STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WEBSTER EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF WEBSTER, Respondent.	Case 12 No. 32447 MP-1528 Decision No. 21312-B

Appearances:

Ms. Melissa A. Cherney, Staff Attorney, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Association.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Michael J. Burke, 21 South Barstow Street, P. O. Box 1030, Eau Claire, Wisconsin 54701-1030, appearing on behalf of the District.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

Examiner Lionel L. Crowley having, on June 22, 1984, issued his Findings of Fact, Conclusion of Law and Order, together with Accompanying Memorandum, in the above-entitled matter, wherein he concluded that the Respondent, School District of Webster, had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)4, Stats., and derivatively 111.70(3)(a)1, Stats., by failing to pay merit increases and increment increases to teachers during the hiatus between collective bargaining agreements; and the Complainant having, on July 2, 1984, filed a timely petition, pursuant to Sec. 111.07(5), Stats., requesting the Commission to review the Examiner's decision; and the parties having filed briefs in support of and in opposition to the petition for review, the last of which was received on November 30, 1984; and the Commission having reviewed the record, the Examiner's decision, the petition for review, and the parties' written arguments, and being satisfied that the Examiner's Findings of Fact should be affirmed but that his Conclusion of Law and Order should be reversed;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact are hereby affirmed and adopted by the Commission. 2/

B. That the Examiner's Conclusion of Law is hereby reversed and set aside and the following Conclusion of Law is substituted therefor:

CONCLUSION OF LAW

That the Respondent, School District of Webster, by failing to pay merit increases and increment increases to returning teachers during the contractual hiatus following the expiration of the parties' 1982-83 collective bargaining agreement committed unilateral change refusals to bargain in violation of Sec. 111.70(3)(a)4, Stats., and derivatively interfered with employes' exercise of their Sec. 111.70(2), Stats., right to bargain collectively through a representative, in violation of Sec. 111.70(3)(a)1, Stats.

(See footnotes 1/ and 2/ on Page 2)

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

2/ Finding of Fact 5 of the Examiner's decision contained a typographical error which we have noted and corrected in Note 4 of our Memorandum accompanying this Order.

C. That the Examiner's Order is hereby reversed and set aside, and that the following Order is substituted therefor:

ORDER

IT IS ORDERED that Respondent, School District of Webster, its officers and agents, shall immediately:

1. Cease and desist from implementing unlawful unilateral changes in existing compensation arrangements for employes represented by the Association.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

   a. To the extent that it has not already done so by its implementation of the parties' 1983-84 agreement or otherwise, make whole with interest 3/ all present and former employes in the bargaining unit represented by the Webster Education Association for any salary losses experienced by the employes due to Respondent's above-noted unilateral changes during the period from July 1, 1983 to the date of implementation of a successor collective bargaining agreement.

   b. Notify its employes in the bargaining unit represented by the Union, by posting in conspicuous places on its premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." That notice shall be signed by an authorized representative of the Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by other material.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of September, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on November 15, 1983, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year." Sec. 814.04(4), Wis. Stats. Ann. (1983). See generally, Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC, 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

APPENDIX A

NOTICE TO 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 commit unlawful unilateral changes in wages covering bargaining unit employes represented by the Webster Education Association.

2. To the extent that we have not already done so, we will make whole, with interest, present and former bargaining unit employes represented by the Webster Education Association for salary losses experienced during the period from July 1, 1983 to the date of implementation of a successor bargaining agreement with the Webster Education Association.

Dated at _____, Wisconsin, this _____ day of _____, 1985.

School District of Webster

By _____

SCHOOL DISTRICT OF WEBSTER, 12, Decision No. 21312-B

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND REVERSING
EXAMINER'S CONCLUSION OF LAW AND ORDER

Background:

Pursuant to and during the term of the parties' 1982-83 collective bargaining agreement, returning teachers were paid a salary which was computed by adding the following components: 1981-82 salary, "increment increases," "merit increases," and 1982-83 bonus payments.

