STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENOMONEE FALLS EDUCATION ASSOCIATION, Complainant, vs. MENOMONEE FALLS SCHOOL DISTRICT and the BOARD OF EDUCATION OF THE MENOMONEE FALLS SCHOOL DISTRICT, Respondent.	Case XXXIX No. 31045 MP-1434 Decision No. 20499-A

Appearances:

Kelly, Haus and Katz, Attorneys at Law, 302 Washington Avenue, Suite 202, Madison, Wisconsin 53703, by Mr. William Haus, on behalf of the Association.

Mulcahy & Wherry, S.C., 2015 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, by Ms. Diane Waterman and Mr. Mark S. Nelson, on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: The Menomonee Falls Education Association, hereinafter the Association, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission on January 20, 1983, alleging that the Menomonee Falls School District and the Board of Education of the Menomonee Falls School District, hereinafter the District, had committed prohibited practices within the meaning of Section 111.70(3)(a)(1) and (4) of the Municipal Employment Relations Act, herein MERA. The Commission thereafter appointed the undersigned to act as Exmainer to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5), Wis. Stats. The parties waived hearing in the matter and submitted a factual stipulation surrounding the issue in dispute. Subsequent thereto, the parties filed briefs and reply briefs which were received by February 29, 1984.

Having considered the arguments and the factual stipulation, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Association is a labor organization whose post office address is c/o TriWauk UniServ Council, 4620 West North Avenue, Milwaukee, Wisconsin 53208. At all times pertinent hereto, it has been the recognized exclusive collective bargaining representative of teachers employed by the District as set forth in the collective bargaining agreement of the parties.

2. The District is a municipal employer as defined in Section 111.70(1)(a), Wis. Stats., with its principal offices located at N84 W16579 Menomonee Avenue, Menomonee Falls, Wisconsin 53051. The District's Board of Education is an agent of the District and is charged with the possession, care, control, and management of the property and affairs of the District.

3. The Association and the District have been signatories to a series of collective bargaining agreements, the most recent of which was from August 10, 1981 through August 9, 1983, with provision therein for the contract to be reopened as of April 1, 1982 solely and exclusively for the purpose of negotiating the following items for the 1982-1983 school year:

1. Basic teaching salary;

2. Health and Dental Insurance, Section 16, A, (1) and Section 16, D. In the event the District files a Petition for Declaratory Ruling regarding Section 16, A, (1) the Menomonee Falls Education Association reserves the right to propose a modification to Section 16, A, (5);

3. Calendar for the 1983-1984 school year.

4. Said collective bargaining agreement also contained the following provisions:

Section 16 Insurance

A. Hospital-Medical

1. The District will pay the hospital and medical insurance premiums, family or single plan, depending on the eligibility of the employee. The Wisconsin Education Association Insurance Trust Hospital-Medical Insurance Plan, $100.00 deductible, $250,000.00 major medical maximum, will be provided to eligible employees.

. . .

D. Dental Insurance

Commencing on July 1, 1980 the District will pay the full cost, but not more than $22.33 for the family plan premium and $7.62 per month for the single plan premium with the Wisconsin Education Association Insurance Trust Dental Plan for a period of two (2) years from the commencement date.

This was the first dental insurance provision agreed to by the parties. When the parties agreed to it, the District insisted on a cap for the employer's contribution to the dental insurance premium. The Wisconsin Education Association Insurance Trust at that time gave a tentative quote on dental insurance rates at $22.33 per month for family coverage and $7.62 per month for single coverage. The parties agreed to use said tentative premium quotes as the caps in the contractual dental insurance provision. Prior to implementation, the actual dental insurance premiums were increased to $23.01 per month for family coverage and $7.83 per month for single coverage; this resulted in the respective employee contributions of 68 cents per month family and 21 cents per month for single coverage. When the parties reached agreement on the language contained in Section 16, A, (1), they incorporated the actual health insurance rates for the 1981-1982 school year into the costing of the total compensation package for that year.

5. The health and dental insurance rates in effect during the 1981-1982 school year and the portions of premium paid by the District were as follows:

A. Health Insurance Rates:		Portion paid by District:
(1) Family:	$114.46	$114.46
(2) Single:	$43.76	$43.76
B. Dental Insurance Rates:		Portion paid by District:
(1) Family:	$23.01	$22.33
(2) Single:	$7.83	$7.62

Dental insurance premium rates are subject to change on July 1st of each year and the health insurance premium rates are subject to change on September 1st of each year.

