STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVE HARTMANN, BUSINESS REPRESENTATIVE, LOCAL 95, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO,	:	
Complainant,	:	Case XXIV No. 28629 MP-1251
vs.	:	Decision No. 19084-B
RICHARD WASSON, DIRECTOR OF OPERATIONS, WISCONSIN RAPIDS BOARD OF EDUCATION,	:	
Respondent.	:	

Appearances:

Mr. Joseph E. Finley, Attorney, 57 Brookstone Drive, Princeton, New Jersey 08540, appearing on behalf of the Complainant.

Melli, Shiels, Walker & Pease, Attorneys, by Mr. James K. Ruhly, 119 Monona Avenue, P.O. Box 1664, Madison, Wisconsin 53701, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 95, Office and Professional Employees International Union, AFL-CIO having, on September 11, 1981, filed a complaint with the Wisconsin Employment Relations Commission alleging that the School District of Wisconsin Rapids had committed a prohibited practice within the meaning of Sections 111.70(3)(a)(1), (3) and (4), Wis. Stats.; and the Commission having appointed Christopher Honeyman, 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 Section 111.07(5), Wis. Stats.; and the parties having stipulated to all of the relevant facts, briefs having been filed with the Examiner by both parties, and the record having been closed on April 5, 1982; the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 95, Office and Professional Employees International Union, AFL-CIO, herein Complainant or the Union, is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats.; and that Steve Hartmann is its Business Representative.

2. That the School District of Wisconsin Rapids, herein the Respondent or District, is a public school district organized under the laws of the State of Wisconsin having its principal offices at 510 Peach Street, Wisconsin Rapids, Wisconsin 54494, and is a municipal employer within the meaning of Section 111.70(1)(a), Wis. Stats.; and that Richard Wasson is its Director of Operations and its agent.

3. That on December 23, 1980 the Wisconsin Employment Relations Commission certified Complainant as exclusive representative of all regular full-time and regular part-time office clerical employes and aides employed by the District, but excluding supervisors, confidential employes, professional employes, maintenance and kitchen employes, and administrators.

4. That bargaining over the terms of a first collective bargaining agreement thereafter ensued between Complainant and Respondent; that at no time material herein has a collective bargaining agreement existed between Complainant and

Respondent; and that wages, salary schedules and vacation schedules were among those items at issue between the parties at least until January 19, 1982.

5. That commencing in or about the 1975-76 school year, Respondent adopted and annually updated manuals specifying terms and conditions of employment for the employes described in Finding of Fact No. 3; that the most recent such manuals were in existence for the period July 1, 1980 to June 30, 1981; that said manuals and the District's personnel policies provided for automatic salary and vacation increases according to length of service by an individual employe; that in 1980-81 the manual applicable to full-year secretarial employes included the following wage schedule:

Secretary	I	II	III	IV	V
Start	4.28	4.51	4.84	5.40	6.20
6 Months	4.42	4.67	5.01	5.59	6.42
12 Months	4.57	4.82	5.17	5.77	6.63
24 Months	4.71	4.98	5.34	5.96	6.84
36 Months	4.86	5.13	5.50	6.14	7.05

Longevity

5 or more years	4¢ per hour
10 or more years	8¢ per hour
15 or more years	12¢ per hour;

and that in 1980-81, the full-year manual specified the following terms, inter alia, for vacation rights:

> Paid vacations are granted only to employees who work on a year-round basis. Paid vacations are granted according to the schedule below:
>
> 80 hours after one year (75 hours for a 37 1/2 hour work-week employee)
> 120 hours after eight years (112 1/2 hours for a 37 1/2 hour work-week employee)
> 160 hours after fifteen years (150 hours for a 37 1/2 hour work-week employee)

6. That upon expiration of said 1980-81 manuals Respondent, without bargaining with Complainant, terminated its policies of automatic salary and vacation progression for said employes, and refused to grant such improvements to employes reaching the lengths of service specified in said manuals after June 30, 1981; and that by these actions Respondent unilaterally and materially altered wages and terms and conditions of employment of the employes described in Finding of Fact No. 3, and refused to bargain with Complainant.

7. That Respondent did not take the actions described above in Finding of Fact No. 6 to discriminate against employes in order to discourage membership in Complainant.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That Respondent, by its actions specified above in Finding of Fact No. 6, has committed and is committing a prohibited practice within the meaning of Sections 111.70(3)(a)(1) and (4), Wis. Stats.

2. That by said actions Respondent has not committed and is not committing a prohibited practice within the meaning of Section 111.70(3)(a)(3), Wis. Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

IT IS ORDERED that the School District of Wisconsin Rapids, its officers and agents shall immediately:

1. Cease and desist from refusing to bargain with Local 95, Office and Professional Employees International Union, AFL-CIO.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

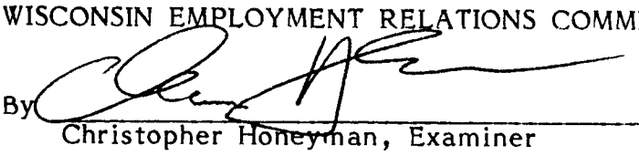
   a) Immediately reinstate its policy of paying automatic salary and vacation improvements to employes reaching the length-of-service requirements specified in its 1980-81 employe manuals and make all affected employes whole for losses occasioned by its unilateral change in said policies, for the period beginning July 1, 1981 and ending when negotiated changes in said conditions of employment take effect.

   b) Notify all employes, by posting in conspicuous places where employes work, copies of the notice attached hereto and marked Appendix "A", which notices shall be signed by a responsible representative of the Respondent, shall be posted immediately upon receipt of a copy of this Order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by Respondent to ensure that said posted notices are not altered, defaced or covered by other material.

   c) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith. 1/

Dated at Madison, Wisconsin this 26th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

WE VIOLATED employes' rights under the law, by changing our prior policy of paying increased wages and granting more vacation as employes gained greater lengths of service without bargaining with Local 95, Office and Professional Employees International Union, AFL-CIO. If employes incurred losses by reason of this action we will make them whole for such losses.

By _____
School District of Wisconsin Rapids

Dated this _____ day of _____, 1982.

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the District violated Sections 111.70(3)(a)(1), (3) and (4), Wis. Stats., by unilaterally refusing to continue progression of clerical employes on pre-existing wage and vacation schedules as of July 1, 1981. Respondent Richard Wasson is charged by name apparently only in view of his official position as Director of Operations of the District.

The facts are stipulated. The employes in the unit involved here have been subject, since at least the 1975-76 school year, to employe "manuals" established, and updated annually, by the District. Since 1977-78 these manuals, which spell out the District's personnel policies in this unit, have specified schedules for periodic salary increases depending on length of service and classification and independent of annual general salary increases. The manuals have also specified increasing amounts of vacation entitlement for employes with greater lengths of service. In more recent years separate manuals, with differing wage rates and benefits, have been issued for full-year secretarial employes as opposed to school-year secretarial, clerical and aide employes. In the 1980-81 "full-year" manual the wage and vacation schedules noted in Finding of Fact No. 5 were specified. School-year employes are not entitled to vacation under the 1980-81 manual, and their wages also varied from the full-year employes' schedule; the school-year manual also, however, provided for automatic progression. The differences in amounts are not relevant to the immediate issue herein.

On December 23, 1980 the Commission certified the Union, following an election, as exclusive representative of a unit of employes essentially co-extensive with those covered by the two manuals referred to above. Bargaining commenced and was not resolved by the time briefs were received in this matter. The most recent policy manuals were, by their terms, for the period July 1, 1980 - June 30, 1981, and on their expiration they were not replaced. Among the items at issue in the negotiations have been wage rates, salary schedules, vacation entitlement and the effective date of the contract.

During the period July 1, 1980 - June 30, 1981 the District moved affected employes from step to step on the manuals' salary and vacation schedules in accordance with the length-of-service requirements spelled out in the manuals. Since June 30, 1981, however, the District has refused to move employes further on these schedules. The matter has been discussed at several bargaining meetings, and both parties at these meetings took positions consistent with their legal arguments discussed below.

Respondent relies primarily on Menasha Joint School District 2/ for its contention that failure to advance employes on the expired schedules after June 30, 1981 is a "neutral" act and not a unilateral change in wages and/or conditions of employment. 3/ Respondent argues that the majority holding in Menasha was to the effect that maintenance of the status quo neither requires nor favors continuation of an expired schedule and that flat freezing of actual wage rates and benefit entitlements is the most neutral act an employer can take during the course of bargaining.

Complainant argues, however, that Menasha is distinguished from the present case in that this matter involves negotiation of an initial contract and the question of maintenance of a status quo including or excluding advancement on salary and vacation schedules established solely by the employer. Both parties cite precedent from other jurisdictions in support of their respective positions. The Examiner does not rely on these precedents, but two such cases are worthy of

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2/ Decision No. 16589-B (9/81).

3/ See City of Greenfield, Decision No. 14026-B (11/77) for the general proposition that an employer must maintain the status quo until its duty to bargain is fulfilled. Good faith is not a defense where a unilateral change precedes impasse in negotiations. (NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177, 1962).

note. In NLRB v. Dothan Eagle, Inc. 4/ the Court found violations both in the employer's refusal of automatic progression increases during organizing and in its continued refusal during first-contract bargaining. And in NLRB v. Allied Products Corp. 5/ a violation was found when the employer abrogated its prior policy of holding regular performance reviews and granting merit wage increases, after a union had been voted in by its employes.

None of the cases cited by Respondent addresses the issue of cessation of automatic progression increases in its present context of first-contract bargaining.

In Menasha, the salary schedule involved was the result of a prior round of collective bargaining with the union complaining therein. The Examiner in that case 6/ noted that

> . . . 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 contract. 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 the 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. (sic)

In affirming the Examiner's decision in Menasha, the Commission majority did not specifically address the question of whether the same rationale would apply in a first-contract situation such as that presented here. As the majority noted, however, that an amicus curiae in that case raised this question in its brief on review, the impression is left that the majority did not disagree with the reservations expressed by the Menasha Examiner in his decision referred to above. Certainly the Commission did not take the opportunity to overturn the theory of Mid-State Vocational, Technical and Adult Education District. 7/ In that case, the Examiner (subsequently upheld by the Commission) found that the employer changed the status quo when, during bargaining for an initial contract, it departed from its prior policy of paying 100% of health insurance premiums and froze said premiums at their former dollar level upon receiving a substantial increase in the rate. While Respondent vigorously asserts that that case is distinguishable on the grounds that the result of the employer's action therein was to reduce employes' take-home pay, the undersigned believes that it has some applicability. In Mid-State the employer had left itself open, by its prior policy, to automatic payment of future increases in health insurance costs. In this matter the Respondent left itself open, by its prior policies, to automatic increases in salary and vacations by increasing length of service of its personnel. The undersigned does not believe that it would be stretching Mid-

change in its prior policy of accepting the automatic increases in its costs as they came, rather than in the resulting deduction from employes' paychecks. That being so, there is "a distinction without a difference" between Mid-State and the present case.

It is appropriate, however, in view of the subsequent decision in Menasha, to consider the policy implications of that case and in particular whether the policies there discussed could be considered applicable to a first-contract situation. The majority began by citing, generally with favor, the following passage from the Examiner's decision:

> 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'.
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> 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 guarantees 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.'
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> 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, therfore, 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. (Footnote omitted.)
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> 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.

. . .

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.

. . .

To some extent, the majority then departed from the Examiner's rationale by stating:

. . . The basis for resolving said dispute can be derived from an examination of the underpinning of the status quo doctrine - the concept that the absence of change in wages, hours and working conditions is the best and most neutral atmosphere in which the realities of the collective bargaining process may take their course after a contract has expired.

The maintenance of the status quo during the contract hiatus is not dependent upon the continuation of a contractual obligation in a pre-existing contract, but in the continuation of the wages, hours and conditions of employment which existed at the time when said agreement was in effect. Here, the District, during the contract hiatus, maintained the same salary payments which it has paid to the employes during the term of the agreement, thus maintaining the status quo.

Acceptance of the Complainants' position would constitute a rejection of the doctrine of maintaining the status quo, as it would require change in the form of a salary increase. It is simply this change, not its cost, not the expectations of the employes, not the absence of past practice, not whether the salary schedule is at issue during bargaining, which requires rejection of the position of the Complainants in this proceeding. Therefore we agree with the Examiner's conclusion that the District was not statutorily obligated to grant experience increments to employes in fulfilling its duty to maintain the status quo during the contract hiatus.

Respondent's argument that the last quoted paragraph of the Commission's analysis is fully applicable to the instant case ignores the preceding paragraph, which makes it apparent that the majority was considering only actions occurring during a contract hiatus. The policy questions in a contract-hiatus situation are articulated by the majority and the Examiner in that case; but not fully discussed there are those policy questions which apply particularly to first-contract situations. These must therefore be examined.

The law concerning the nature of the status quo which an employer must maintain during an organizational campaign is well settled and may be summarized as being that the employer must neither improve nor lower wage rates and other conditions of employment except as it would have done had no campaign been in effect. 8/ Obviously, upon expiration of the 1980-81 manuals a lacuna would be

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8/ See Dane County, Decision No. 11622-A (10/73).

opened which would make it difficult to determine, if the "organizational" definition of status quo is applied, just what the District would have done had there been no union certified or organizing on July 1, 1981. It is improbable, however, that the salary and vacation schedules would have been abruptly discontinued after several years in existence. Neither is there any evidence to support such a proposition, and the District does not argue it. Had the manuals expired while the representation issue was in doubt, the undersigned therefore believes that the District would still have been under an obligation to continue the underlying policy of movement of employes on the expired schedules, under that rule. 9/

The rule governing the organizational status quo has its roots in the policy favoring neutral conditions for an election. The possibility that an employer might selectively improve or worsen conditions of employment in order to affect employe desires for representation, however, does not necessarily expire upon the union's victory in an election. It is well known that some employers do not readily accept the certification of a new union and that the negotiation of a first contract can be a period unusually fraught with uncertainty for the union, employer and employes alike. The bar to a new election created by the certification is of one year's duration; as in this case, it is not uncommon for the first contract's negotiations to stretch beyond that period. It is therefore at least possible that an employer could take advantage of a freezing of actual wage rates, for example, to put pressure on employes in the hope of persuading them to abandon the union a year later. 10/ To this extent the public interest in stability of collective bargaining, once employes select a labor organization, weighs against giving employers this latitude and the temptation such latitude could present. Respondent's argument to the effect that the mediation-arbitration statute permits either party to accelerate the bargaining process has some merit; but delays and the accompanying pressures are not unknown in that procedure either. The contention that public employes are more commonly neutral to organizational campaigns than private employers may also have merit, but the difference is again one of degree.

Furthermore, the policies which Respondent here discontinued are policies which Respondent alone created: the fact that the union in Menasha was a party not only to the salary schedule but also to its expiration date can be seen as an undercurrent in the majority's opinion in that case. Unlike the situation in Menasha, there is no element of consent here by the Union or employes, 11/ nor of any expectation by employes 12/ that the salary or vacation schedules would not be continued in effect until new arrangements came into effect through collective bargaining. These factors, together with the similarities between this case and the Mid-State case referred to above, convince the undersigned that Respondent reads Menasha too broadly and that by applying that decision in a first-contract negotiation period the District has unilaterally broken the status quo applicable

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9/ The decision in Gateway Vocational, Technical and Adult Education District, (Examiner's Decision No. 14142-A, 1/77, affirmed in Decision No. 14142-B, 2/78) that no violation occurred when the employer froze existing salaries during an organizing campaign is not generally applicable, as the organizational campaign therein arose in the context of another union's existing representation of those employes. cf. NLRB v. Dothan Eagle, supra.

10/ No such contention is made in this matter; the undersigned is reviewing this possibility solely as an element in general policy considerations.

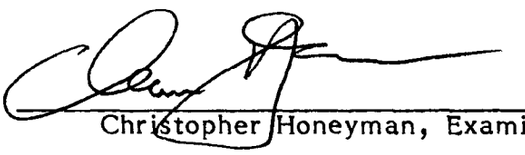
11/ There is no evidence that any type of negotiations with employes took place prior to the issuance of the manuals. The manuals are therefore nothing more than formal expressions of the District's management policies, and the fact that they contain expiration dates does not have the significance of the expiration date of the Menasha collective bargaining agreement.

12/ In Menasha the majority gave no weight to this factor; but because of the proximity of first-contract bargaining to the possible heat of an election campaign, the undersigned believes that employe expectations cannot be discounted in this situation.

in this situation. The District has therefore violated Sections 111.70(3)(a)(1) and (4), Wis. Stats. There is no evidence that the District's motivation in so doing was discriminatory; accordingly, no violation of Section 111.70(3)(a)(3) is found.

Dated at Madison, Wisconsin this 26th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner