STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant,

vs.

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

Case 310
No. 67340
MP-4386

Decision No. 32419-B

Appearances:

Richard Thal, Lawton & Cates, S.C., Ten East Doty Street, Suite 400, Madison, Wisconsin 53701, appearing on behalf of Madison Teachers, Inc.

Kirk D. Strang, Davis & Kuelthau, S.C., Ten East Doty Street, Suite 600, Madison, Wisconsin 53703, appearing on behalf of the Madison Metropolitan School District and Board of Education of the Madison Metropolitan School District.

ORDER ON REVIEW OF EXAMINER'S DECISION

On January 5, 2009, Examiner Stanley H. Michelstetter issued Findings of Fact, Conclusions of Law, and Order dismissing Complaint in the above-captioned matter, holding that the Respondents Madison Metropolitan School District and Board of Education of the Madison Metropolitan School District (collectively "the District") did not refuse to accept an arbitration award and therefore did not violate Sec. 111.70(3)(a)5, Stats., as had been alleged by the Complainant Madison Teachers, Inc. (MTI or the Union).

On January 26, 2009, MTI filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision. Both parties filed briefs in supportive of their respective positions, the last of which was received on June 8, 2009.

For the reasons set forth in the Memorandum that follows, the Commission largely affirms the Examiner's Findings of Fact and affirms his Conclusions of Law and Order dismissing the complaint in this matter.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 12 are affirmed.

B. The Examiner's Findings of Fact 13 and 14 are set aside.[1]

C. The Examiner's Findings of Fact 15, 16, and 17 are renumbered Findings of Fact 13, 14, and 15 and as renumbered are affirmed.

D. The following Finding of Fact 16 is made:

> 16. During the 2007-08 school year, the District assigned one or more elementary specials teachers to more than 1,350 minutes per week of student contact time. Said assignment would have been a violation covered by the Specials II arbitration award if it had occurred during the period covered by 2005-07 collective bargaining agreement.[2]

E. The Examiner's Findings of Fact 18 is set aside.[3]

F. The Examiner's Finding of Fact 19 is renumbered Finding of Fact 17 and as renumbered is affirmed. [4]

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[1] The Examiner's Finding of Fact 13 set forth a proposal the Union had made in negotiations leading to the 2005-2007 collective bargaining agreement. We agree with the Union's argument on review that this Finding, while accurate, is immaterial to the issue presented in this case, since it predated both the Specials II award and the contract (2007-09) under which the instant case arose. The Examiner's Finding of Fact 14 states that "The parties never sought clarification of the Specials II award." We agree with the Union's argument on review that this finding, while also accurate, has no context in the record (such as whether or not the arbitrator would have had jurisdiction to clarify his award) and no bearing on the issue in this case.

[2] We agree with the Union's argument on review that the information set forth in this additional Finding, information to which the parties stipulated, is an integral part of the factual context for the instant case.

[3] The Examiner's Finding of Fact 18 refers to the parties' maintaining a voluntary impasse resolution procedure for successor contract negotiations and to the fact that during the pertinent time frame the parties have agreed to continue the predecessor contracts until the successor agreements have been reached. We agree with the Union's argument on review that this information, while accurate, has no bearing on the issue in the instant case.

[4] This Finding refers to the fact that the Union has not filed a grievance, subsequent to receiving the Specials II

G. The Examiner's Conclusions of Law 1 through 3 are affirmed.

H. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

award, regarding the assignment of more than 1,350 weekly student contact minutes to elementary specials teachers. On review, the Union challenged this Finding as "an ultimate (as opposed to an evidentiary) finding of fact." While this Finding adds little to the resolution of the issue in this case, it reflects that the Union acted consistently with its point of view that such a grievance would have been redundant given the Specials II award. As such, it helps complete the context for the instant case. Accordingly, we deny the Union's request to set aside this Finding.

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

For many years, the Union has represented a bargaining unit of teachers and other professional employees of the District. Included within the unit are teachers of music, art, physical education, and REACH, hereafter referred to as "elementary specials." Special subject teachers move from room to room and perhaps school to school and as a result have different needs in terms of travel and set-up time compared with the elementary classroom-based teachers.

At all relevant times, each successive collective bargaining agreement has contained the following provisions affecting the number of "student contact minutes" for elementary teachers:

. . .

V - Factors Relating to Employment –Classroom

. . .

I. HOURS OF SCHOOL

. . .

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

. . .

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.

. . .

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.
>
> . . .
>
> VIII - Other Board and MTI Agreements
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> 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. …

Each successive contract has also contained a grievance procedure culminating in final and binding arbitration.

The parties agree that, as a result of the specified minutes in section V.I.2.c. and the preparation time provision in section V.P., above, the number of student contact minutes per week for regular elementary classroom teachers (i.e., not "specials") has been either 1506 or 1523 at all material times. [5] The underlying dispute between the parties over the years has been whether and/or how the contract applies to the number of student contact minutes that the District may assign to elementary specials.

On April 4, 2003, the Union filed a grievance pursuant to the grievance procedure in the 2001-03 collective bargaining agreement, challenging the District's decision to assign certain elementary specials a teaching load in excess of 1,260 minutes per week. The Union contended that the District, by agreeing to a 1,260-minute standard for elementary specials for the 1999-2000 school year, by using that standard as a basis for a grievance settlement in 1999, and by continuing to abide by that standard for the 2000-01 and 2001-02 school years, had entered into a contractual commitment not to assign more than 1,260 minutes per week to specials. The arbitrator issued his award on February 9, 2004, holding that the District did not violate the contract by assigning elementary specials to teach more than 1,260 minutes per week during the 2002-03 school year. The arbitrator stated, *inter alia*:

> In this case, the parties' collective bargaining agreement contains no language limiting the number of minutes an elementary special teacher can be required to teach. However, the record indicates that elementary specials have historically taught 1,350 minutes a week. …

[5] The contractual language, at least in V.I.2.c., does not appear to have changed over the successive contracts during the relevant time frame. However, the record indicates that at an earlier point the number of minutes was construed to be 1506 and at a later point to be 1523. The record does not seem to explain this anomaly, but we merely note it here, since resolving it is not necessary to deciding this case.

The February 2004 arbitration award is referred to in the instant proceeding as "Specials I."

On September 30, 2004, the Union filed a second grievance concerning the number of student contact minutes properly assigned to elementary specials. The grievance challenged the District's decision to assign some full time specials more than 1,350 student contact minutes during the 2004-05 school year. The parties submitted the grievance to arbitration before the same arbitrator who had issued the Specials I award. On July 13, 2006, the arbitrator issued an award holding that the District violated the contract by assigning full time specials more than 1,350 minutes of teaching time. The arbitrator wrote, *inter alia*:

> 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. Because the bargaining unit covered by the contract includes eighteen classifications of District employees, including nurses, psychologists, and social workers, generally defined as "teachers" it is not plausible to interpret the contract so that the specified 1,506-minute maximum applies to bargaining unit members other than regular classroom teachers. 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. . . . Arbitrators generally agree past practice may be used to create a separate, enforceable condition of employment in appropriate circumstances. … ("If a collective bargaining agreement is silent about a particular topic and a practice has been in effect for an extensive period of time, arbitrators often use past practice to infer the existence of a term not set forth in the written agreement, assuming there are no contractual barriers to such an analysis.") …
>
> Since at least 1994, 1,350 minutes per week appears to have been the maximum standard used for allocation of elementary special teachers. . . .
>
> … The 1,350-minute standard is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as the fixed and established practice accepted by both parties. For more than a decade, the District has asserted 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.").

The July 13, 2006 arbitration award is referred to in this proceeding as "Specials II."

The Specials II award was issued in the middle of the parties' 2005-07 collective bargaining agreement. For the remainder of that contract term, the District did not assign elementary specials more than 1,350 minutes of student contact time. During negotiations for the successor (2007-09) agreement, the District conveyed in writing to the Union, "Note: Repudiate past practice, if any, on the scheduling of elementary specials teachers." During those negotiations, the Union proposed to add a subsection "f" to Article V.I.2, stating that full time specials would be assigned no more than 1,350 minutes per week of student responsibilities, with "(Note: the above represents the continuation of practice of scheduling specials.)" The Union did not agree that the District had a right to repudiate the past practice and the District did not agree to change the contract language.

During the 2007-08 school year, the District assigned one or more elementary specials teachers to more than 1,350 minutes per week of student contact time. The District acknowledges that this would have violated the contract if it had occurred during the 2005-07 agreement.

On October 8, 2007, the Union filed the instant prohibited practice complaint, contending that the District had refused to accept the terms of the Specials II arbitration award by failing to abide by the 1,350-minute standard for elementary specials student contact time during the 2007-08 school year.

Examiner's Decision and the Issues on Review

The Union contends that the Specials II award construed the contract to limit weekly instructional minutes for elementary specials to 1,350. To the Union, the arbitrator interpreted the language in the contract in light of the parties' practices and, since the contract language has not changed, the arbitrator's interpretation remains binding. Therefore, according to the Union, the District has refused to comply with the arbitration award by assigning elementary specials more than 1,350 minutes. To the Union, the District's unilateral claim of "repudiating" the practice, without changing any language, should be given no legal effect. The Union contends that its view of the Specials II award is reinforced by the arbitrator's specific reference to the practice remaining in effect until the party negotiates a change, citing Article VIII-B of the contract.

