STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENASHA TEACHERS UNION, LOCAL 1166, WFT, AFT, AFL-CIO and WISCONSIN FEDERATION OF TEACHERS, AFT, AFL-CIO, Complainants, vs. MENASHA JOINT SCHOOL DISTRICT, Respondent.	Case XXV No. 23554 MP-896 Decision No. 16589-A

Appearances:
Habush, Gillick, Habush, Davis and Murphy, S.C., Attorneys at Law, by Mr. John Williamson, on behalf of Complainants.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dennis S. Rader, on behalf of Respondent.
Ms. Judith Neumann, Staff Counsel, filing an *amicus curiae* brief, on behalf of the Wisconsin Education Association Council.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: Menasha Teachers Union, Local 1166, WFT, AFT, AFL-CIO and Wisconsin Federation of Teachers, AFT, AFL-CIO, herein the Federation, filed the instant complaint on September 22, 1978, with the Wisconsin Employment Relations Commission, herein the Commission, where it alleged that the Menasha Joint School District, herein the District, had committed certain unfair labor practices under the Municipal Employment Relations Act, herein MERA. The Commission on October 2, 1978 appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5) of the Wisconsin Statutes. Respondent filed an answer on October 30, 1978. The parties subsequently agreed to waive hearing in the matter and to have the issues decided upon the basis of joint factual stipulation which was received on November 29, 1978. The Federation and the District thereafter filed briefs and reply briefs. Pursuant to the agreement of the parties, the Wisconsin Education Association Council also filed an *amicus curiae* and reply brief.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Federation is a labor organization which represents a bargaining unit comprised of all certified full time and part time teachers employed by the District.

2. The District, a municipal employer, operates a school system in Menasha, Wisconsin.

3. The parties were privy to a 1977-1978 collective bargaining agreement which provided in part at Article XV, entitled "The Agreement", that:

> "This Agreement shall be in effect as of the dates hereof, and shall remain in full force and effect until August 31, 1978."

Pursuant to said provision, said collective bargaining agreement expired on August 31, 1978.

4. Article VIII of said contract contained three separate salary schedules. One ran from January 1, 1977 to August 31, 1977; the second ran from September 1, 1977 through December 31, 1977; and the third ran from January 1, 1977 to August 31, 1978. The latter salary schedule grid in part provided:

Salary Schedule
January 1, 1978 - August 31, 1978

Step	BA	BA+12	BA+24	MA	MA+15	MA+30
0	9,950	10,180	10,415	10,750	11,025	11,200
1	10,300	10,545	10,805	11,160	11,460	11,655
2	10,650	10,910	11,195	11,570	11,895	12,110
3	11,000	11,275	11,585	11,980	12,330	12,565
4	11,350	11,640	11,975	12,390	12,765	13,020
5	11,700	12,005	12,365	12,800	13,200	13,475
6	12,050	12,370	12,755	13,210	13,635	13,930
7	12,400	12,735	13,145	13,620	14,070	14,385
8	12,750	13,100	13,535	14,030	14,505	14,880
9	13,182	13,547	14,007	14,522	15,022	15,377
10	13,614	13,994	14,479	15,014	15,539	15,914
11	14,046	14,441	14,951	15,506	16,056	16,451
12		14,888	15,423	15,998	16,573	16,988
13		15,335	15,895	16,490	17,090	17,525
14		15,782	16,367	16,982	17,607	18,062
15				17,474	18,124	18,599
16				17,966	18,641	19,136

5. Since on or about February 13, 1978, the parties engaged in collective bargaining negotiations for a successor contract.

6. On or about June 2, 1978, the Federation petitioned the Commission for mediation-arbitration pursuant to Section 111.70(4)(cm)6, Stats. Thereafter, a member of the Commission's staff was assigned by the Commission to investigate the dispute between the parties. The investigator conducted informal investigation meetings on July 11 and August 10, 1978. Final offers were submitted to the investigator by the parties and the investigation was closed on August 28, 1978. On September 6, 1978, the Commission certified that the parties were deadlocked in their negotiations and ordered the parties to mediation-arbitration.

7. The number of columns and the number of increment steps were not a subject of negotiations between the parties. However, the amounts of money to be paid at the columns and steps were discussed in negotiations, and the parties submitted final offers which incorporated their respective positions on this issue. Thus, the Federation's final offer on this issue provided:

September 1, 1978 - August 31, 1979

Step	BA	BA+12	BA+24	MA	MA+15	MA+30
0	10550	10761	11289	11605	12133	12555
1	10946	11165	11712	12040	12588	13026
2	11342	11569	12135	12475	13043	13497
3	11738	11973	12558	12910	13498	13968
4	12134	12377	12981	13345	13953	14439
5	12530	12781	13404	13780	14408	14910
6	12926	13185	13827	14215	14863	15381
7	13322	13589	14250	14650	15318	15852
8	13718	13993	14673	15085	15773	16323
9	14114	14397	15096	15520	16228	16794
10	14510	14801	15519	15955	16683	17265
11	14906	15205	15942	16390	17138	17736
12		15609	16365	16825	17593	18207
13		16013	16788	17260	18048	18678
14		16417	17211	17695	18503	19149
15				18130	18958	19260
16				18565	19413	20091
CR*	15206	16717	17511	18865	19713	20391

*CR = Career recognition: Teachers who have been at the top of their lane for at least one year shall receive a career recognition bonus of $300."

8. The District, in turn, proposed the following salary schedule:

"September 1, 1978 - August 31, 1979

Step	BA	BA+12	BA+24	MA	MA+15	MA+30
0	10,475	10,705	10,940	11,275	11,550	11,725
1	10,825	11,070	11,330	11,685	11,985	12,180
2	11,175	11,435	11,720	12,095	12,420	12,635
3	11,555	11,830	12,140	12,535	12,885	13,120
4	11,935	12,225	12,560	12,975	13,350	13,605
5	12,315	12,620	12,980	13,415	13,815	14,090
6	12,685	13,015	13,400	13,855	14,280	14,575
7	13,075	13,410	13,820	14,295	14,745	15,060
8	13,455	13,805	14,240	14,735	15,210	15,545
9	13,917	14,282	14,742	15,257	15,757	16,112
10	14,379	14,759	15,244	15,779	16,304	16,679
11	14,841	15,236	15,746	16,301	16,851	17,246
12		15,713	16,248	16,823	17,398	17,813
13		16,190	16,750	17,345	17,945	18,380
14		16,667	17,252	17,867	18,492	18,947
15				18,389	19,039	19,514
16				18,911	19,586	20,081

Longevity· Teachers who are at the top step in their respective lanes during the 1977-78 school year and who will remain at that step during the 1978-79 school year, shall receive an additional $200.00 during the 1978-79 school year."

9. Unit employes represented by the Federation normally advance an increment step at the beginning of every school year if such employes successfully worked for the District the previous school year. At the beginning of each school year since 1970 and through 1977, there was a contract in effect between the parties and employes were advanced an increment step if they worked for the District the previous school year, except for 1971. In 1971, when the wage-price freeze was in effect, the parties agreed that the September base increase and increment would not be paid until after the wage-price controls were lifted on November 30, 1971. The status of collective bargaining agreements from 1970 to 1978 was as follows:

School Year	Master Agreement Year	Status of Contract at Beginning of School Year
1970-71	1970-71 School Year	Contract in effect at beginning of school year.
1971-72	Sept.1971-Dec.1972	Agreement between the parties to postpone September base increase and increment until after Nov. 30, 1971.
1972-73	1/1/73-12/31/73 Calendar Year	Contract in effect at beginning of school year.
1973-74	1/1/74-12/31/75 2 year	Contract in effect at beginning of school year.
1974-75	1/1/74-12/31/75 2 year	Contract in effect at beginning of school year.
1975-76	1/1/76-12/31/77	Contract in effect at beginning of school year.
1977-78	1/1/78-8/31/78 Shift from calendar year to school year	Contract in effect at beginning of school year.
1978-79	9/1/78-8/31/79	Contract expired on 8/31/78.

10. At the outset of the 1978-1979 school year, the District failed to advance all of its teachers under the provisions of Article VIII of the expired contract. Instead, the District on Septem-12, 1978, adopted the following policy regarding payment to its teachers:

"1) Teachers who were employed by the school district in 1977-78 and continue to be employed in this capacity, work under the Continuing Contract Law and therefore will not be moved vertically.

2) Teachers who are new to the system will be placed on the current schedule at the agreed-upon step and lane.

3) Teachers who were employed by the school district in 1977-78 and who were non-renewed and then re-employed by the school district, are working under a new contract (not continuing) and therefore will be moved vertically.

4) Teachers who have earned enough credits to change lanes will be so moved.

5) Comparison of a current semi-monthly check with that of the last semi-monthly check received in 1977-78 will result with a variable. This is the result of two factors:

   a) The base salary was increased by $400 in January, 1979. This full amount will be part of the continuing 1978-79 contract. During the 1977-78 (sic) the adjustment was equated to the number of contract days remaining between January 1, 1978, and June 9, 1978, and only a portion of the $400 was paid.

   b) The 1978-79 continuing contract will be divided into 24 payments. The adjusted 1977-78 contract was divided into 16 payments.

