief of Staff wrote to District Principals that elementary specials could be assigned up to 1,506 minutes, the same maximum amount as then applied to regular classroom teachers. The Union responded to that letter objecting that assigning full-time elementary specials to more than 1,260 contact minutes violated the May 11, 1999, agreement. During negotiations for the 2001-2003 agreement, the Union unsuccessfully sought a provision "reducing" the student contact limit for elementary specials to 1,200 minutes. During the 2002-2003 school

year, the District assigned three elementary specials more than 1,260 student contact minutes and the Union filed the grievance alleging that conduct was a violation of the parties' agreement which grievance was the one then heard by Arbitrator Grenig.

Arbitrator Grenig recited that the Union argued that the Rumbelow grievance settlement established that the allocation formula was also a maximum for student contact. It argued that a practice created pursuant to a binding grievance settlement was a "binding practice" that could only be changed by mutual agreement of the parties. The Union then argued that the parties' three year practice of treating the 1,260 minute standard as a maximum teaching load establishes that the parties agreed to permanently establish that as a maximum teaching load.

The District argued that Section V-I of the 2002-3 agreement, which is substantively the provision in dispute herein, was clear and unambiguous in that the term "full-time elementary teacher" applied not only to regular elementary classroom teachers, but also applied to elementary specials as well. It argued that the 1,506-minute limit effectively specified in that provision was the limit which applies to elementary specials. It alternatively argued that the lack of a different standard was further evidenced by the fact that the Union unsuccessfully sought a different, lower standard in negotiations for the 2001-2003 agreement. It then argued that there was no mutual agreement with regard to the limit of assignment of classes to specials. It distinguished between the number used to allocate specials from the number used as a limit on the amount of student-contact time which could be assigned to specials. It then argued that there was no way that the allocation time could be construed to be a limit on the amount of student-contact time. It then argued that the commitment in the May 11, 1999, meeting to base allocations on the 1,260 per week number was for the 1999-200 school year only. There was no evidence of past practice as to any <u>limit</u> for student-contact time for elementary specials at any time.

Arbitrator Grenig reasoned that the parties' agreement contains no language limiting the number of minutes a special can be required to teach. Specials have historically taught 1,350 minutes both because that was the number the District historically used for allocation, specials have generally, but not always, actually been assigned 1,350 minutes or less, and the Rumbelow grievance used a 1,350 minutes standard for full-time. The parties did agree to a 1,260 "standard" for the 1999-2000, school year, but the agreement was expressly limited to that year. He concluded that even though the District continued to use the 1,260 standard in the following two school years, it was not a binding past practice. Nothing in the Rembelow settlement agreement addressed the issue of whether the District could assign a special more than 1,260 minutes. He, therefore, issued the following award:

> . . . . the District did not violate the parties' collective bargaining agreement by assigning full-time elementary specials teachers to teach more than 1,250 minute during the 2002-2003 school year. Accordingly, the grievance is denied.

8. The parties entered into a comprehensive collective bargaining agreement for the period July 1, 2003-June 30, 2005. That agreement was in effect when the Specials I award was issues on February 9, 2004.

9. On September 20, 2004, the Union filed a grievance claiming that the District violated the parties' 2003-2005 comprehensive collective bargaining agreement when it assigned elementary full-time specials to teach more than 1,350 contact minutes during the 2004-05 school year. The grievance was properly processed through all of the steps of the parties' grievance procedure without resolution.

10. In June, 2006, the District and Union submitted the grievance specified in Finding of Fact 9 to arbitration before Arbitration Grenig. The following specific issue was submitted to arbitration before Arbitrator Grenig:

> Did the District violate the parties' [2003-2005][1] Collective Bargaining Agreement by assigning full-time elementary specials teachers to teach more than 1,350 minutes per week? If so, what is the appropriate remedy?

The parties stipulated to the facts underlying the grievance ". . . for this arbitration proceeding only." They included in the record, without limitation:

1. The full record upon which Arbitrator Grenig's Special I award was based including the transcript of the hearing therein and his award;

2. A stipulation that the Union filed a grievance on September 20, 2004, that the District violated the agreement then in effect by assigning certain full-time elementary specials to teach more than 1,350 minutes per week during the 2004-05 school year;

3. A stipulation that the grievance specified in 2 was not resolved and was properly processed to the arbitration before Arbitrator Grenig;

4. A stipulation as to which full-time specials were assigned more than 1,350 minutes.

Arbitrator Grenig issued his award in the above matter (herein Specials II) on July 13, 2006. Arbitrator Grenig included in his findings of fact facts previously found in his Specials I award and which are also stated in Finding of Fact 7, above. He also included a recitation of the testimony from the hearing before him leading to the Specials I award.

He also recited the following occurrences subsequent to the Specials I award which led to the dispute before him. On May 27, 2004, the Union wrote the District and alleged that Rembelow grievance settlement meant that there was a 1,350 minute limit of instruction time for full-time specials and that it would grieve any assignment greater than 1,350 minutes. The District did assign some full-time specials to more than 1,350 commencing for the 2004-2005,

[1] The parties agreed that the arbitration occurred under the parties' July 1, 2003-June 30, 2005 comprehensive collective bargaining agreement. The Examiner has added this fact in brackets for clarity.

school year. The District responded to the letter on July 30, 2004, and, in relevant part, stated that the collective bargaining agreement does not limit the District to assigning a maximum of 1,350 student contact minutes to full-time elementary specials and that there is no historical acceptance of a 1,350 limit. It then went on to state:

> Moreover, although the District maintains its position, argued in the prior case, that it is free to assign elementary specials teachers to more than 1,350 minutes of instruction, any alleged practice on the part of the District is hereby repudiated.

The Union answered the July 20, 2004, letter and stated, in relevant part:

a. that the Specials I award was based on the conclusion that the Rumbelow grievance settlement did not limit the District to assign no more than 1,260 minutes, but that the Rumbelow settlement did limit the District from assigning more than 1,350 minutes; and, therefore, the settlement was a binding agreement which continued in effect limiting the District to 1,350 minutes;

b. that if the Union were making a past practice argument, the District cannot repudiate a past practice during the term of the collective bargaining agreement.

Arbitrator Grenig stated that the parties took the following positions. The Union argued that Sec. V-I-2-c, the provision of the comprehensive collective bargaining agreement in dispute herein, was ambiguous as to the maximum teaching load of elementary specials teachers in that a "teacher" is "anyone in the collective bargaining unit" and it is impossible to apply the maximum teaching load provision to everyone in the bargaining unit. The District is "bound" by the practice of standardizing the elementary specials' teaching load at a maximum of 1,350 minutes per week. Given Arbitrator Grenig's Specials I decision, the 1,350 minutes standard is binding on the District. The Rumbelow grievance settlement is binding precedent. The District argued that the agreement is clear and unambiguous in that a full-time elementary teacher is responsible for teaching 1,506 minutes (1,776 per week– 270 minutes of planning time). Because there is no separate provision for specials, the agreement provides a 1,506 per minute limit. The Rumbelow grievance settlement does not affect the maximum number of teaching minutes for specials in that that issue was never raised in that grievance. The District rejected the position that there was a binding past practice with respect 1,350 minutes. All allocation decisions were made by the District unilaterally and were not the product of mutual agreement with the Union.

Arbitrator Grenig found that Sec. V-I-2-c was ambiguous as to a limit for Specials in that it was impossible to apply the language to all non-classroom teachers. Using a rationale which referred to past practice as a separate implied provision of collective bargaining agreements, he concluded that there was a 1,350 minute past practice which formed the limit

for Specials. He stated the difference between an implied past practice and mere unilateral action by an employer was "mutuality." He concluded that there was mutuality between the parties in that the evidence, including, but not limited to the Rumbelow grievance resolution indicated that the 1,350 minute allocation formula was also the maximum contact time, except as the parties had agreed in the year 1999-2000 as noted in Specials I. His award stated:

> The language in Section V-I-2-c of the parties' collective bargaining agreement referring to the "standards on minutes of the teacher's responsibility with students," construing the contract as a whole, is ambiguous with respect to standards on minutes for elementary specials. . . . . While the parties have explicitly agreed to a contract provision governing the workloads of elementary teachers in Section V-I-2-c, the contract is silent with [sic] elementary specials teachers and other nonclassroom teachers. Accordingly, it is necessary to look at other evidence to determine what the maximum number of minutes for an elementary specials teacher.
>
> Past practice may be used (a) to clarify ambiguous contract language, (b) to implement general contract language, or (c) to create a separate, enforceable condition of employment. . . . .

Since at least 1994, 1,350 minutes per week appears to have been the maximum standard used for allocation of elementary special teachers. . . . .

For more than a decade, the District has asserted that a 1,350-minute standard applies to elementary specials teachers.

C. CONCLUSION

> Except where, as in 1999-2000, the parties agreed upon a lower standard, the evidence shows that at least since 1994, 1,350 minutes per week has been the accepted allocation standard for elementary specials teachers. Since 1994, communications from District administrators have articulated a 1,350-minute standards (sic) for elementary specials teachers. In addition, the 1998 grievance settlement used the 1,350-minute standard in determining the appropriate load for a part-time elementary specials teacher. Although the MTI has from time to time argued that a lower standard applies, in negotiating their contracts the MTI has relied on the District's assertion (as well as the practice) that a 1,350-minute standard applies to elementary specials teachers, if either party wishes to change this long-accepted standard, that party must do so through negotiations—not unilateral action. Cf. Contract § VIII.B. ("All policies of the Board of Education affecting teachers' wages, hours and conditions of employment shall remain in effect unless changed by mutual agreement by the Board of Education and Madison Teachers."). VII.

AWARD

> Having considered all the relevant evidence and the arguments of the parties, it is concluded that the District violated the parties' Collective Bargaining Agreement by assigning full-time elementary specials teachers to teach more than 1,350 minutes per week during the 2004-2005 school year. . . .

11. The parties entered into a comprehensive collective bargaining agreement for the period July 1, 2005, to June 30, 2007. The Specials II award was issued during the term of the 2005-2007 agreement.

12. The District fully complied with the Specials II award with respect to the matters litigated as it applied to the 2003-2005 agreement term.

13. The Union made a proposal in the negotiations leading to the 2005-2007 comprehensive collective bargaining agreement:

> Because of the time necessary to set-up and prepare for each class, full time specialist teachers (i.e. Art, Music, Physical Education and REACH) shall be assigned to no more than 1200 minutes or 20 sections (units of classroom students) of instruction per week. Part-time specialists shall have their workload determined a prorate basis.

The District stated that the proposal was a "permissive subject of bargaining" and rejected the proposal and the parties made no relevant change in the 2005-2007 agreement.

14. The parties never sought clarification of the Specials II award.

15. On April 25, 2007, during negotiations leading to the parties 2007-2009 comprehensive collective bargaining agreement, the District provided a written proposal in its initial proposals which included the following statement: "Note: Repudiate past practice, if any, on the scheduling of elementary specials teachers."

16. The proposal stated in Finding of Fact 15 was made in accordance with the parties' practice by which they recognize that the District is rejecting a past practice to the extent it is allowed to do so by law, the parties' bargaining procedures, and any applicable collective bargaining agreements.

17. On June 4, 2007, during negotiations leading to the parties 2007-2009 comprehensive collective bargaining agreement, the Union made a proposal to add a new sub-section f to Section V-I-2-c of the agreement as follows:

> "Full-time specialist teachers (i.e. Art, Music, Physical Education and REACH) shall be assigned no more than 1,350 minutes of student responsibilities per week. Part-time specialists shall have their responsibilities determined on a prorate basis.
> (Note: the above represents the continuation of practice of scheduling specials.)

The parties substantively discussed the proposal on June 4, 2007. The District explained that it could not meet the Union's proposal with its currently budgeted staff of Elementary Specials. It stated that it particularly could not meet this limit where elementary specials were shared between buildings. Following the discussion, but still on June 4, 2007, the Union made the following proposal:

> MTI withdraws, without prejudice, its proposal above, and the District withdraws its statement at page 73 of its May 17, 2007 proposal i.e. "Note: Repudiate past practice, if any, on the scheduling of elementary specials teachers." both with the stipulation that the relevant Contract terms will remain, and that the District will make a good faith effort to maintain a maximum work week for specials teachers of 1,350 minutes per week, in accordance with Arbitrator Grenig's Award rendered July 13, 2006.

The District and the Union discussed the Union's proposal, but could not agree. The Union stated that it believed that the Specials II award required the District to maintain a 1,350 minute2 student contact limit for elementary specials. The District responded that the Specials II award related to a practice that existed at that time and that the practice related to a permissive subject of bargaining and that the District was free to repudiate the practice pursuant to Section VIII-B of the parties' agreement.

18. At all material times, the parties maintained a voluntary impasse resolution procedure within the meaning of Sec. 111.70(4)(cm) 4, Stats, which, in part, continued all comprehensive collective bargaining agreements in effect until a successor took effect.

19. The Union never filed any other grievance after the Specials II award was rendered alleging that the District violated any of the parties' comprehensive collective bargaining agreements by assigning Elementary Specials more than 1,350 student-contact minutes.

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

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[2] There is an ambiguity starting at page 77 of the transcript as to whether the Employer proposed 1,380 minutes or 1,350 minutes. It is not necessary to address this ambiguity.

CONCLUSIONS OF LAW

1. Respondent Madison Metropolitan School District and The Board of Education of the Madison Metropolitan School District collectively are a municipal employer within the meaning of Section 111.70(1)(j), Stats.

2. Complainant Madison Teachers, Inc., is a labor organization within the meaning of Section 111.70(1)(h), Stats.

3. Respondent did not refuse to accept the Specials II arbitration award as it applied to its assignment of contact hours to elementary specials during the term of its 2007-2009 agreement and, therefore, did not violate Sec. 111.70(3)(a)5, Stats, by refusing to accept Arbitrator Grenig's Specials II award.

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

ORDER

The complaint filed herein is dismissed.

Dated at Madison, Wisconsin, this 5th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

MTI V. MADISON METROPOLITAN SCHOOL DISTRICT, ET AL

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING THE COMPLAINT

POSITIONS OF THE PARTIES

Union:

Arbitrator Grenig's Elementary Specials II decision is final and binding. He directed the District ". . . to assign full-time elementary specials teachers to no more than 1,350 minutes per week." Beginning in the 2007-08 school year, the District has failed to comply with that award. Section 111.70(3)(a)5, Stats., makes it a prohibited practice to "violate an agreement to . . . accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding." Under STATE OF WISCONSIN (DOC) DEC. NO. 31240-B (WERC, 5/06) at page 5 the Commission set the following standard for the application of an award to subsequent facts:

> Second, taking guidance from the concepts of claim preclusion (res judicata) and issue preclusion (collateral estoppel), an employer must comply with the resolution arbitrators have reached regarding the issues underlying an arbitration award, when the same issues arise subsequently between the same parties and no material facts have changed.

The facts have not changed materially. Both cases involved the situation when the District assigned more than 1,350 minutes to elementary specials. Additionally, Arbitrator Grenig specifically stated that the if the District "wishes to change this long accepted-standard," it may only go through negotiations – not unilateral action. Cf. Contract § VIII.B ('All policies of the Board of Education affecting wages, hours and conditions of employment shall remain in effect unless changed by mutual agreement by the Board of Education and Madison Teachers.')"

The District's position that it is entitled to repudiate the 1,350 minute-limit practice at the expiration of the 2005-07 agreement is wrong. Arbitrator Grenig used the practice to interpret the agreement and did not treat a past practice as an implied term of the agreement. Accordingly, the interpretation of §V-I-2-c remained unchanged in the new comprehensive collective bargaining agreement. The District did not invoke evaporation theory to remove standards regarding maximum teaching loads from the agreement during bargaining for the successor agreement. The District never filed a declaratory ruling to allege that the limits which are the subject of this dispute are not a mandatory subject of bargaining. District negotiator Robert Butler admitted in testimony that he was aware of the correct procedure to invoke "evaporation theory" but chose not to do so. The Union requests that the Examiner order the District to comply with the disputed provision for the contract term and make all affected elementary specials teachers whole for time spent from the start of the 2007-08 school year.

District:

The Union has the burden of proof and persuasion in this matter. The District agrees that pursuant to the Specials II award, it was obligated to continue the 1,350 minute-limit practice during the term of the 2003-05 agreement. However, the parties have recognized that the District may end past practices during the negotiations for successor agreements by notifying the Union that the District is renouncing a practice and giving the Union an opportunity to negotiate a change in the agreement. The District gave the Union proper notice during the negotiations for the 2007-09 agreement. The Union had the opportunity to negotiate a provision concerning the subject into the agreement and was unsuccessful in its attempt to do so. Having failed to negotiate a provision into the agreement, the practice expired.

Arbitrator Grenig's awards both found that there was no express language in the Section V-I 2-c or anywhere else in the collective bargaining agreements setting the maximum amount of contact time. His Specials II award is solely based upon a conclusion that past practice of limiting specials to 1350 contact minutes is an implied provision of the agreement. The Union is not correct that he used the disputed past practice to clarify ambiguous language in Section V-I-2-c He did not, and could not, have concluded Section V-I-2-c is ambiguous and interpreted by the alleged past practice. That provision is silent with respect to elementary teachers and other non-classroom teachers. He identified the fact that past practice can be used to explain ambiguous language or create an implied provision in the agreement. However, he focused on the use of past practice as an implied provision.

The Union made a proposal to add language incorporating the disputed past practice into the agreement during the negotiations for the 2007-09 agreement. The fact that they chose to propose adding a provision to the disputed article indicates that they understood the award solely concluded that there was an implied provision based upon the disputed past practice.

The District properly repudiated the alleged practice. The subject of the practice was a permissive subject of bargaining. In the initial exchange of offers in the negotiations leading to the 2007-2009, agreement, the District notified the Union that it was its position that the subject of a limit on student contact for specials was, in its view, a permissive subject of bargaining and that it was repudiating the alleged past practice which is the subject of the Specials II award. The Union responded to that by proposing to add a new provision incorporating the Specials II award's alleged past practice into Section V-I of the Agreement. The District stated in bargaining that the proposal was a permissive subject of bargaining and discussed the impact that the proposal would have on the District. The Union then made the proposal stated in Finding of Fact 17. The parties disagreed on that proposal and the District took the position that it was free to repudiate the past practice pursuant to Section VIII-B of the Agreement. The parties reached a comprehensive collective bargaining agreement without a change in the existing relevant provisions. Thus, the Employer's actions were effective to repudiate the practice in accordance with the parties' negotiating practice, collective bargaining law, and Section VIII-B of the collective bargaining agreement.

Arbitrator Grenig's reference to Section VIII-B of the Agreement does not restrict the District's right to repudiate the past practice. Arbitrator Grenig stated, "If either party wishes to change this long accepted standard, that party must do so through negotiations – not unilateral action. Cf. Contract §VIII-B". [Quote omitted.] By its very terms, Section VIII-B only applies to policies regarding wages, hours and conditions of employment, i.e. mandatory subjects of bargaining. The Union takes the view that this agreement provision means that the District may never change a practice. The District's position is that the provision applies only during the term of an agreement and does not control negotiations for a successor agreement. When bargaining the 1999-2000 Agreement, the District and the Union had discussions regarding the extent and applicability of Section VIII-B, and the District made it clear that it intended to follow the contract language limiting its scope only to subjects of bargaining which are mandatory subjects of bargaining under MERA. The Management Rights clause of the applicable agreements reserves to management the right to control all subjects which are not mandatory subjects of bargaining under MERA. The District's evidence indicates that the Union has acknowledged that Section VIII-B applies only to mandatory subjects of bargaining.

The history of the parties' relationship reveals an understanding that unwritten practices may be renounced or repudiated during bargaining for a successor agreement. The long history of litigation between the parties shows that the Union understands this concept. The Union has attempted to interpret Section VIII-B to apply to mandatory and permissive subjects of bargaining. It unsuccessfully attempted in the negotiations leading to the 1999-2001 agreement to modify Section VIII-B to apply to permissive as well as mandatory subjects of bargaining. The District sent a memorandum to the Union dated May 18, 1999, during negotiations for that agreement, stating that it was renouncing any past practice under Section VIII-B which might cause that provision to apply to non-mandatory subjects of bargaining. Accordingly, there is no basis to conclude that Section VIII-B regulates a past practice concerning a non-mandatory subject of bargaining. It concludes that neither Arbitrator Grenig, nor the WERC may bind the District to an unwritten practice for all eternity. It asks that the Hearing Examiner dismiss the complaint in its entirety.

Union Reply:

The District's purported repudiation of standardizing the teaching load of elementary specials at a maximum 1,350 minutes per week had no legal significance. The District cannot repudiate a past practice that gives meaning to an ambiguous contract provision. Further, the Arbitrator ruled that the agreement could only be changed by mutual consent. Only stand-alone past practices can be repudiated, not ones which interpret an ambiguous provision of an agreement. Those may only be changed by successfully negotiating a change to the affected contract language. It is undisputed that the parties did not negotiate any change to the affected language.

Arbitrator Grenig could have ruled that MTI and the District were bound by the 1,350 minute maximum only for the duration of the 2005-07 agreement. He was aware of the fact that in September, 2004 the District first attempted to repudiate the 1,350-minute practice.

Knowing of the 2004, purported repudiation, Arbitrator Grenig likely anticipated that the District would again try to repudiate the past practice. But he specifically stated in the Specials II Award in July, 2006, he did not find it was binding only for the duration of the 2005-2007 agreement. Rather, he held that it could only by changed by mutual agreement through negotiations.

The bargainability of teaching load and contact time proposals is not at issue and does not come into play in this dispute. The District incorrectly asserts that "the issue of permissive bargaining comes into play in this dispute" because Arbitrator Grenig cited Section VIII-B of the agreement. The District incorrectly suggests that Arbitrator Grenig relied on Section VIII-B as the basis of the requirement that the District could not unilaterally discontinue the 1,350-minute practice. Rather, Arbitrator Grenig cited this provision only as an example that the Employer could not unilaterally change the practice. The Union recognizes that if the 1,350-minute practice were a stand-alone practice without any basis in the contract, the District could have repudiated the practice whether or not it was a mandatory subject of bargaining.

Finally, the Union argues that there were ambiguities in Section V-I-2-c. The District's brief asserted that Arbitrator Grenig "casually" concluded that Section V-I-2-c was ambiguous. In fact, he deliberately concluded that it was ambiguous because it was ambiguous. Specifically, the Union submits that Section V-I-2-c may be ambiguous with respect to the elementary specials' teaching load and silent with respect to the number of contact minutes for elementary specials. In this case, ambiguity and silence are not mutually exclusive. The Union notes that the 1,525-minute maximum workload for regular classroom teachers is not expressed in the agreement, but is a calculation from other terms. Those terms are specific for regular classroom teachers, but all of the necessary components of the calculation are not specific for specials. As Arbitrator Grenig stated, construing it as a whole, the agreement explicitly contains a limitation on the regular teachers' minutes of instruction, but it is ambiguous with respect to the teaching load of elementary specials.

District Reply:

The District notes that at the heart of this matter of whether Arbitrator Grenig in the two previous grievances found the parties' 2003-05 agreement to be silent with regard to the work load of specials, or to contain language which was ambiguous with regard to the work load of specials. In Specials I, Arbitrator Grenig stated that the agreement contained ". . . no language limiting the number of minutes an elementary special teacher can be required to teach." Based upon the record, he concluded that "[n]othing in the parties' collective bargaining (sic) precludes the District from assigning elementary specials teachers to teach more than 1,260 minutes per week."[3] Next, interpreting the 2003-2005 agreement, in Specials II, he stated: "While the parties have explicitly agreed to a contract provision governing the workloads of elementary teachers in Section V-I-2-c, the contract is silent with elementary specials teachers and other teachers. Accordingly, it is necessary to look at other

[3] The District's footnote to the word "sic" noted that the word "agreement" was missing.

evidence to determine what the maximum number of minutes for an elementary specials teacher." Assuming, *arguendo,* that Arbitrator Grenig mistakenly believed that the practice of assigning minutes of instruction to elementary specials teachers to be a mandatory subject of bargaining and that, correspondingly, the District could not unilaterally change the practice during the term of the agreement, the Union has not proven that there is any language that was interpreted by Arbitrator Grenig. Given this, the Hearing Examiner must conclude that the District was free to repudiate the past practice during the negotiations for the 2007-09 agreement.

The Union's contention that Arbitrator Grenig interpreted the parties' agreement to mean that the District could never change the 1350-minute practice without the Union's consent is incorrect. As the District has demonstrated, setting aside the issue as to whether the 1350-minute standard is a mandatory subject of bargaining, that statement would be true only during the term of the applicable contract. While the District stated in September, 2004, during the term of the 2003-05 agreement, that it was repudiating the alleged past practice, the Union told the District, following the filing of its grievance, that it could not repudiate the practice during the term of the agreement because the agreement subsumes that past practices continue during its terms. The District disagreed because this was a permissive subject of bargaining and proceeded to assign more than 1,350 minutes of teaching to specials. Thus, what the District did was to attempt to change the practice during the term of the agreement, not after the expiration of an agreement. That is what Arbitrator Grenig was interpreting.

The Employer was entitled to repudiate the practice in negotiations for a successor by giving due notice to the union and an opportunity for it to bargain language. This the Employer did. The Union not only had an opportunity to bargain language in the successor agreement, but it did, in fact, try to do so for the 2007-09 agreement. The Union failed to prove by a clear and satisfactory preponderance of the evidence that the District was forever precluded by the Specials II award from effecting its right to repudiate the practice. Therefore, the Union's complaint herein must be dismissed.

The facts are materially different from the facts involved in the Specials II case. Assuming that the standards of STATE OF WISCONSIN (DOC), DEC. NO. 31240-B (WERC, 2006), apply, there is no dispute that the District complied with the Specials II award. Instead, the issue is the application of that award to a later set of circumstances. The Union incorrectly assumes that no material facts have changed. First, the Union proposed to write an-assignable-minutes-of-instruction limit for specials into the 2005-07 agreement and the District rejected the proposal as not being a mandatory subject of bargaining. Second, the District gave the Union notice that it would not be adhering to the 1,350-minute practice for specials and the Union made a proposal to codify the 1,350-minute limit which was again rejected by the District as a permissive subject of bargaining. The District further advised the Union as to how it would be proceeding in assigning elementary specials to student instruction in the future. The Union dropped its proposal, and ultimately voluntarily settled without any relevant changes in the agreement.

The District notes that the Union has conceded that the District has the right under Commission case law to repudiate a stand-alone practice. The Examiner must note that there is no language whatsoever associated with the practice. Even the Union's proposals in negotiations for the successor attempt to add new language and not amend current language. Therefore, the District ended the practice. The District also notes that "evaporation" theory for eliminating non-mandatory subjects of bargaining did not apply because there was no contract language to evaporate. The District asks that the complaint be dismissed.

DISCUSSION

I. Legal Principles

The modern policy of the WERC in the enforcement of arbitration awards in subsequent circumstances was first stated in WISCONSIN PUBLIC SERVICE CORPORATION, DEC. NO. 11954-D (WERC, 5/74) and refined by the WERC in STATE OF WISCONSIN, DECISION NO. 31240-B (WERC, 5/06) (herein "LUDER 1") and modified in STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), DECISION NO. 31856-D (WERC, 11/07) (herein "LUDER 2"). In short, the purpose of enforcement proceedings is to enforce the parties' agreement that awards be "final and binding" for the purpose of ensuring that the parties receive the arbitration they bargained for, nothing more and nothing less. It would frustrate the purpose of finality if the parties were required to re-litigate precisely the same issue in arbitration repeatedly. In WISCONSIN PUBLIC SERVICE, *supra*, the WERC noted a split in federal authority on the same point [4], and stated, in part,

> Notwithstanding this split of authority, this Commission has said repeatedly that it will apply the principle of res judicata to a prior arbitration award in complaint cases filed alleging a violation of Section 111.06(1)(g), where there is no significant discrepancy of fact involved in the prior award and in the subsequent case to which a complainant is requesting the Commission to apply the prior award. A balance must be struck between the need for consistency and finality and invading that province specifically reserved by the courts to the arbitrator – deciding the merits of the dispute. Where no material

[4] The current view of the federal courts is as follows. See, dicta in METROPOLITAN EDISON CO. V. NLRB, 460 US 693, 112 LRRM 3265, n 13 (1983); W. R. GRACE AND COMPANY V. LOCAL UNION 759, UNITED RUBBER WORKERS, 461 U.S. 757, 765, 113 LRRM 2641 (1983) (conflict between arbitration awards). There remains a split in the circuits as to whether to apply preclusive doctrines or reserve the issue of the effect of prior awards merely to the arbitrators. See, discussion in AUTOWORKERS V. DANA CORP., 278 F.3D 548, 169 LRRM 2193, 2198-9 (CA6, 2002) [We . . . hold that absent a contractual provision to the contrary, the preclusive effect of an earlier arbitration award is to be determined by the arbitrator."]; In CONNECTICUT POWER AND LIGHT V. IBEW, 718 F.2D 14, 114 LRRM 2270 (CA 2, 1983) Second Circuit dealt with a situation in which a second arbitrator refused to give effect to a prior arbitrator's award requiring an employer to maintain a 3-person crew, where the second arbitrator concluded that the reasoning of the first arbitrator was mistaken under the labor agreement. The Seventh Circuit stated about preclusion in arbitration cases: "Federal courts do not enforce rules of preclusion divorced from the norms of the tribunals that rendered the judgments" BROTHERHOOD OF MAINTENANCE OF WAY V. BURLINGTON NORTHERN RAILWAY, 24 F. 3D 947 (CA7, 1994)

> discrepancy of facts exists, the prior award should be applied. In these circumstances both interests are accommodated without undermining either.[5]

In LUDER I the WERC restated this policy as follows:

> Historically, the Commission has viewed the Section (1)(e) requirement, and its municipal and private sector analogs, as taking two forms. First, an employer must comply with the specific remedy set forth in a specific arbitration award. [Citation omitted.] Second, taking guidance from the concepts of claim preclusion (res judicata) and issue preclusion (collateral estoppel), an employer must comply with the resolution arbitrators have reached regarding the issues underlying an arbitration award, when the same issues arise subsequently between the same parties and no material facts have changed. [Citations omitted.]

In LUDER 2, the Commission clarified its statement of the WERC's case law policy in circumstances in which a prior award was ambiguous on the point which a party sought to use to preclude an employer's subsequent actions:

> We do take this opportunity to clarify one element of the LUDER paradigm, which appears to have caused some confusion in the Examiner's decision and perhaps between the parties. Having decided that the actual issue underlying the instant set of medical verification grievances has not been conclusively litigated and determined in the prior Torosian or Fleischli arbitration awards, it is not necessary or appropriate to reach the question of whether material factual circumstances have changed since those awards. "Material factual circumstances" means subsequent events that are material to the previous outcome on the issue. If there has been no determination of the issue, then subsequent events are immaterial. . . .

In that case, the Commission, quoting LUDER 1, stated that ". . . 'the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case . . . [T]he doctrine is 'equitable' and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim.'" In LUDER 2, the Commission chose not to resolve the ambiguity in the award in dispute therein, but to conclude that the issue was not "finally decided" because of the ambiguity.

The Wisconsin Court of Appeals in DANE COUNTY V. DANE COUNTY UNION ASFCME, AFL-CIO, 210 Wis.2D 267, 279-280 (1997)[6] in a case of first impression before it on the subject reviewed the law of the federal courts under Sec. 301, LMRA, and other states and stated its policy in this way:

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[5] WISCONSIN PUBLIC SERVICE, supra at p. 7

[6] Also see the concurrence at. 287-8 which argues that preclusion should not be applied in those cases where it would "thwart the general rule favoring arbitrability."