In contrast, the District contends that the Specials II award was based upon the arbitrator's finding of a "freestanding" past practice regarding the specials' instructional

minutes, one that did not clarify ambiguous language but rather filled in a "silence" or gap in the contract. The District believes it has the right to repudiate/renounce a freestanding practice of this type, citing DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, 12/08). To the District, this is particularly true of a practice that relates to a permissive subject of bargaining, as the District view this one to be.

The Examiner concluded that the Specials II award was ambiguous as to whether the arbitrator used past practice to construe ambiguous language or instead to fill in a silence or gap and therefore was ambiguous and not "final" as to whether the District could repudiate the practice for purposes of successor agreements. The Examiner further concluded that the arbitrator's comment about the effect of Article VIII-B was "dicta," since that issue was not before the arbitrator. The arbitrator concluded that the District's attempt to repudiate the practice subsequent to the Specials II award was a "materially different circumstance" that could change the outcome in a subsequent arbitration about the 1,350-minute standard for elementary specials. Accordingly, the Examiner held that the District did not "refuse to comply" within the meaning of Sec. 111.70(3)(a)5, Stats., and dismissed the complaint.

As discussed below, we essentially agree with the Examiner.

DISCUSSION

As the Examiner noted, the Commission has recently had occasion to explain the situations that constitute a refusal by an employer to accept the terms of an arbitration award:

> Historically, the Commission has viewed the [Sec. 111.70(3)(a)5 requirement … as taking two forms. First, an employer must comply with the specific remedy set forth in a specific arbitration award. see, e.g., STATE OF WISCONSIN, DEC. NO. 14823-C (WERC, 10/77) (holding that the State violated the law by granting the relief only to the specific grievants when the award by its terms covered all similarly situated employees). 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. See, e.g., WISCONSIN PUBLIC SERVICE CORPORATION, DEC. NO. 11954-D (WERC, 5/74).

STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 5/06) at 5-6. In that decision, as to the second variety of claim, the Commission cautioned 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." Further,

> [A]rbitration ... remains the primary forum for enforcing and interpreting contractual provisions. Both parties are entitled to fully litigate issues regarding the meaning of contract language in the arbitration forum. The Commission's jurisdiction under [Sec. 111.70(3)(a)5, Stats.] is not a proper vehicle for extrapolating the outcome of issues that were not actually controverted in earlier cases."

ID. at 8. See also, STATE OF WISCONSIN, DEC. NO. 31865 (WERC, 11/07); STATE OF WISCONSIN, DEC. NO. 32019-B (WERC, 1/09).

In the instant case, there is no question that the arbitrator in the Specials II award decided that the contract required the District to limit elementary specials' instructional minutes to 1,350 per week. There is also no question that the District implemented the actual relief that the arbitrator ordered up to and through the end of the contract in effect at the time of the award. At that point, the District announced that it would discontinue the practice that had given rise to the award. The District believes it has the legal and contractual authority to so renounce. In accordance with the renunciation, the District assigned some elementary specials more than 1,350 contact minutes per week in the next (2007-08) school year. The Union argues that the District lacked such authority, hence, according to the Union, the renunciation was not a material change because it had "no legal significance."

The only question properly before us in this proceeding is whether the Specials II award has already determined all the legal and factual issues necessarily raised by the District's decision to assign more than 1,350 minutes to some specials during the 2007-08 school year. Certainly many of those issues have been conclusively resolved in the previous arbitration awards. For example, neither party would be permitted over the other party's objection to relitigate the factual pattern of specials' assignments, the negotiations history prior set forth in prior awards, and the other factual circumstances found and recited in Specials I and II.

More difficult is whether the District's purported renunciation of the practice at the conclusion of the 2005-07 agreement constitutes a material change in circumstances that, in effect, creates a new issue that was not addressed in the previous awards. Underlying this question are other questions that both parties suggest are pivotal: What kind of past practice was the 1,350-minutes for elementary specials? Was it a practice that clarified ambiguous language or instead a "freestanding" or "gap-filling" practice? Would renunciation be permitted if it were one kind rather than the other? More importantly, did the arbitrator conclusively decide these questions?

Both parties have cited arbitral wisdom to the effect that past practices that are used to clarify ambiguous language become part and parcel of the contract language itself and cannot be renounced separately, whereas a "freestanding" or "stand-alone" practice, which may be binding during a contract term, might be subject to renunciation at the conclusion of the contract. See Union Brief at 10-12; District Brief at 20-23. Thus, both parties appear to believe that the nature of the 1,350 student contact hour practice for elementary specials –

whether or not it is to be viewed as grafted into contract language – might affect the significance of the renunciation. We agree.

Thus, in order to prevail here, the Union must meet the "relatively heavy burden" of proving that the arbitrator in Specials II has conclusively determined that the practice of 1,350 student contact hours for elementary specials could not be independently renounced at the conclusion of the contract. Like the Examiner, and contrary to the Union, we are not persuaded that the arbitrator conclusively decided this issue. As the parties have pointed out, the arbitrator characterized the nature of the issue inconsistently. In Specials I at 14, he stated that, "[t]he parties' collective bargaining agreement contains no language limiting the number of minutes an elementary special teacher can be required to teach." In Specials II at 17, he stated that "[t]he language in Section V-I-2-c …, construing the contract as a whole, is ambiguous with respect to standards on minutes for elementary specials." He also 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 [regard] to elementary specials teachers and other nonclassroom teachers."

It is not surprising that the arbitrator was less than explicit about the precise nature of the past practice, because that issue did not affect the outcome of the case before him. No matter how the practice was characterized, the arbitrator found it to be a binding contractual commitment. He had no need to be more precise on this question. Thus the question – what is nature of the practice – was neither explicitly nor inherently decided in the Specials II award.

As a result of the District's stated renunciation, it may or may not have become important now to parse the exact nature of the 1,350-minute practice. It is possible that an arbitrator might decide, under this particular contract, that this is a practice that can be renounced. It is also possible that an arbitrator might decide, even if the practice is "free-standing," that it cannot be renounced unilaterally under the parties' particular contract. [6] While there may be conventional arbitral wisdom on these issues, ultimately in grievance arbitration it is always a matter of a particular arbitrator interpreting a particular collective bargaining agreement. Such interpretation is outside of the Commission's limited role in this type of case. It is worth re-emphasizing that, "[t]he Commission's jurisdiction under

[6] The Union contends that the arbitrator in Specials II did, in fact, decide this issue. In the "Conclusion" on page 20 of Specials II, the arbitrator stated, "If either party wishes to change this long-accepted standard, that party must do so through negotiations – not unilateral action." The arbitrator then cited Article VIII.B of the agreement, which is set forth in the instant decision in the Summary of the Facts. We agree with the Examiner that this statement by the arbitrator was at best "dictum," since nothing in the award or the record in the instant case indicates that the parties had litigated in Specials I or II the meaning or application of Article VIII.B. For example, in the instant record, the District proffers bargaining history supporting the District's view that Article VIII.B does not apply to permissive subjects of bargaining. It does not appear on this record that the District did (or had reason to) present that kind of evidence to the arbitrator in connection with the Specials II award. Moreover, we have no reason to believe that the arbitrator intended to decide conclusively how Article VIII.B would apply to the District's purported renunciation of the instant practice at the end of a contract period.

[Sec. 111.70(3)(a)5, Stats.] is not a proper vehicle for extrapolating the outcome of issues that were not actually controverted in earlier cases." STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 5/06), at 8.

Our holding in the instant case is narrowly limited to our conclusion that neither the Specials I or II arbitration awards have conclusively determined the contractual nature of the 1,350-minute practice and/or whether or not it can be renounced unilaterally and independently of any other contractual provision. The District's stated renunciation may constitute material changes in circumstances depending upon the arbitrator's view of this issue.[7]

For the foregoing reasons, we hold that the District has not refused to comply with an arbitration award in violation of Sec. 111.70(3)(a)5, and we affirm the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin, this 14th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

[7] In light of the District's reliance upon the Commission decision (Commissioner Gordon concurring in pertinent part) in DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, 12/08), we take this opportunity to clarify that the question in DODGELAND (as to pay for loss of prep time for full time teachers) was whether a municipal employer may renounce/repudiate a practice that exists outside of the contract. This is not the same question as whether and how an employer may repudiate or renounce an unwritten practice that is *contractual* in nature. Contrary to the District's view, the pivotal factor in DODGELAND (on this issue) was that the practice was *non-contractual*, not that the practice was "unwritten." The Commission held in DODGELAND that an employer may lawfully repudiate a non-contractual practice that is a mandatory subject of bargaining, provided the renunciation is properly noticed to the union, the union is afforded an opportunity to negotiate in good faith about the issue, and the renunciation takes effect at the outset of the successor agreement. That holding is inapposite to practices that have a contractual basis, like the 1,350-minute practice at issue here.