In conclusion, "a" will increase the semi-monthly amount and "b" will cause that amount to decrease . . ."

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Thereafter, the District paid its teachers under the terms of the above policy.

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

CONCLUSION OF LAW

The District's refusal at the outset of the 1978-1979 school year to advance all of its teachers under the terms of the salary grid contained in the expired contract was not violative of Sections 111.70(3)(a)1, 3, or 4 of MERA.

Based upon the above Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

It is ordered the Complaint herein be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of April, 1980.

By [signature]
Amedeo Greco, Examiner

AG/emw

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Federation asserts that the District's refusal to grant increments to all eligible teachers under the terms of the 1977-1978 salary grid was violative of Sections 111.70(3)(a) 1, 3, and 4 of MERA. Arguing that "This is an important, though not a difficult, case", the Federation contends that for pay purposes "the parties agreed that the relevant criterion should be not what a specific teacher received the prior year but what experience she or he has accumulated and that condition normally changes from year to year . . ." Accordingly, the Federation claims that the District's refusal to recognize that experience factor for all teachers constituted a reduction in teacher salaries and that it was therefore a change in the status quo then in effect. Moreover, the Federation contends that the District's actions "also creates irrational inequalities between teachers by paying some more for the same experience that it pays others."

The amicus curiae brief filed by the Wisconsin Education Association Council, herein WEAC, supports the Federation's position. WEAC claims that the withholding of the salary schedule increments changed the status quo in that employes reasonably expected to receive said increments by virtue of the "long-standing and consistent history of automatic annual increments . . ." WEAC also contends that the District's unilateral abolition of wage increments was inconsistent with any previous offer to the Federation and that said action was therefore violative of the District's bargaining obligation.

The District, on the other hand, maintains that its duty to grant automatic increments ended when the contract expired on August 31, 1978, and that it in fact thereafter maintained the status quo when it did not subsequently grant increments to all teachers under the salary grid of the expired 1977-1978 contract.

In resolving this issue, a few preliminary points should be noted.

One is that the parties, including WEAC, have indicated that the decision herein should not turn on whether an employer - following an impasse in negotiations - can unilaterally implement its last offer to a union. Accordingly, and as the issue posed can be decided on a narrower ground, it is unnecessary to resolve this impasse issue.

Secondly, and as noted in Finding No. 3, the 1977-1978 contract terminated on August 31, 1978. This case is therefore distinguishable from other cases which contain contract continuation clauses under which the contract would continue in effect until successor agreements were reached. 1/

1/ See, for example, Joint School District No. 8, (16000 (A)(B) 11/79.

By the same token, the instant case is distinguishable from those cases which have involved an employer's duty to maintain conditions of employment, pending negotiations for an initial con tract.2/ The reason for this is that such cases turn on whether an employer is obligated to maintain conditions of employment which it has maintained in the past. Here, as noted below, there is no past practice under which the District has granted increments during a contract hiatus. Moreover, although the issue need not necessarily be decided herein, there may be policy reasons to differentiate between an employer's obligation to maintain the status quo pending resolution for an initial contract versus the status quo which is required to be maintained during a contract hiatus. In the former situation, for example, an employer has unilaterally established wages, hours, and working conditions. As a result, there is no agreement with the employes that such matters might be frozen in the future. Once an initial contract has been negotiated, however, employes are put on notice that their contractual benefits are to be in effect only for the duration of their contract. Furthermore, since bargaining for an initial contract often lasts longer than does bargaining for a successor contract, it would be unfair to employes, and a windfall to employers, if employes were to be deprived of well established past benefits merely because they have chosen to exercise their statutory right to select a collective bargaining purposes. 3/

Moving on to another issue, the Federation argues in its brief that acceptance of the District's position would affect the rights of employes under contractual provisions relating to probation, seniority, sick leave, and vacation days. That is not necessarily so. For, whereas the parties herein bargained over what teachers would be paid for the 1978-1979 school year , there is no indication that the parties similarly bargained over the contractual provisions alluded to by the Federation. Absent such bargaining, the provisions of the expired contract would continue in effect until a successor contract was reached, as such provisions constitute the status quo. Moreover, even if those provisions were in dispute during negotiations, there would be considerable merit to the view that the benefits therein are accrued during the term of the prior contract and that an employer therefore cannot unilaterally deprive employes of such benefits, until at least such time as either an impasse is reached for a successor contract or the parties have exhausted the statutorily provided for dispute restitution mechanism.

2/ See, for example, Mid-State Vocational Technical and Adult Education District, V, (14958-C)

3/ See, for example , The University of Maine and the Board of Trustees, Case No. 79-08, June 29, 1979, wherein the Maine Labor Relations Board adopted a "dynamic view" of the status quo for the period before an initial contract, but at the same time, adopted a "static view" of the status quo for the post-contract period.

Turning to another issue, the Federation points out that the District's refusal to grant salary increments to all teachers has created "irrational inequalities between teachers by paying some more for the same experience than it pays others". This point is well taken as the District granted salary increases to teachers who earned additional educational credits and it gave salary increments to teachers who initially had been non-renewed and then rehired and it apparently placed newly hired teachers in the appropriate step, thereby giving them full credit for their prior experience. As a result, for example, a newly hired teacher with three years experience in another school district may have been paid more at the outset of the 1978-1979 school year than was a teacher who had been with the District for three years.

In response, the District maintains that teachers who taught for the District in 1977-1978 and who had their individual teaching contracts renewed received the identical contract for the 1978-1979 school year pursuant to Section 118.22, Stats. On the other hand, the District points out that newly hired teachers and teachers who were initially non-renewed but later hired, were not working under a continuation of their 1977-1978 contracts, but rather, under new contracts.

The District's response is not particulary persuasive, as it implies that the District can pick and choose whether to grant increments to individual teachers. Since the very purpose of a grid is to provide uniformity by paying teachers similarly situated the same salary, the District in essence is saying that it can encage in individual bargaining by unilaterally setting the salaries of a handful of teachers. The Federation's brief rightfully notes that such a result "interjects unfairness, absurdity, and, ultimately, divisiveness into the bargaining unit."

Nonethelss, the Federation's complaint does not allege that the District acted unlawfully when it granted increments to a few of its teachers. Instead, the thrust of that complaint is that a school district acts unlawfully when it refuses to advance all teachers under an expired salary grid. Accordingly, even if the District had not differentiated among some of its teachers, the primary legal question surrounding the granting of increments would still remain. Since the parties herein are clearly interested in this larger question, the Examiner concludes that resolution of the issue presented should not hinge on the fact that the District may have improperly granted increments to some of its teachers.

In addition, it must be emphasized that the instant dispute only centers on whether an increment must be paid granted following the termination of a contract. It does not in any way concern itself with whether teachers can be advanced from one salary lane to another after they have obtained their requisite post-graduate credits. Indeed, the District here did move teachers across the laned following the expriation of the contract because, in its words, "the contract was still in effect when the credits were earned." As a result, since this issue is not before the Commission, it would be totally improper to reach out and decide an issue which is not in dispute and which has not been briefed by the parties.

As to the substantive merits of the increments issue, all of the parties rely on the Commission's Greenfield 4/ decision

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3/ Greenfield Education Association vs. School Board, School District No. 6, (14026-B) 11/77.

in support of their respective positions. There, the Commission ruled that an employer is obligated to maintain the status quo during a contract hiatus. Pointing to Greenfield, supra, the District argues that it in fact maintained the status quo by freezing most of its teachers at the salaries they received for the 1977-1978 school year. The Federation and WEAC, on the other hand, assert that the salary grid was part of the status quo during the contractual hiatus and that the District's refusal to advance all teachers pursuant to that grid was violative of the status quo requirement set forth in Greenfield, supra.

This case turns, then, on what constitutes the status quo. Does the status quo consist of advancing teachers under the grid, as urged by the Federation and WEAC, or does the status quo consist of freezing teachers at the salaries they received in the prior year, as contended by the District? The parties acknowledge that the Commission itself has never decided this precise issue 5/ and, as a result, they have cited numerous cases in other jurisdictions which have involved this issue.

WEAC, for example, claims that its position has been sustained in the following cases: Galloway Board of Education v. Galloway Education Association, 393A.2d218, 100 LRRM 225 (N.J. Sup. Ct. 1978); Hartford Federation of Teachers v. Board of Education, 92 LRRM 3149 (Conn. Superior Ct. 1976); Springfield Board of Education v. Education Association 95 LRRM 3001 (Ill. App. Ct. 1977); and Duluth Federation of Teachers v. Independence School District No. 709 (St. Louis Cty. Dist. Ct.), No. 137947 (10/75).

The District, in turn, points out that: (1) Galloway, supra, turned on a separate New Jersey statute which required teacher advancement on the salary schedule and that no such statute exists in Wisconsin; (2) Hartford, supra, involved what rights parties have when they reach impasse, which is not an issue herein; (3) Duluth, supra, had no supporting rationale for its conclusionary findings; and (4) Springfield, supra, arose in an injunction situation. Instead of relying on any of those cases, the District contends that the Commission should follow Board of Cooperative Educational Services of Rockland County vs. New York State Public Employment Relations Board, et al (herein BOCES) 95 LRRM 3046, May 21, 1977, wherein the highest court in the State of New York found that a school district was not required to pay teacher increments at the expiration of a contract. 6/ To the same effect, says the District, is Cardinale vs. Anderson, 84 LRRM 2268 (1973), another New York case. The District also cites two cases by the Kansas Supreme Court: NEA - Wichita et al vs. the Board of Education Unified School District No. 259, Wichita (No. 49,740-February 24, 1979) and NEA-Goodland vs. Board of Education, U.S.D. 352, Sherman County (No. 50,165-March 31, 1979). In addition, the District notes that the Indiana Education

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5/ In Gateway Vocational, Technical and Adult Education District, VII, No. 14142-B 2/78, the Commission affirmed a hearing examiner's ruling that a school district had not acted unlawfully when it refused to grant increments at the expiration of a contract. In so ruling, however, the examiner made it clear that his holding was based on the fact that the dispute arose in the context of a representative proceeding and that he was not passing upon whether, absent such a proceeding, a school district could withhold increments at the expiration of a contract. Since no such representation proceeding exists in the instant case, Gateway, supra, is therefore not controlling.

6/ In doing so, the court modified Matter of Triborough Bridge and Tunnel Authority, 5 PERB 3064 (1972), wherein the New York Public Employment Relations Board had earlier ruled that certain increments had to be paid during a contract hiatus.

Employment Relations Board found that increments are not automatic in Georgia Sheppard vs. Mill Creek Community School Corporation Board of School Trustees, (Case No. U-78-36-3335).

In response, WEAC argues that the rulings in BOCES, supra, and NEA-Goodland, supra, "proceed upon principles which are not only irrelevant but repugnant to traditional labor relations policies'. WEAC also contends that the two cited Kansas cases are distinguishable because they involved the application of the Kansas "Continuing Contract Law".

A review of the above cited decisions established that there is, indeed, a difference of opinion throughout the United States as to whether the status quo requires advancement on a salary grid following the termination of a contract. Accordingly, while the cited opinions may be of some value, the Examiner is of the opinion that the Commission must make its own independent determination as to what the correct law should be in the State of Wisconsin on this issue.

WEAC also argues that a long-standing and consistent history of automatic annual increments existed here and that, as a result, the teachers herein reasonably expected to receive their increments for a new work year. In this connection, WEAC claims that:

> "If employes reasonably expect to receive normal or automatic wage increases at a particular time, as bonuses, merit raises, or annual increments, those increases are part of the established wage system or status quo."

Going on, WEAC maintains that the National Labor Relations Board (NLRB) and various courts have recognized this "dynamic concept of the status quo" and that the United States Supreme Court accepted this principle in NLRB v. KATZ, 369 U.S. 736. Thus, WEAC points to cases which have held that the status quo requires payment of incentive pay rates, 7/ promised wage increases, 8/ cost-of-living increases, 9/ year-end bonuses, 10/premium pay plans, 11/ Christmas bonuses, 12/ and other bonuses and automatic

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7/ McGraw-Edison Co. v. NLRB, 419 F.2d 67, 72 LRRM 2918 (8th Cir. 1969).

8/ Armstrong Cork Co. v. NLRB, 211 F.2d 843.

9/ State Farm Mutual v. Am. Comm. Asso., 195 NLRB No. 155, 79 LRRM 1621 (1972).

10/ Progress Bulletin Pub. Co., 182 NLRB No. 135, 74 LRRM 1237 (1970)

11/ NLRB v. C&C Plywood Corp., 385 U.S. 421, (1967), reh. den. 386 U.S. 939, 64 LRRM 2065.

12/ Gas Machinery Co., 221 NLRB No. 129, 90 LRRM 1730 (1975); Mello Pistoresi and Son Inc., 203 NLRB 905, 83 LRRM 1212 (1974), enf. den. on factual grounds, 500 F.2d 399, 86 LRRM 2936, (9th Cir. 1974); NLRB v. McCann Steel Co., 448 F.2d 277, 78 LRRM 2237 (6th Cir. 1971), enf'g in part, 184 NLRB 779, 76 LRRM 1556 (1970)

increases. 13/

There are several major difficulties with this contention. The first is that all of the cited cases deal with the private sector. Since bargaining in the public sector at times differs from the private sector, care must be taken before mechanistically applying private sector rules to the public sector. 14/ It is for that reason, perhaps, that some public sector agencies in the United States have refused to accept the "dynamic View" of the status quo in its entirety. Thus, as noted above, the Maine Labor Board has adopted a "static view" of the status quo during a contract hiatus. The Florida Public Employment Relations Commission has also held that the status quo is to be determined by classifying benefits "as either cyclical or continuing in nature". 15/ Secondly, none of the above cited cases deals with a contract hiatus and the concomitant obligation of an employer to maintain the terms of an expired contract during such a hiatus. Instead, all except one deal with either of two unrelated issues, i.e., the obligation of an employer to maintain past terms and conditions of employment during negotiations for an initial contract or the payment of Christmas bonuses. The only exception is C&C Plywood supra, which centered on whether an employer could unilaterally institute a premium pay plan for certain employes during the term of a contract. Here, of course, we are not dealing with an existing contract. Thirdly, and most importantly, the record herein in fact fails to establish that the District automatically gave annual increments in the absence of a collective bargaining agreement. For, as noted in Finding No. 9, and with the exception of 1971 when the wage-price freeze was in effect, the District from 1970 to 1978 gave automatic increments at the outset of the school year because such increments were required under the terms of an operative collective bargaining agreement. In none of those years, however, had the contract expired. As a result, 1978 marked the first time that the question of advancement on the grid arose following the termination of the contract. Since this case turns on the narrow question of what happens during a contract hiatus, and as there was no history of granting increments during such a hiatus, the cases cited by WEAC are inapposite as they all turned on an employer's well established past practice. Accordingly, the subjective feelings of the teachers herein as to whether they expected advancement on the grid are not controlling, as there is no past practice to show that teachers could reasonably expect that such increments would be automatically given during a contract hiatus.

13/ Jimmy Dean Meat Co. Inc., 227 NLRB No. 227, 94 LRRM 1414 (1977); Century Electric Motor Co. v. NLRB, 447 F.2d 10, 14, 78 LRRM 2042 (8th Cir. 1971); NLRB v. Harrah's Club, 403 F.2d 865, 874, 69 LRRM 2775 (9th Cir. 1968); Beacon-Journal Publishing Co. v. NLRB, 401 F.2d 336, 367, 69 LRRM 2232 (6th Cir. 1968); NLRB v. Wonder State Mfg. Co., 344 F.2d 210, 213, 59 LRRM 2065 (8th Cir. 1965); NLRB v. Niles-Bement-Pond Co., 199 F.2d 713, 714, 31 LRRM 2057 (2nd Cir. 1952).

14/ See for example, Unified School District No. 1 of Racine County v. WERC, 81 Wis 2d. 89 (1977).

15/ Levy County School Board, 5 FPER 10213.

WTAC also alleges that the District here did not merely "freeze" increments, but that it eliminated them at the outset of the 1978-1979 school year. WTAC claims that such action constituted "economic warfare" and that it "unfairly exacerbates the economic pressure on employes which already attends protracted negotiations beyond the expiration of agreements." Numerous cases are cited in support of this general proposition. 16/

The difficulty with this claim is that it is a bootstrap argument. For, the underlying premise of this claim is that teachers are entitled to automatic increases during a contract hiatus. If one accepts that premise, then the District, indeed, did wage "economic warfare". However, since it is that very premise which is in issue in the instant case, it is necessary to determine whether such increments are, in fact, automatic.

The resolution of this issue largely turns upon what aspect of the problem is examined. If, for example, one looks only at the expired grid, a good case can be made for the view that it is that grid which determines teacher salaries and that teachers automatically advance on the salary schedule at the beginning of a new school year. On the other hand, if one focuses only on what teachers have been paid in their prior year of employment, there is merit to the claim that the status quo requires continuation of that payment and that no automatic increments are warranted at the expiration of a contract. Any attempt to resolve this issue by the use of such abstract reasoning, however, would be useless, as it would be akin to debating how many angles can dance on the head of a pin. Instead, it is far better to examine the realities of the collective bargaining process, as such an examination reveals the true nature of a teacher salary grid.

Here, for example, the expired 1977-1978 contract listed various steps and lanes under the heading "Salary Schedule January 1, 1978 - August 31, 1978". The plain meaning of this language is that that schedule will be effective for that time frame and that teachers for the second half of the 1977-1978 school year would be paid the amounts specified therein. Period.

There is absolutely nothing in that language, however, to indicate that teachers would be automatically advanced on the salary schedule for the next school year. That question - what salary teachers will receive in the next school year - is one which must be resolved in the collective bargaining negotiations for a successor contract. Indeed, the Federation itself recognized that fact when it sought to increase the salaries for the

16/ Greenfield, supra; NLRB v. Katz, supra; Racine School District, 11315-B, D (4/74); Winter Jt. School District, 14482-B, C (1977) NLRB v. Crompton Highland Mills, 337 U.S. 217 (1949). In re Cumberland School District, 100 LRRM 2059 (1978); NLRB v. Insurance Agents' Int'l. Union, 361 U.S. 477 (1960); Kenosha County, 14937-B, 14943-B (1/78); Borden, Inc. 196 NLRB 1170; American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); Hi-Way Billboard Inc., 203 NLRB 688; Harford Fed. of Teachers v. Board of Education, 92 LRRM 3149; NLRB v. Almside Bus Lines, Inc., 333 F.2d 724, 56 LRRM 2548 (1st Cir. 1964); Bi-Rite Foods, Inc., 147 NLRB 59; Taft Broadcasting Co., 163 NLRB 475, enf. den. on other grounds; Aftra v. NLRB, 395 F.2d 622, Eddie's Chop House, 165 NLRB 861; Manor Mining and Contracting Co., 197 NLRB 1057; NLRB v. Intracoastal Terminal Inc., 386 F.2d 954, 47 LRRM 2629 (5th Cir. 1961; Caravelle Boat Co., 222 NLRB No. 162; and Pasco County School Bd. v. PERC, 96 LRRM 3347.

1978-1979 school year. Thus, as reflected in its final offer, the Federation sought to increase each step of the salary grid by approximately $600 to $1,100. In addition, the Federation sought a "career recognition" bonus of $300 for teachers who were at the top of their lanes. In seeking those wage increases, the Federation was therefore obviously of the view that the grid in the expired 1977-1978 contract was not determinative of how much teachers would be paid in the subsequent 1978-1979 school year.

If one doubts that that is so, he/she need only ask what would happen if a school district ever took the position that the grid in an expired contract continued in effect for the next school year that it was therefore relieved of its obligation to bargain over salary increases for a successor agreement, and that, instead, it was only required to grant the increments provided for in the expired contract. If any district ever took that position, the howls of laughter (or outrage) from the teacher bargaining team would be deafening. The teachers would rightfully reject such an assertion because they know that they have the right to bargain for higher salaries at the expiration of a contract and that what they received under a prior contract is not binding on what they are to receive under a successor contract. It is for that reason that teachers almost universally bargain for higher salaries at the expiration of a contract. Requests for higher salaries can come in a variety of ways, e.g., raising the cells (i.e., base pay), adding steps, adding lanes, or by asking for longevity pay.

Collective bargaining in the State of Wisconsin guarantees that teachers, along with other municipal employes, can ask for higher wages, fewer hours, and/or better working conditions. For, as noted by Samuel Gompers nearly a century ago, unions want "more". Here, by asking for higher salaries for the 1978-1979 school year, it is clear that the Federation likewise sought "more".

But, having said that, an important caveat must be added: although collective bargaining enables teachers (and others) to seek "more", the system does not guarantee that teachers (and others) will necessarily receive "more". For, by the same token that unions can bargain over changes in an expired salary grid, school districts can similarly bargain over what they are to pay teachers. Thus, districts can insist that a grid should be contracted by decreasing the number of lanes and/or steps. Similarly, while they may be willing to increase base salaries, school districts are free to reject proposals dealing with either the creation of additional lanes and steps or longevity increases. Moreover, districts can insist that they will not grant any salary increases of any kind. Furthermore, school districts can even insist that teachers may have to suffer salary cuts. While it is extremely rare for municipal employers in Wisconsin to refuse to grant any wage increases or to cut salaries, the fact remains that there is no requirement which guarantess wage increases to employes. Thus, for example, if a school district (or other municipal employer) finds itself in a financial bind, the district may be able to claim that it simply cannot afford any wage increases. Indeed, Section 111.70(4)(cm)(7)(c) of MERA states that in considering the respective positions of the parties, a mediator/arbitrator shall pay attention to "the financial ability of the unit of government to meet the costs of any proposed settlement."

As a result, while the Federation here sought to increase teacher salaries for the 1978-1979 school year, the central fact remains that the District was not required to grant any such increases. To the contrary, the District had the legal right to either offer a smaller salary increase than was requested, to offer absolutely no increase whatsoever, or to even offer to decrease salaries. The question of what teachers would be paid for the 1978-1979 school year, then, was one which was entirely open. There was, therefore, no agreement at the outset of the 1978-1979 school year between the parties as to what salaries should be for that year, since that was a matter which could only be resolved in the collective bargaining process. 17/

What the Federation is seeking then in the instant case is an interim agreement under which the District at the outset of the 1978-1979 school year would pay teachers more than they paid them in the 1977-1978 school year, pending resolution of their collective bargaining negotiations for a successor contract, after which point, according to the Federation's final offer, the District would then have to pay the teachers even more than that interim increase. For example, a teacher in the "BA" lane with five year's experience received a yearly salary of $11,700 under the terms of the expired January 1, 1978 to August 31, 1978 grid. If that teacher were to receive an automatic increment at the outset of the 1978-1979 school year, that teacher would receive a salary of $12,050. Thereafter, if the Federation's offer were accepted, that same teacher would receive a salary of $12,926 for the remainder of the year. The September increment, then, would clearly be an interim increase.

The School District, however, was not required to enter into such an interim agreement for several reasons. First, and as just noted, collective bargaining does not guarantee that teachers in fact will receive larger salaries for the 1978-1979 school year than they received for the 1977-1978 school year, as that is an issue which can only be resolved through the collective bargaining process.

Secondly, while it is argued that advancement on the expired grid constitutes the status quo, such an advancement in fact would constitute a substantial change in the status quo in that teachers would receive several hundred dollars more than they received in the previous year. In this connection, Commission records indicate that there are about approximately 200 teachers in the bargaining unit. The grid for the 1977-1978 contract herein shows that the increment steps vary widely, from about $350 to $537. If one assumes that the average increment approximates $400 and multiplies that sum by the 200 teachers, automatic advancement on the grid at the outset of the 1978-1979 school year would have cost the District approximately an additional $80,000 over and above the salaries it paid for the previous year. 18/ Viewed in that light, it can hardly be said that automatic advancement on the grid merely reflects the status quo, when it in fact represents a major cost increase to a school district.

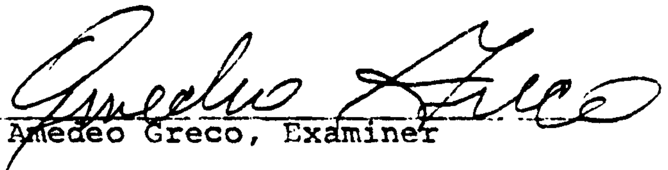
Thirdly, the Wisconsin Supreme Court has held in another context that parties are not required to enter into interim agreements. In State of Wisconsin, Department of Administration v. Wisconsin Employment Relations Commission, 90 Wis. 2d. 426., the State of Wisconsin asserted that a union could not bargain over the effective date of a contract which provided for retroactivity on the ground that such retroactive wage increases were prohibited by Art. IV, Section 26, of the Wisconsin Constitution. The State of Wisconsin there argued that the parties were therefore bound to the terms of an interim agreement between the expiration of the old contract and agreement on a successor contract, one which, in the State's view, mandated that compensation be paid under the terms of the old contract during the contract hiatus. The Court rejected that contention, finding in pertinent part that:

> "The fact that the law requires the parties to maintain the status quo during the period of contract negotiations does not mean that the parties have agreed to a contractual wage agreement for the hiatus period. We believe it would be illogical to conclude that the law requires the parties to adopt an interim wage agreement when that is one of the overriding issues in collective bargaining negotiations. The retroactive wage adjustment, whether it be up or down, is a necessary ingredient of such negotiations. The adjusted wage rates can properly be retroactive to the date when the wages became indefinite as a result of the expiration of the old contract and thus became subject to future determination by the execution of a new contract."

Here, since the District is not contending that a union is precluded from bargaining over wages during a contract hiatus, the cases are somewhat distinguishable. Nonetheless, both the Federation and WEAC argue that the District is in effect required to enter into an interim agreement by advancing teachers on the grid at the outset of the 1978-1979 school year, even though the question of teacher salaries for the 1978-1979 school year is, in the words of the Court, "one of the overriding issues in collective bargaining negotiations." That being so, it is also true that the question of retroactivity for the 1978-1979 salaries is, again in the words of the Court, "a necessary ingredient of such negotiations". Since, as noted above, such negotiations may result in either higher, the same, or lower wages, it would be unreasonable to require the District to enter into an interim agreement under which it would be required to advance teachers pursuant to the grid in the expired 1977-1978 contract.

In light of the above, the Examiner therefore concludes that the maintenance of the status quo during a contract hiatus does not require a school district to grant increments pursuant to the grid of an expired contract. The complaint is therefore dismissed in its entirety.

Dated in Madison, Wisconsin this 28th day of April, 1980.

By 
Amedeo Greco, Examiner

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