6. During their subsequent negotiations under the limited contractual reopener, the parties in 1982 bargained over wages and the amount the District should pay for health and dental insurance for the upcoming 1982-1983 school year. The Association wanted the District to pay for the full cost of those insurance premiums and the District insisted that a cap should be placed on its insurance costs and that the teachers should pay for part of those premiums. The parties subsequently jointly filed a mediation-arbitration petition and an investigation on the matter was conducted on June 9, 1982 by Sherwood Malamud of the Commission's staff. On that same date, the parties filed their final offers with the investigator on the matters in issue and the investigation was then closed. The District's offer regarding health and dental insurance premiums provided that a cap would be placed on those premiums, that employes would have to pay for part of the premium increases, and it submitted the following proposals to that effect:

. . .

2. Section 16 - Insurance

A. Hospital - Medical:

Revise paragraph 1 to read as follows:

1. The District will pay up to $131.63 in hospital and medical insurance premiums for the family plan or up to $50.33 in medical insurance premiums for the single plan, depending on the eligibility of the employee. The Wisconsin Education Association Insurance Plan, $100.00 deductible, $250,000 major medical maximum, will be provided to eligible employees.

3. Section 16 - Insurance

D. Dental Insurance

Revise to read as follows:

The District will pay up to $25.68 for the family plan premium and up to $8.76 for the single plan premium per month.

. . .

The Association's offer specified that the District should continue to pay the full costs of the health and dental insurance premiums in the following provisions:

. . .

1. Health Insurance: Sect. 16, A, 1

The Status Quo shall be maintained for the 1982-1983 contract.

2. Dental Insurance: Sect. 16, D

The District shall pay any increase in the premium costs for the Dental Plan included in 16, D.

. . .

7. Effective September 1, 1982, the health insurance rates for the 1982-1983 school year were increased to $140.80 for family coverage and $53.82 per month for single coverage. On September 30, 1982, teachers received their first paycheck for the 1982-1983 school year and received the following note from the District: "Due to the fact that insurance rates have increased there is now a

deduction for health insurance from your check. The School District is paying the 1981-1982 rates. The additional amount shown on your check as a deduction-HLTH-INS." The District therefore deducted $26.34 from the monthly wages of those employes with family coverage and $10.08 from the monthly wages of employes on single coverage, with the District paying the balance of $114.46 and $43.76 per month respectively, just as it had during the 1981-1982 school year. At no time did the Association agree or consent to the District's deduction of health insurance premiums from bargaining unit employe wages.

8. The contract dispute of the parties was earlier submitted to Arbitrator Reynolds C. Seitz who met with the parties on October 18, 1982 and November 8, 1982. Arbitrator Seitz issued his award on March 12, 1983, at which time he selected the District's final offer. The District thereafter issued checks to bargaining unit members which reflected the difference ($17.17 per month family and $6.57 per month single coverage respectively) between the 1981-1982 health insurance premium rates and the District's final offer on health insurance rates awarded by Arbitrator Seitz for the period of September 1, 1982 through March 1983. Checks were issued to teachers for retroactive salary reflecting the difference between the 1981-1982 salaries and the District's salary offer awarded by Arbitrator Seitz.

Based upon the foregoing Findings of Fact, the Examiner issues the following

CONCLUSION OF LAW

Since the issue herein constitutes a continuing case and controversy which has not been rendered moot, the District violated Section 111.70(3)(a)1 and 4 of MERA by unlawfully charging teachers for increased insurance premiums at a time when the District was required to pay the full costs of such premiums.

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

ORDER 1/

IT IS HEREBY ORDERED that the District, its officers, and agents shall immediately

1. Comply with any existing bargaining obligation regarding the amount of money that the District must pay for health insurance premiums.

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.

2. Pay interest at a rate of 12% per year on the money it improperly withheld from teachers for health insurance from the beginning of the 1982-1983 school year to the issuance of Arbitrator Seitz's Award on March 12, 1983. 2/

3. Cease and desist from forcing employes to pay any increased insurance premiums at a time when the District is required to pay for the full costs of said premiums.

4. Take the following affirmative action to rectify the District's prohibited practice:

a. Immediately adhere to any insurance terms in effect between the parties by not forcing employes to pay any insurance premiums which the District is required to pay.

b. Pay interest at a rate of 12% per year on the money it improperly withheld from teachers for health insurance from the beginning of the 1982-1983 school year to the issuance of Arbitrator Seitz's Award on March 12, 1983.

c. Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the District and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the District to insure that said notices are not altered, defaced or covered by other material.

d. 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.

Dated at Madison, Wisconsin this 2nd day of July, 1984.

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2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed on January 20, 1983. At that time, the rate in effect was 12% per year. Sec. 814.04(4), Wis. Stats. Ann. (1983). See, Wilmot Union High School, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245 (1983) and Madison Teachers v. WERC, 115 Wis.2d 623 (CtApp, 1983).

"Appendix A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL NOT charge employes for any increased insurance premiums which the District is required to pay and we will pay the cost of those premiums pursuant to our bargaining obligations.

2. We will not alter the status quo regarding wages, hours, or other conditions of employment upon the expiration of any collective bargaining agreement or any of its terms.

3. We will pay any affected teachers 12% interest on the money we improperly withheld from them for health insurance premiums from the beginning of the 1982-1983 school year to the issuance of Arbitrator Seitz's Award on March 12, 1983.

MENOMONEE FALLS SCHOOL DISTRICT

By _____

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Association's complaint charges that the District acted unlawfully during collective bargaining negotiations over the limited reopener when it deducted contributions from employes' paychecks for the increased cost of health insurance payments. The Association maintains that the District was required to pay for the full costs of such insurance and that its failure to do so was violative of the status quo doctrine which generally requires an employer to maintain existing wages, hours, and conditions of employment during the course of collective barganing negotiations. As a remedy, the Association claims that restoration of the status quo ante requires the District to reinstitute full payment of the health insurance premiums for the duration of the original dispute, that the District should pay interest for the money improperly withheld, and that it also should be ordered to pay attorney's fees.

The District has filed a Motion to Dismiss the Complaint, arguing the issue herein has been rendered moot by Arbitrator Seitz's Award and the District's subsequent payment of the insurance premiums in question "precisely as the contract mandates for the period in question." The District also asserts that it did comply with the status quo doctrine because it continued to pay the exact same insurance premiums throughout negotiations that it previously paid during the 1981-1982 school year. The District therefore contends that it is the Association which has attempted to alter that status quo by seeking to force the District to pay more than the premium paid during the 1981-1982 school years. The District similarly contends that the Association's position "ignores the realities of the collective bargaining process" because it seeks implementation of the Association's final offer as an interim agreement pending the resolution of the dispute through binding arbitration.

In support of its mootness claim, the District relies upon Zieman v. Village of North Hudson, 102 W.2d 705, 307 N.W.2d 236 (1981), where the Wisconsin Supreme Court declared:

> A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.

Contrary to the District's position, application of this test establishes that the issue herein has not been rendered moot.

The central question here is whether the District acted unlawfully when it forced teachers to pay part of the increased health insurance premiums for part of the 1982-1983 school year until issuance of Arbitrator Seitz's Award. As a result, we are not dealing with "an abstract question which does not rest upon existing facts or rights," or "a pretended controversy", but rather, with a real dispute between the parties which arose out of a concrete factual setting. In addition, since the instant complaint was filed after the District had acted, there likewise is no basis for finding that the Association "seeks a decision in advance about a right before it has actually been asserted or contested . . ." We are left, then, with the question of whether any judgment rendered here will have "any practical legal effect upon the existing controversy."

As to that, the District rightfully points out that Arbitrator Seitz selected the District's final offer and that it thereafter made retroactive payment to the teachers in accordance with that Award. However, Arbitrator Seitz did not rule upon the narrow issue posed in the Association's complaint--the District's unilateral action in forcing teachers to pay for the increased costs of their health insurance premiums pending issuance of his Award. In addition, while the teachers have been made whole in the monetary sense by reason of the District's retroactive payment, they nonetheless were adversely affected by the District's

conduct for the months they had to pay for the increased health insurance premiums at a time there was a dispute over whether the District's actions were proper and when the District may have been required to pay the full costs of those premiums.

As a result, dismissal of the complaint because of such alleged mootness in effect could enable parties (in this case an employer) to engage in unlawful conduct with total impunity if they ultimately prevail in the mediation-arbitration process. The Association correctly points out: "Such a legal position totally ignores the damage incurred and threatened for the future with respect to employee collective bargaining rights under MERA." Accordingly, and because the Commission has ruled in a similar case that "such conduct could frustrate the public policy expressed in MERA and would have the 'practical legal effect' of leaving the Complaintant without an effective remedy," 3/ it follows that the issue here is not moot.

As to the substantive merits of the issue, both parties agree that the issue herein is governed by the status quo doctrine which generally requires an employer to adhere to the terms of an expired contract during the hiatus period before a successor agreement is reached. The Commission in Menasha Joint School District 4/ addressed this issue, stating that the status quo doctrine centers on 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 preexisting 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, we are not dealing with the termination of an entire contract, but rather, with a limited contractual reopener which provided that the parties could bargain over wage and insurance matters for the 1982-1983 school year. Nevertheless, the status quo doctrine comes into play because the wage and insurance provisions for the 1981-1982 school year expired at the end of that school year, thereby raising the question of what wages and insurance premiums the District would have to pay for the subsequent 1982-1983 school year until an agreement or interest arbitration award was reached on the matter. Accordingly, and just like other cases involving the status quo doctrine, the resolution of this issue turns on the District's statutory bargaining obligations after the contractual wage and health insurance provisions lapsed at the end of the 1981-1982 school year. 5/

The District argues that it complied with the status quo doctrine because it was only required during the 1981-1982 school year to pay $114.46 per month for family coverage and $43.76 for single coverage in health insurance premiums and that it therefore acted lawfully when it continued to pay that exact amount in premiums during the 1982-1983 school year, pending issuance of Arbitrator Seitz's Award. The fatal flaw with this argument is that the contract on its face does not specify that the District had to pay $114.46 and $43.76 for insurance premiums during the 1981-1982 school year. Rather, Section 16, A therein mandates: "The District will pay the hospital and medical insurance premiums . . ." Phrased in that way, the contract requires the District to pay for the full costs of those premiums, irrespective of what they may be, as there are no words of limitation on the District's obligation to provide the health insurance bargained for between the parties.

3/ Racine Education Association v. United School District No. 1 of Racine County, Dec. No. 11315-D (WERC, 4/74).

4/ Menasha Joint School District, Dec. No. 16589-A (WERC, 9/81) reversed on other grounds.

5/ Initially, the Association claimed that the District also violated the contract and the District urged that the contractual issue had to be submitted to arbitration rather than to the Commission's complainant procedures. Thereafter, both parties agreed to drop this contractual issue and to have the case decided under the status quo doctrine which centers on an employer's statutory obligations. It therefore is appropriate for the Commission to exercise its jurisdiction over this issue.

This language stands in sharp contrast to what the parties agreed to vis-a-vis dental insurance, as Section 16, D states: "Commencing on July 1, 1980, the District will pay the full cost, but not more than 22.33 for the family plan premium and $7.62 per month for the single plan premium . . ." By thereby placing caps on the District's contribution for the dental plan, the parties have treated the District's contributions for the dental plan differently than its contributions for its health plan.

The District, under the status quo doctrine, therefore was never required to contribute more than $22.33 and $7.62 for dental premiums for the 1982-1983 school year while it bargained over the limited contractual reopener and while it awaited Arbitrator Seitz's Award. On the other hand, the status quo doctrine required the District during that same period to "pay the hospital and medical insurance premiums . . ." whatever that may be until such time as the contract was modified. Thus, it is immaterial as to whether health insurance premiums decreased, remained the same, or increased throughout that time since Article 16, A provides that the District has assumed that risk.

In this connection, the District argues that the Association's position "ignores the realities of the collective bargaining process." The simply is not true; the Association only seeks compliance with the contractual language agreed to by the parties and which was subsequently binding on the District under the status quo doctrine. Here, "the realities of the collective bargaining process" establish that the District got the better of the bargain in Section 16, D which requires teachers to pay for all dental premiums over and above those provided for therein, and that the Association got the better of the bargain in Section 16 A., which requires the District to pay all health premiums until that language is changed. These are the "realities" of the bargain struck between these parties. If the District wanted to limit its open-ended health insurance costs, it was free to bargain for such a provision, just as it did over the dental provision for the 1981-1982 school year and just as it subsequently did for the health insurance coverage in the 1982-1983 school year. By failing to do so, the District now cannot complain that the clear and unambiguous language of Section 16 A. must be disregarded in favor of what the District wishes it had agreed to. By failing to pay for the full costs of the health insurance premiums during the hiatus period, the District therefore violated Section 111.70(3)(a)1 and 4 of MERA.

Since the District improperly collected money from teachers for the increased health insurance premiums pending issuance of Arbitrator Seitz's Award, the District is required to pay interest on the money so withheld for that period, and the Order so provides. However, and contrary to the Association's claim, there is no need for the District to assume full payment of health insurance premiums for that period as the payment of interest represents an adequate remedy to rectify the District's conduct. In addition, it is inappropriate to award attorney's fees since there is no evidence that the District acted in bad faith in this matter.

Dated at Madison, Wisconsin this 2nd day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner