STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN LAKE EDUCATION ASSOCIATION, Complainant, vs. GREEN LAKE SCHOOL DISTRICT, Respondent.	Case VII No. 32452 MP-1531 Decision No. 21314-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 Complainant.

Mr. David R. Friedman, Staff Counsel, Wisconsin Association of School Boards, 122 W. Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Green Lake Education Association having, on November 18, 1983, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Green Lake School District had committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on January 11, 1984, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and the Green Lake Education Association having, on January 30, 1984, amended its complaint to allege a violation of Section 111.70(3)(a)5 of MERA; and hearing on said amended complaint having been held in Green Lake, Wisconsin on February 3, 1984; and both parties having filed briefs in the matter, the last of which was received on April 24, 1984; and the Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Green Lake Education Association, hereinafter referred to as the Association, is a labor organization which functions as the exclusive collective bargaining agent of all employes of the Green Lake School District engaged in teaching; and that its address is c/o Arden Shumaker, South Central United Educators, 214 West Cook Street, P.O. Box 192, Portage, Wisconsin 53901.

2. That the Green Lake School District, hereinafter referred to as the District, is a municipal employer which operates a public school system for the benefit of inhabitants of the District, and its offices are located in Green Lake, Wisconsin 54941.

3. That at all times material herein, the Association and the District had been parties to successsive collective bargaining agreements, including a 1982-83 collective bargaining agreement which included a grievance procedure for the resolution of disputes arising thereunder, but which did not provide for arbitration or any other means of final and binding resolution of such disputes; that the District waived the procedural requirements of the filing of a grievance; that said 1982-83 collective bargaining agreement provided, in relevant part, as follows:

ARTICLE X COMPENSATION

A. The approval and adoption of the salary schedule and provisions by the Board of Education and GLEA RESCINDS ALL PREVIOUS POLICIES RELATIVE TO SALARY.

B. 1982-83 SALARIES. All teachers shall be placed on the salary schedule (Appendix B) according to their years of experience and their degree status, including approved credits beyond the degree. In placing teachers on the schedule, partial or fractional steps will not be used in calculating credit (horizontal) steps. Example: Any number of approved credits beyond the BA degree but less than six approved credits would only qualify for placement at the BA level. Six or more approved credits but less than twelve approved credits, would qualify for placement at the BA + 6 level, and so on across the schedule. However, fractional steps would be used in calculting(sic) experience (vertical) steps. Example: A half year of full time teaching would equal 1/2 year experience or, a full year of half time teaching would equal a half year experience. Fractional experience steps will be calculated by multiplying the fractional portion of a year times the difference between the appropriate preceeding(sic) and succeeding experience steps and then adding that amount to the preceeding(sic) step. Example: BA with 2 1/2 years experience.

Step 3	$13,453.38			
-Step 2	13,027.25			
Diff.	$ 426.13	x	0.5	= $ 213.07

$13,027.25 (step 2) + $213.07 (half step) = $13,240.32 Salary for 2 1/2 years experience.

Initial and future placement on the salary schedule shall be subject to the provisions of Article IX, Sections A & B, Sections C, D, E, F, and all the other articles and sections of the Agreement not specifically mentioned here which would affect or govern placement on the schedule.

C. PLACEMENT ON THE SALARY SCHEDULE. In placing any new full time teacher on the applicable salary schedule, a step will normally be construed as one (1) year of full time teaching experience, subject to the limitation provided in Article X, Section E below. Deviations from this general rule may be made by the Board in cases of unusual or exceptional background, merit, experience or education. GLEA will be notified of such cases and will be given an explanation of the reason for the placement. Any new teachers not fulfilling the requirements of Article IX, Section A above will remain at their initial salary until such requirements are satisfied.

D. ADVANCEMENT IN CLASSIFICATION. If a full time teacher completes the necessary credits for advancement to a higher professional level, i.e., a horizontal change between salary schedule columns, such teacher will be issued a new contract reflecting the salary increase resulting from such change based upon the salary schedule applicable to the school year when such change becomes effective. Notification of such change must be received by the District Administrator by September 1, to be effective in the subsequent school year. Notification may be accomplished by the teacher(s) informing the District Administrator in writing of the approved credits earned by September 1, with verification from the institution involved by November 1st. Credits allowable for advancement to the level of BA + 12 must be graduate credits or undergraduate credits. All credits beyond the level of BA + 12 must be graduate credits. Undergraduate credits beyond this level may be authorized by the Administration if no meaningful graduate graduate(sic) course is available or if the needs of the District require undergraduate courses for effective teaching.

E. OUTSIDE EXPERIENCE -- Credit on the salary schedule for experience outside the school district may be granted up to eight (8) years.

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1982-83 SALARY SCHEDULE

EXHIBIT B.

Ex	BA	BA + 6	BA + 12	BA + 18	BA + 24	BA + 30	MA	MA + 6	MA + 12	MA + 18
0	12,900.00	13,222.50	13,545.00	14,125.50	14,448.00	14,770.50	15,222.00	15,544.50	15,867.00	16,189.50
1	13,351.50	13,674.00	13,996.50	14,577.00	14,899.50	15,222.00	15,673.50	15,996.00	16,318.50	16,641.00
2	13,803.00	14,125.50	14,448.00	15,028.50	15,351.00	15,673.50	16,125.00	16,447.50	16,770.00	17,092.50
3	14,254.50	14,577.00	14,899.50	15,480.00	15,802.50	16,125.00	16,576.50	16,899.00	17,221.50	17,544.00
4	14,706.00	15,028.50	15,351.00	15,931.50	16,254.00	16,576.50	17,028.00	17,350.50	17,673.00	17,995.50
5	15,286.50	15,609.00	15,931.50	16,512.00	16,834.50	17,157.00	17,608.50	17,931.00	18,253.50	18,576.00
6	15,867.00	16,189.50	16,512.00	17,092.50	17,415.00	17,737.50	18,189.00	18,511.50	18,834.00	19,156.50
7	16,447.50	16,770.00	17,092.50	17,673.00	17,995.50	18,318.00	18,769.50	19,092.00	19,414.50	19,737.00
8		17,350.50	17,673.00	18,253.50	18,576.00	18,898.50	19,350.00	19,672.50	19,995.00	20,317.50
9		17,931.00	18,253.50	18,834.00	19,156.60	19,479.00	19,930.50	20,253.00	20,575.50	20,898.00
10			18,834.00	19,414.50	19,737.00	20,059.50	20,511.00	20,833.50	21,156.00	21,478.50
11				19,995.00	20,317.50	20,640.00	21,091.50	21,414.00	21,736.50	22,059.00
12									22,317.00	22,639.50

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ARTICLE XIV TERM OF AGREEMENT

A. This Agreement shall be in effect August 15, 1982, and shall remain in effect through August 14, 1983. Negotiations for any succeeding agreement shall not be initiated prior to January 1, 1983, but a negotiation meeting shall be held prior to March 15, unless mutually agreed to by both parties in writing. This agreement shall continue in force past its expiration date of August 15, 1983 until a new agreement is signed or until either party gives 10 days notice upon the other of its intent to terminate the agreement.

4. That the District and the Association did not reach a new agreement prior to the commencement of the 1983-84 school year; that on August 31, 1983, the District, in accordance with Article XIV, Section A., of the 1982-83 agreement, notified the Association in writing that it intended to terminate the agreement effective on September 11, 1983; and that pursuant to this notice said agreement expired on September 11, 1983.

5. That the District's 1983-84 school year began on or about August 26, 1983; that at that time returning teachers were not advanced on the salary schedule to the next experience level or to the appropriate level due to the attainment of additional educational credits; and that these teachers became aware that their salary at the beginning of the 1983-84 school year was the same as their 1982-83 salary when they received their first paycheck on September 10, 1983.

6. That the District hired five new teachers for the 1983-84 school year; that three of these new teachers had no experience and their salary was that of the BA, 0 experience cell of the 1982-83 schedule; that one new teacher had one-half year experience and was placed at the BA, 1/2 year experience level; and that one new teacher had five and a half (5 1/2) years experience and was placed at the BA + 24, 5.5 years experience salary level on the 1982-83 schedule.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the grievance procedure established by the parties' 1982-83 collective bargaining agreement does not provide for final and binding arbitration and the District waived any objections to the Complainant's failure to utilize the grievance procedure, and therefore, the Examiner will assert the jurisdiction of the Wisconsin Employment Relations Commission to determine the alleged contractual violation under Sec. 111.70(3)(a)5, Stats.

2. That the District, by its refusal to advance all returning teachers to the appropriate salary level of the 1982-83 salary schedule at the commencement of the 1983-84 school year, violated Article X, Section B of the parties' 1982-83 collective bargaining agreement, and therefore, the District committed a prohibited practice within the meaning of Section 111.70(3)(a)(5 of the Municipal Employment Relations Act.