> On balance, we conclude that the policies underlying arbitration, its consensual, final and binding nature, weigh in favor of allowing the application of preclusion doctrines, to a limited extent. Where, at minimum, the claim, or the issue necessarily decided in the first arbitration is the same as in the second arbitration, the parties are the same, the parties have had a full opportunity to argue their respective positions to the first arbitrator and the parties have not agreed to re-submit the claim or the issue necessarily decided in the first arbitration to the second arbitration, then, the preclusion doctrine may be applied by an arbitrator or by a reviewing court.

Because both future arbitrators and the WERC must apply the parties' provision making a prior award "final and binding" the WERC's construction must not invade the legitimate role of the arbitrator to decide the degree of deference to a prior award where a prior award is not final on a subject or there are material differences in the subsequent circumstances. While the WERC applies legal concepts of issue preclusion and claim preclusion, the application of those principles must be tempered with recognition that the parties have also bargained for arbitral application of those principles. It must also be tempered with recognition that these are labor arbitration proceedings. Labor arbitration is different than legal proceedings, in part, because it occurs in a context in which parties have a continuing relationship, have a legal obligation to bargain with each other in a manner structured by law, the process has limited pleading and joinder procedures, and repeated litigation may be focused on creating a range of doctrine ("law of the shop") or may be focused on dealing with underlying interests of the parties a substitute for labor strife.[7]

One of the roles labor arbitrators are occasionally called upon by parties to perform is "gap filling" in labor agreements in which they go beyond their role as mere interpreters of the contract to developing substantive terms of an agreement in the guise of interpreting the parties' agreement. Legal concepts of issue preclusion and claim preclusion should have less applicability in these situations and, therefore, the WERC must be ever vigilant and circumspect to avoid invading the province of the arbitrator.[8]

The elements of claim preclusion were stated in NORTHERN STATES POWER V. BUGHER, 189 Wis.2D 541, 551 (1995) as follows:

> In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction.

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[7] NAA, Ted St. Antione, *The Common Law of the Workplace: The View of The Arbitrators* (BNA, 2d. Ed), Sec. 2.2
[8] *Common Law*, *supra*, Sec. 2.21: Alan Miles Ruben, Elkouri and Elkouri: *How Arbitration Works* (BNA, 6th Ed.) pp. 442, 659.

The doctrine of issue preclusion in Wisconsin applies only to issues which were "actually litigated" in prior proceeding and the application must be consistent with fundamental fairness. The factors considered in applying issue preclusion in Wisconsin are:

1. whether party against whom preclusion is sought, as a matter of law, could have obtained review of the judgment;

2. whether the question is one of law that involves two distinct claims or claims or intervening contextual shifts in law;

3. whether significant differences in quality or extensiveness of proceedings between two courts warrant re-litigation of issue

4. whether the whether the burdens of persuasion have shifted such that party seeking preclusion had lower burden of persuasion in the first trial than in the second trial: or

5. whether matters of public policy and individual circumstances are involved that would render application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain full and fair adjudication initial action. See, Mako v. City of Madison, 265 Wis.2d 442 (Ct. App., 2003)

II. Application

Applying the foregoing to the instant case, the Examiner concludes that the matters in dispute are properly within the purview of a successor arbitrator. After having lost the Specials II award, the District now seeks to force the Union to litigate again whether there is a 1,350 minute student contact limit on elementary specials. The claim presented in Specials II was whether there was a 1,350 minute limit during the agreement while the claim presented herein is whether the District unilaterally ended the practice underlying Arbitrator Grenig's decision by renouncing it in negotiations for the successor. The latter claim was not before arbitrator Grenig and was not within the scope of the issue submitted to him by the parties. The doctrine of claim preclusion does not prevent the litigation of the issue now raised by the District. The Examiner also concludes that the doctrine of issue preclusion does not apply to prevent the litigation of that issue in the subsequent arbitration proceeding.

The Examiner notes that the underlying approach of the District is that it seeks to have a successor arbitrator minimize the weight of the prior award on the basis that it was 1. wrongly decided (there was no practice differing from the contract provision of a "limit" as opposed to the allocation practice), and 2 there was a mistake of law in Arbitrator Grenig's award [9] which if one views his award as filling a gap in Section V-I-2-c, by finding the 1,350

[9] It alleges that Arbitrator Grenig mistakenly assumed that a limit of student contact was a mandatory subject of

minute limit renders questionable his decision to apply past practice theory.[10] The Examiner concludes that there is a substantial basis for this approach. Some arbitrators are more reluctant to apply the doctrine of an implied provision based upon past practice in areas outside the scope of subjects over which employers are required to bargain by law.[11] There is no evidence that the mandatory versus permissive nature of the contact time issue was actually litigated or vital to the narrow issues decided in Specials II. Therefore, it is appropriate for a subsequent arbitrator to consider it rather than the Examiner.