The parties did not reach agreement on a successor contract prior to the July 1, 1983 expiration of the 1982-83 agreement. During the hiatus that followed, the District paid returning teachers the same salary they were paid during the preceding school year.

The Association filed a complaint alleging that the District committed a unilateral change refusal to bargain in violation of Secs. 111.70(3)(a)4 and 1, Stats., on the grounds that the District's failure to pay increment increases and merit increases to returning teachers during the hiatus constituted a failure to maintain the status quo.

The Examiner's Decision:

The Examiner concluded that the District's failure to grant increment increases and merit increases did not violate Secs. 111.70(3)(a)4 and 1, Stats. He generally based that conclusion upon a determination that neither the increment increases nor the merit increases provided for in the parties' expired 1982-83 contract were part of a dynamic status quo because neither constituted a system "of automatic increases with little or no discretion on the part of the District." (Examiner Decision at 10.) He interpreted the increment increases and merit increases as two parts of a combined Merit Schedule whereby the employe's "performance level" (attained by the employe in the District's performance evaluation of the employe during the preceding February 1 through January 30) determined both (a) the employe's eligibility for an increment increase based on an additional year of experience and pegged to educational attainment, and (b) the employe's eligibility for a range of merit increases corresponding to various performance levels above a minimum.

Having concluded that increment increases and merit increases both depended on the "performance level" determined through an evaluation process involving substantial management discretion, the Examiner found both types of increases at issue herein different from increment increases in many teacher contract pay arrangements which depend only upon attainment of an additional year's service. The Examiner concluded that neither merit increases nor increment increases were sufficiently automatic so as to fall within the scope of the District's obligation to maintain the status quo.

The Examiner found further support for his ultimate conclusion in the fact that Merit Schedule increases represented the major portion of the teacher salary increases negotiated for 1982-83 over the preceding year and the total increases negotiated in certain previous contracts. The Examiner characterized inclusion of such increases in the status quo as "tantamount to taking the issue of wages out of the negotiations and providing an increase identical to the previous year's" and concluded that the evidence failed to demonstrate that the parties intended such an unusual result. (Examiner Decision at 12.)

The Petition for Review and Complainant's Position in Support of Same:

The Complainant timely filed a petition for review of the Examiner's decision. Although its initial brief sets forth a lengthy analysis of the case law as it relates to a dynamic status quo, Complainant states that it does not disagree with the legal principles applied by the Examiner but rather disputes the Examiner's application of those principles to the instant facts.

Complainant advances the following major arguments in that regard:

1. The expired agreement provided for increment increases for the various educational attainment levels payable solely upon attainment of another year of teaching experience. The Examiner's conclusion that increment increases depended to any extent upon performance level is contrary to the record evidence, the positions of both parties, and the "regular schedule" portion of the salary schedule article. Since employer discretion is therefore not involved in determining increment increase eligibility or amount, and since eligibility for such increases is automatic upon attainment of another year of teaching experience, the increment increases should have been found to be a part of the status quo.

2. In excluding merit increases, which are based on performance level, from the status quo, the Examiner erroneously equated increases which became mandatory and fixed in amount once the required evaluation process was completed, with increases the existence, basis and amount of which remain entirely a matter of unilateral employer determination. The merit increases herein are not discretionary but rather are required by the existing compensation arrangements represented by the terms of the expired collective bargaining agreement. In that regard, Complainant relies upon the Article VIII language stating "composite evaluations are determined by evaluations made between February 1 of the previous year, to January 31 of the current year and is the score used to determine merit increases for the following school term" and the "Example" wherein "a composite score of 3.78 accumulated between February 1, 1982 and January 31, 1983 would result in a $400 merit increase." Complainant argues that these types of merit increases are part of the status quo because they are part of an a long-standing practice of granting merit review as to which the District had committed itself by the terms of the 1982-83 contract. Complainant argues that it would be senseless to set up a contractual process which determines performance level determinants of salaries in the following year if those determinations were not expected and intended to have an effect on the determination of the following year's increase.

3. Complainant cites the history of the parties' bargaining in support of its contention that, since at least 1978, the parties have had a wage system with automatic experience increments at the beginning of each year and an automatic merit increase based on the previous year's performance. Complainant contends that the parties' bargaining has taken as a given the automatic nature of increment and merit increases and has focused on whether and how much of a bonus payment would be paid over and above the automatic increases. While the parties could also bargain elimination or changes in the amounts of the automatic increases, Complainant asserts that the system in place at the expiration of the contract must be maintained during the hiatus. Complainant also relies on the fact that the $640 bonus payment provision is specifically and expressly contractually terminated whereas there is no such specific termination in the provision for either the merit increases or for the increment increases.

4. Complainant also argues that, contrary to the Examiner's findings, the District's treatment of new teachers was also consistent with Complainant's view of the wage system as providing automatic increases. While the merit schedule was not applicable to new employes, Complainant argues that the District applied the regular schedule in a manner which credited new teachers fully for their experience, unlike the District's treatment of returning teachers. While Complainant would not urge that an employer's treatment of new teachers be deemed determinative as to what constitutes the status quo, it states that it is addressing this issue because it was part of the Examiner's analysis and possibly was a significant factor in Menasha Joint School District, Dec. No. 16589-B (WERC, 9/81), rev'd, Case No. 81-CV-1007 (CirCt Winnebago, 8/83).

5. Finally, Complainant rejects that portion of the Examiner's analysis which concludes that a finding that Merit Schedule increases were part of the status quo would be "tantamount to taking the issue of wages out of the negotiations." Complainant asserts that such a statement is not true because the parties may still bargain changes in the status quo during their negotiations. Even if the Employer was seeking a cut in increment increases and merit increases it was not prevented from doing so under Complainant's view of this case, but it would have to maintain the status quo and propose that its change take effect retroactively.

Respondent District's Position in Opposition to the Petition:

The District filed a brief in support of a full affirmance of the Examiner's decision. It submits that the Examiner properly concluded that the granting of Merit Schedule increases is discretionary and thus outside the scope of Respondent District's obligation to maintain the status quo. The District also notes that the parties' contract language specifies that the salary schedules apply to the 1982-83 school term. The District asserts that there is no bargaining history or past practice which would alter the impact of this clear contractual language.

The District further argues that the application of a dynamic status quo is inappropriate in this case because, unlike Menasha Schools, supra, the District did not treat new teachers differently from continuing staff. While admitting that this similarity of treatment may have been based upon an administrative error, the District argues that the fact remains that the new teacher was treated the same as a continuing teacher in that she did not receive full experience increments until after the 1983-84 agreement was settled in December 1983. Indeed, the District asserts that it did not move any teachers on a vertical or horizontal increment during the hiatus. Given the foregoing, the District urges the Commission to affirm the Examiner's decision.

Discussion:

After the Examiner issued his decision in the instant matter, we addressed ourselves to several aspects of the nature of the duty to bargain during a contract hiatus in Wisconsin Rapids Schools, Dec. No. 19084-C (WERC, 3/85). In pertinent part, we stated:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment--either during negotiations of a first agreement or during a hiatus after a previous agreement has expired--is a per se violation of the MERA duty to bargain. Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. . . . In addition, an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining.
>
> The dispute in this case is about what the status quo was. . .
>
> In the private sector, case law under the National Labor Relations Act has essentially recognized a need to view the status quo dynamically. . . . For example, Professor Gorman's treatise summarizes the NLRA law as follows:
>
> > . . . "conditions of employment" are to be viewed dynamically over a period of time, and the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of changes in employee status. Employer modifications consistent with such a pattern are not a "change" in working conditions at all. Indeed, if the employer, without bargaining with the union, departs from that pattern by withholding benefits otherwise reasonably expected, this is a refusal to bargain in violation of section 8(a)(5). . . .
>
> (Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining, BNA, 1976)
>
> In the public sector, some labor relations tribunals have adopted a dynamic view of the status quo, others have viewed the status quo in static terms, but the overall trend is toward the dynamic view. . . .
>
> The current status of case law under MERA on this subject does not provide clear-cut guidance for determining the status quo after expiration of a schedule on which wage rates or benefits vary according to levels of employe attainment of work experience, education, licensure, etc.

. . .

. . . the ultimate Menasha outcome is, if anything, inconsistent with a strict static view of the status quo, but it has little other significance beyond its specific fact situation. Rather, the ultimate disposition in Menasha leaves the Commission free in this and future cases to determine in what other fact situations, if any, the status quo includes post-expiration increases upon attainment of experience levels specified in the expired schedule.

. . .

In our recent City of Brookfield decision (Dec. No. 19822-C (WERC, 11/84)), we agreed with the City's contention that the proper mode of analysis for determining the status quo must take into account not only the terms of the expired collective bargaining agreement bearing on the subject, but also the history of bargaining and history of administration of the language in question. Consistent with our City of Brookfield analysis and with the ultimate judgment entered in the Menasha case, we expressly disavow the Menasha majority's static view dicta and adopt, instead, a dynamic view of the status quo. 15/

15/ Compared to the Menasha majority's emphasis on freezing dollar amounts, we consider our approach herein more consistent with the Commission's previous decision in Mid-State VTAE, Dec. No. 14958-D (4/78) affirming the examiner's conclusion that where the employer's past policy provided for 100% employer-paid insurance the duty to bargain required the employer to pick up premium increases as part of maintaining the status quo.

Wisconsin Rapids Schools, supra, at 14-17.

We went on in Wisconsin Rapids Schools to provide the following "partial statement of controlling principles" in disputes concerning the nature of the status quo:

As we are applying it, the dynamic status quo doctrine calls upon parties to continue in effect the wages, hours and conditions of employment in effect at the time of the expiration of the predecessor agreement or the time of the union's initial attainment of exclusive representative status. In applying that doctrine to periods of time after expiration of wage or benefit compensation plans and schedules relating level of compensation to levels of employe experience, education or other attainments, we consider the dynamic status quo doctrine to require adherence to the following partial statement of controlling principles: 16/

> 1. Where the expired compensation plan or schedule, including any related language--by its terms or as historically applied or as clarified by bargaining history, if any--provides for changes in compensation during its term and/or after its expiration upon employe attainment of specified levels of experience, education, licensure, etc., the employer is permitted and required to continue to grant such changes in compensation upon the specified attainments after expiration of the compensation schedule involved. (To do otherwise would undercut the majority representative and denigrate the bargaining process in a manner tantamount to an outright refusal to bargain.)

16/ The principles stated herein are not intended to answer the additional question of how specific the expired language must be for schedule advancement to be deemed a part of the status quo where there is no past pattern of advancement on a given schedule either during the life of the schedule or during prior hiatuses between such schedules.

2. Where the expired compensation plan or schedule, including related language--by its terms or as historically applied or as clarified by bargaining history, if any--provides that there is to be no advancement on the schedule during its term or no advancement on the schedule after its expiration, then the employer is prohibited by its duty to bargain from unilaterally granting such advancement.

. . .

Wisconsin Rapids Schools, supra, at 17.

We also had occasion to comment about the matter of increases involving substantial employer discretion:

> . . . as the District has argued, there is a difference between the statutory requirements applicable prior to the attachment of a duty to bargain but during an organizing campaign and the statutory requirements applicable after a labor organization has attained exclusive representative status. As an example, during an organizing campaign, an employer would be required to continue to grant discretionary increases in the same general manner as before the organizing campaign began, even where such would involve substantial employer discretion. Once a union attains exclusive representative status, however, the employer is required to fulfill its duty to bargain before making any further changes that would involve substantial employer discretion. 17/

17/ Compare, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) and McCormick Longmeadow Stone Co., 158 NLRB 1237 (1966), with, NLRB v. Katz, 369 U.S. 736 (1962), Allis Chalmers Corp., 237 NLRB 290 (1978) and Kendall College, 228 NLRB 1083, 1085 (1977).

Wisconsin Rapids Schools, supra, at 18.

Because the Examiner's decision herein was issued before our Wisconsin Rapids Schools decision, we have chosen to focus our primary attention in this review on a direct application of the principles set forth in that case to the fact situation involved herein, rather than to comment in detail on whether we agree or disagree with each and every point in the Examiner decision 4/ or in the arguments advanced by the parties herein.

The most recent expired contract of the parties provides "This Agreement shall be in effect July 1, 1982 and shall remain in effect through June 30, 1983.", and contains the following "Article VIII - Salary Schedule":

REGULAR SCHEDULE

STEP	BA	BA+15	MA	MA+15	MA+30
0	12,500	12,900	13,300	13,700	14,100
Inc't.	(475)	(500)	(525)	(550)	(575)

4/ In that regard, however, we note one typographical error in the Examiner's decision worthy of correction. The portion of Article VIII from the parties' 1978-79 agreement quoted in Finding of Fact 5 should show the full line to the right of "Under 2.5" as blank. In the original exhibit, the word "Increm't" appears in between that line and the "2.5 - 2.99" line below it, in what is a space and one half rather than single spaced format. In that corrected form, the Merit Schedule structure in the 1978-79 agreement is parallel to those in the later agreements, wherein the parties have simply entered the more abbreviated "Inc't. only" as the last entry in the Merit Schedule line beginning "2.5 -2.99."

MERIT SCHEDULE

Performance Level	BA	BA+15	MA	MA+15	MA+30	Merit Bonus
Under 2.5						
2.5 - 2.99	475	500	525	550	575	Inc't. only
3.0 - 3.24	"	"	"	"	"	100
3.25 - 3.49	"	"	"	"	"	200
3.50 - 3.74	"	"	"	"	"	300
3.75 - 3.99	"	"	"	"	"	400
4.0 - 4.24	"	"	"	"	"	500
4.25 - 4.49	"	"	"	"	"	600
4.50 - 5.0	"	"	"	"	"	700

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1. The above schedules apply to the 1982-83 school term.

. . .

3. All full time classroom teachers above "Regular Schedule" are eligible for merit increases at their respective performance level as determined by their composite evaluation score plus increment at respective tracks.

4. Composite evaluations are determined by evaluations made between February 1 of the previous year, to January 31 of the current year and is the score used to determine merit increases for the following school term. Example: a composite score of 3.78 accumulated between February 1, 1982 and January 31, 1983 would result in a $400 merit increase. First year teachers will use the fall and spring evaluations.

5. Merit increases and increments are accumulative.

. . .

7. Each full time teacher shall receive a $640.00 bonus payment for the 1982-83 school year. This item shall terminate on June 30, 1983. Less than full time teachers shall be pro-rated based on time. (eg. a 60% contract would receive 60% of $640).

. . .

9. The issued teacher's contracts shall include the following information:

81-82 salary	$ _____
Merit increases	_____
Increment increases	_____
Bonus payment	_____
1982-83 Salary	_____

. . .

In applying the above-noted Wisconsin Rapids Schools principles to the facts of this case, several basic points can be noted at the outset:

First, there is no specific statement in the expired agreement to the effect that increment increases and/or merit increases are or are not understood to be payable during a contract hiatus following expiration.

Second, since the instant parties have historically reached agreement on their successor agreements before expiration, there is no practice of paying or not paying such increases during contract hiatuses in the past.

Third, this is not a case in which the District granted increment increases to any bargaining unit personnel during the instant hiatus. Rather, whether by mistake or otherwise, the District did not pay increment increases to employes newly hired in 1982-83. As the Examiner stated at p. 11 of his decision, "the only new hire on which evidence was presented was not given any increment for her last year of experience until after the successor contract had been implemented. (Tr.24)."

And fourth, there is no evidence of a practice of increment increases and/or merit increases being paid to teachers at various points during the term of a given salary schedule. Our reference in Wisconsin Rapids Schools to advancement during the term of the schedule referred to situations such as the anniversary date wage and vacation increases in Wisconsin Rapids Schools which took effect at various times during the term of the salary and vacation schedules therein involved. The increment and merit increases paid to returning teachers herein were not of that sort.

Therefore, unlike the situation in Wisconsin Rapids Schools, we have here a situation of the sort described in Note 16 of that case: "There is no past pattern of advancement on a given schedule either during the life of the schedule or during prior hiatuses between such schedules." As that Note 16 stated, the principles set forth in that case were "not intended to answer the additional question of how specific the expired language must be for schedule advancement to be deemed a part of the status quo."

Given the unusual nature of the expired language involved herein, in order to determine whether that language is sufficient to render the merit increases and/or increment increases a part of the status quo, we need to address the preliminary issues of whether increment increases depend on "performance level," and whether the supervisory discretion involved in the contractual performance evaluation system renders increases based on "performance level" outside the status quo.

Dependence of Increment Increases on Performance Level

We agree with the Examiner, that in the instant circumstances, increment increases depend on "performance level." In our view, this is clear from the language of the Salary Schedule Article. Specifically, increment increases, while based on an additional year of experience and a particular level of educational attainment, appear payable only if performance level has been evaluated at or above the 2.5 level. While increments are generally noted in parentheses within the "Regular Schedule," their payment is specifically provided for within the Merit Schedule itself. Thus, one's "merit bonus" is "increment only" at a performance level of 2.5 - 2.99 and nothing at a performance level below 2.5.

That reading of the expired agreement is more persuasive than one that would conclude that increment is separate from and therefore not dependent upon performance level. For, it would seem to render meaningless the "Inc't. only" language and the absence of any entries at the "under 2.5" performance level in the Merit Schedule if the agreement were interpreted to mean that increment increases did not depend on receiving a performance level of at least 2.5. On the other hand, treating increment increases as dependent upon at least a performance level of 2.5 does not render meaningless or otherwise necessarily conflict with the agreement language wherein "increments" or "increment increases" are listed separately from "merit increases" (e.g., Article VIII, paragraphs 3, 4 and 5).

The language of Article VIII, paragraph 3, cited by Complainant does not require the conclusion that increment increases do not require having a performance level of at least 2.5. That paragraph describes the eligibility requirements for increases over and above increment. It does not say, nor does it necessarily imply, that the composite evaluation score does not also play a part in determining eligibility for the increment increase in the first place.

The evidence cited by Complainant as regards the nature of the parties' bargaining is neither persuasive nor necessarily supportive of its position. Costing documents by their nature do not necessarily indicate an understanding concerning the rights of the parties during a contract hiatus. Moreover, the particular document in evidence herein did not reveal any employe with a stated performance level of under 2.5.

For the foregoing reasons, then, we conclude that increment increases depended not only upon attainment of an additional year of experience, but also on attainment of a performance level of at least 2.5.

Effect of Employer Determination of Performance Level on Status Quo

As noted above, then eligibility for an increment increase depends upon attainment of a performance level of at least 2.5; eligibility for a merit increase depends upon attainment of a performance level of at least 3.0; and the amounts of merit increases depend upon which range of performance level the employe's composite score falls into.

The Examiner concluded on the following basis that this relationship of employer discretion to increases in compensation rendered both increment increases and merit increases outside the status quo:

> . . . Movement under the Merit Schedule is not merely dependent on experience or educational attainment. There is no grid established which provides for an increase solely due to greater experience. The Merit Schedule depends on the performance evaluation which, in turn, determines the amount of merit. The result could be no increase or an increase of as much as an increment plus $700. Therefore, a review of the Merit Schedule does not establish that it is a system of automatic progression along an established schedule or from one cell of a grid to another with a concomitant pay increase. The Association points out that, because the performance level is known and determined before the contract has expired, application of the performance level to the expired schedule yields a known amount of merit increase for each teacher. This alone, however, does not convert the schedule to one of automatic progression. The measurement of performance is usually based on some period in the past. It is the evaluation of performance that is significant because that in turn determines the amount of increase. The evaluations resulting in the performance level rating are based on the judgment and discretion of the District as to a teacher's performance. It is the exercise of this discretion which determines not only the eligibility for an increase but also the amount of any increase. This amount is simply an increase in pay determined by the District's evaluation of performance. It is not part of a system of pay progression from one level through a series of steps to another level. It must be concluded that this system does not have the earmarks of an automatic progression system. The Merit Schedule does not provide a system of set increases in pay, and any increases involve more than minimal discretion on the part of the District and, therefore, the Merit Schedule fails to meet the test for wage increases which may be granted by an employer pursuant to the status quo as provided by NLRB v. Katz, (369 U.S. 736, 50 LRRM 2177 (1962).)

Examiner Decision, Dec. No. 21312-A at 11.

We disagree with the conclusion reached by the Examiner above, and hence with his ultimate decision that the status quo did not include increment increases and merit increases in the instant circumstances. If the increases involved herein were "simply an increase in pay determined by the District's evaluation of performance," then the Employer would be required to fulfill its duty to bargain before implementing further changes. 5/

In our view, however, neither the instant increment increases nor the instant merit increases are "simply an increase in pay determined by the District's evaluation of performance." This is not a situation in which the employer's agents decide whether and how to change each employe's compensation for the coming year. Rather, the compensation arrangements put in place by the parties' expired agreement establish a system in which specified increases must be granted corresponding to the results of a specified and ongoing system for determining performance level. Both the amounts of merit increases and the eligibility requirements for increment increases and for merit increases have been established

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5/ See generally, Green County, supra, and City of Broofield, supra.

in detail, and the District has no choice but to pay the established amount of increase, if any, that corresponds to the employe's performance level. While the determination of performance level involves an exercise of discretion on the part of the evaluators, the evaluation process is an ongoing and mandated part of the compensation system, and both the "composite" nature of the scoring process and the time period to which it must relate are specified in the existing compensation arrangements.

In our view, this is not the sort of "substantial employer discretion" which the case law intends to prohibit an employer from continuing to exercise during a contract hiatus. On the other hand, the Examiner's conclusion would have been appropriate, for example, had the salary schedule and related language not only made the District the evaluator but also provided that whether or not to pay any merit increases generated under the established system was also discretionary with the District.

We also do not agree with the Examiner that the instant exercise of discretion by supervisory evaluators within an established system for determining eligibility for certain increases within a schedule is a persuasive indication that the instant compensation arrangement has or "lacks the earmarks of an automatic progression system." While the instant compensation arrangements are unquestionably different from the compensation arrangements in Wisconsin Rapids Schools and in Menasha Schools, the role of supervisory discretion in the evaluation process herein is not a difference that warrants a different conclusion concerning inclusion of post-expiration increases in the status quo. Whether a different outcome is warranted, however, will depend upon a detailed analysis of the nature of the compensation arrangements represented by the language of the expired agreement, and our analysis of that language is set forth below.

General Status Quo Analysis

As the quoted portion of our Wisconsin Rapids Schools decision indicates, the expired agreement--through its terms or as historically applied or as clarified by bargaining history--plays a critical role in determining the employer's status quo obligations under the duty to bargain. Since we have herein no persuasive bargaining history evidence and there have been no prior contractual hiatuses, the precise language utilized by the parties in the expired 1982-83 contract must be given the closest of scrutiny.

Paragraph 4 of Article VIII provides that "composite evaluations are determined by evaluations made between February 1 of the previous year, to January 31 of the current year and is the score used to determine merit increases for the following school term." Thus, while the "Example" deals specifically with 1982-83, the language establishing the evaluation system is written broadly and without limitation to a particular year. It follows that the expired agreement required the District to conduct an evaluation of performance during the term of the 1982-83 agreement which could only have its effect on increment increases and merit increases "for the following school term." That arrangement strongly suggests that the parties were establishing a compensation arrangement involving increment increases and merit increases in accordance with an established evaluation procedure and established schedule rather than a singular set of salaries to remain in effect following expiration and pending the results of the parties' negotiations concerning a successor agreement.

That same conclusion is indicated by the parties' inclusion of an express statement that no additional $640 increase was intended after June 30, 1983, and their non-inclusion of such a specific and express termination of merit increases and increment increases after June 30, 1983.

The foregoing considerations are sufficient in our view to overcome the competing inference that might be drawn from the more general language in Article VIII, paragraph 1 that "the above schedules apply to the 1982-83 school term" and from the general statement near the end of the agreement that "This Agreement shall be in effect July 1, 1982 and shall remain in effect through June 30, 1983.

We therefore conclude that the language of Article VIII of the expired agreement, taken as a whole, is sufficiently specific to establish an ongoing system of both increment increases (in amounts corresponding to established

educational attainment criteria and payable upon attainment of an additional year of experience and a "performance level" of at least 2.5) and of merit increases (in amounts depending on "performance level") payable upon attainment of a "performance level" of at least 3.0.

Because the District has not pleaded or proven a valid defense for its failure to pay those increment increases and merit increases during the contract hiatus from June 30, 1983 to the time that the parties reached agreement on the terms of a successor contract to the 1982-83 agreement, we conclude that the District thereby committed unilateral change refusals to bargain in violation of Secs. 111.70(3)(a)4 and 1, Stats.

We reject the Examiner's view that by so concluding we are "taking wages out of the negotiations" for a successor agreement. As the Complainant persuasively argues, and as we have previously noted in our City of Brookfield 6/ and Green County 7/ decisions, the Employer is free to propose whatever salary arrangements it deems appropriate, and to further propose that such arrangements be given retroactive effect; but it must also maintain the status quo compensation arrangements in effect at the time the predecessor agreement expires while it is pursuing such an outcome. Rather than taking salary out of the negotiations, our outcome requires that the existing (and in this case dynamically ongoing) compensation arrangements between the parties be maintained until they are changed (retroactively or prospectively) through the bargaining process including interest arbitration. If either of the parties prefers a different status quo for possible future hiatuses, it can, of course, pursue in bargaining adjustments in the language of successor agreements to achieve such an outcome in future hiatuses.

Where, as here, an employer is found to have unilaterally changed the status quo, the conventional remedy includes an order to reinstate the status quo ante and bargain and to make whole employes for losses suffered as a result of the unlawful change. 8/ The fact that the parties have reached a successor agreement does not, without more, render the instant case moot, for reasons stated in Brookfield and Green County. However, it does warrant limiting the remedy to requiring the District, if it has not already done so in the course of implementing the successor agreement or otherwise, to pay affected employes and former employes the difference between what they were paid during the period of the violation and what they would have been paid had the Employer maintained the status quo, plus interest. 9/ Even if the successor agreement provided each affected employe with a retroactive increase in excess of that to which the employe was entitled during the period of the violation, the District is nonetheless required by our Order to pay such employe interest on the amount of the deprivation for the length of time the employes experienced that loss. 10/

Dated at Madison, Wisconsin this 19th day of September, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Dahae Davis Gordon, Commissioner

6/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) at 10.

7/ Green County, Dec. No. 20308-B (WERC, 11/84) at 16 and Note 17.

8/ See, e.g., Green County, supra, at 17-20, citing, Mid-State VTAE, Dec. No. 14958-C (5/77) aff'd Dec. No. 14958-D (WERC, 4/78); and Milwaukee Metropolitan Sewerage District, Dec. No. 17123-B (3/81) aff'd, 17123-C (WERC, 3/82).

9/ Wisconsin Rapids Schools, supra, at 19-20.

10/ Ibid.