The Union's theory herein is that Arbitrator Grenig used past practice to interpret an ambiguity in Section V-I-2-c and, therefore, the District was bound by that interpretation until it successfully obtained a change in the language. However, the Examiner concludes that the Specials II award is ambiguous as to whether Arbitrator Grenig used past practice to interpret an ambiguous provision or used past practice as an implied provision to fill a gap in the parties' agreement. Both parties initially took the position before Arbitrator Grenig that Section V-I-2-c's use of the word "teacher" meant that the parties intended that there be a maximum contact limit for specials (who fell within the definition of "teacher"). However, they sharply disagreed as to what the limit was or if, in fact, they had inadvertently failed to create a limit at all. Arbitrator Grenig's express rationale for his 1,350 limit is ambiguous. It could be viewed as interpreting the ambiguous language of Section V-I-2-c or as adding a new implied provision crafted by the arbitrator from past practice. Additionally, his discussion concerning the obligation of the District to seek a change in language in subsequent negotiation may be easily viewed as dicta. The issue of the rights of the District in subsequent negotiations was not before Arbitrator Grenig. Because either theory (construction-of-ambiguous-language or practice-as-implied-provision) would have supported the award, it is not final on that point.[12]

The Examiner also notes that there are other ambiguities in or about this award which make it appropriate to leave the ambiguity discussed in the paragraph above for construction by a subsequent arbitrator. The Union assumes that Specials II concluded that the past practice was for an unchangeable and inflexible 1,350 minute limit in analogy to the limit expressed for classroom teachers. However, the award establishes only the general rule that there is a 1,350 minute practice. There have always been exceptions to the practice. The District has been

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bargaining under Sec. 111.70(2), Stats. A permissive subject is one over which an employer may, but need not, bargain, but over which it must bargain its effects on wages, hours and working conditions. As to the mandatory-versus-permissive nature of this subject, see, OAK CREEK SCHOOL DISTRICT, DEC. NO. 11827-D (WERC, 9/74); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83). Cf, DODGELAND EDUCATION ASSOCIATION V. WERC AND DODGELAND SCHOOL DISTRICT, 250 Wis.2D 357 (2002). The parties disagree as to whether this subject is a mandatory subject. The Examiner 's conclusion is limited only to the fact that there is a substantial basis for the District's argument. The Examiner also notes that the distinction discussed below as to whether Arbitrator Grenig found the 1,350 limit existed as result of ambiguity in Section V-I-2-c or is an implied provision affects the relevance to this concept in future arbitrations between the parties. The District voluntarily bargained to agreement over this issue only if it agreed to a contract provision covering the subject.

[10] Elkouri, p. 612 *et seq.*

[11] , Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 1961 *Proceedings of the National Academy of Arbitrators*, p. 30, 35, 52 et seq. and see, note 10.

[12] See the Commission's decision in LUDER 2 which reached a similar conclusion.

able to articulate an arguably legitimate management reason for the exceptions in the subsequent circumstances as noted in Finding of Fact 17. It is unclear whether the District had the factual basis to make a similar argument in Specials II. In this regard there are material differences between Specials II and the circumstances under dispute herein.

The Union contends that by the dicta stated by Arbitrator Grenig as to the obligation of the District to seek different contract language the District's failure to obtain a change in subsequent negotiations means that the 1,350 minute limit is to be fixed. However, a different arbitrator could adopt the view that Arbitrator Grenig was only reluctantly attempting to temporarily fill a gap in the parties' agreement. In this view, a subsequent arbitrator could view Arbitrator Grenig's primary goal as one of attempting to change the dynamics of bargaining in an effort to effect a mutual resolution of this long standing issue between the parties. In this regard, the dynamics of subsequent bargaining as stated in Finding of Fact 17 and the fact that the Union did not file a subsequent grievance are both a material change of circumstances.

Even if the Examiner would view Arbitrator Grenig's award as a construction of an ambiguity in Section V-I-2-c, a subsequent arbitrator ought not be precluded from hearing this matter. The parties correctly tend to agree to the general principle recognized by the WERC and labor arbitrators that ambiguous language interpreted by an arbitrator by reference to past practice continues to retain that same meaning in successive agreements until a party is successful in negotiating new language.[13] However, that rule has been stated as merely a presumption.[14] The Employer seeks an exception to that doctrine and the facts stated in Finding of Fact 17 are a clear factual foundation for that argument. The issue of whether the District is allowed to reject this past practice is an issue requiring interpretation of the parties' collective bargaining agreement. It is, therefore, primarily within the scope of issues subject to arbitration. It involves the interpretation and application of the final and binding arbitration provision of the grievance procedure, the parties' negotiation practices and contractual procedures, and Section VIII-B.

A core issue before the Examiner is whether he should interpret the main ambiguity in dispute or reserve it to a subsequent arbitrator. He concludes the matter should be reserved to a subsequent arbitrator. The underlying award was a "gap filling" situation in which the function of the WERC under Sec. 111.70(3)(a)5, Stats, ought to be very narrow. The underlying contractual issue is one which is in the nature of developing arbitral "case law" to which exceptions 2 and 5 to the doctrine of issue preclusion apply. There are materially different circumstances which ought to be reserved to a subsequent arbitrator.

In any event, the parties chose to adopt a contractual negotiation procedure and other express provisions about the District's right to make changes. The issue as to the right of the Employer to make changes in a practice underlying ambiguous language is properly left to a

[13]As to arbitrators, see, "Common Law" supra, Sec. 2.20 comment 3c. As to the WERC see, DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, 2/07).

[14] Elkouri, supra, p. 623.

subsequent arbitrator. For the foregoing reasons, the, the Examiner concludes that the Employer did not violate Section 111.70(3)(a)5, Stats. The Complaint is, therefore, properly dismissed.

Dated at Madison, Wisconsin, this 5th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

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