3. That, inasmuch as the 1982-83 collective bargaining agreement between the parties was continued in full force and effect until September 11, 1983, and since said collective bargaining agreement contained express provisions relating to salary schedule placement of teachers, the Association waived any right to bargain a change in salary placement made during the term of said extended agreement and therefore, the District did not violate its duty to bargain in good faith with respect to its failure to grant increments prior to September 11, 1983 within the meaning of Sec. 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings and Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

IT IS ORDERED that the Green Lake School District, its officers and agents, shall immediately:

1. Cease and desist from violating Article X of the parties' 1982-83 collective bargaining agreement by its refusal to place returning teachers at the proper salary level at the commencement of the 1983-84 school year.

2. Take the following action which the Commission finds will effectuate the policies of MERA:

a. Comply with the provisions of Article X of the parties' 1982-83 collective bargaining agreement by placing all returning teachers at the proper salary level at the commencement of the 1983-84 school year, and pay them the amounts they should have been paid if so placed, together with interest at the rate of 12% per year on amounts due commencing on September 10, 1983 and each pay period thereafter until the District has properly placed them on the 1982-83 schedule or on a subsequently negotiated schedule, whichever occurs first.

b. Notify the Wisconsin Employment Relations Commission within twenty (20) days of this decision what action the District has taken to comply with this Order.

3. It is further ordered that the complaint be dismissed as to violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 7th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY Lionel L. Crowley
Lionel L. Crowley, 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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its amended complaint, the Association alleged that the District violated the parties' collective bargaining agreement by refusing to pay employes their education and experience increments at the start of the 1983-84 school year, thereby violating Sec. 111.70(3)(a)5, Stats. The Association further alleged that the District failed to bargain in good faith by unilaterally changing the wages of employes and failing to maintain the status quo by refusing to grant said experience and education increments, thereby violating Sec. 111.70(3)(a)4 and 1, Stats. The District admitted that it had not paid the experience and educational increments for the 1983-84 school year but denied that this was a violation of the parties' collective bargaining agreement or a change in status quo with respect to wages, thereby denying any violation of Sec. 111.70(3)(a)5, 4 or 1.

ASSOCIATION'S POSITION:

The Association contends that the 1982-83 agreement, which was in effect for the first few weeks of the 1983-84 school year, clearly provides in Article X that teachers' salaries shall be determined by their years of experience and educational level. It points to the salary schedule as providing that salary is determined by the appropriate experience and education factors. It asserts that its position is confirmed by the District's placement of new teachers hired for the 1983-84 school year by the District's crediting them with experience and education gained during the 1982-83 school year. It claims that there is no basis in the contract for treating returning teachers differently, and the District's failure to credit them with all their experience and education and to pay them according to the 1982-83 salary schedule violated the agreement. The Association contends that the failure to pay experience and education increments was a unilateral change in a mandatory subject of bargaining and a violation of the District's duty to bargain. It asserts that, even though the agreement was still in effect, the District could not effect a unilateral change unless authorized by the agreement. The Association argues that, after the 1982-83 agreement had expired on September 11, 1983, the District had an obligation to maintain the status quo. It contends that the status quo required the District to maintain in effect the salaries which should have been in effect before the expiration of the agreement, and the District's refusal to pay employes the experience and educational increments constituted a failure to maintain the status quo in violation of its bargaining obligations under Sec. 111.70(3)(a)4, Stats.

DISTRICT'S POSITION:

The District contends that it maintained the status quo by not paying the educational and experience increments to returning teachers. It argues that the status quo is not an extension of the contract terms but, instead, is the continuation of monetary amounts previously paid under the agreement prior to its expiration, so as to satisfy the obligation to bargain changes in mandatory subjects of bargaining. It takes the position that the status quo requires mandatory subjects of bargaining be maintained and not changed, absent agreement by the parties, or impasse. It asserts that the language of the parties' agreement establishes an underlying status quo with respect to salaries that the salary provisions were meant for a fixed period of time and did not continue beyond the stated expiration of the agreement. The District contends that the Association has failed to meet the burden of proving that teachers were in fact entitled to any increments in that no evidence was presented, with one exception, that any teacher was eligible for experience and/or educational increments. It maintains that the placement of new employes occurred while the agreement was in effect, and the terms of the agreement gives the administrator discretion to credit new hires for their previous experience, and therefore status quo does not come into play with respect to their placement vis-a-vis the placement of returning staff. The District contends that the failure to pay increments cannot be both a violation of Section 111.70(3)(a)4 and of Section 111.70(3)(a)5 because the duty to bargain during the contract term applies only where the contract contains no provision dealing with the problem, but if the contract contains such a provision, then the duty to bargain has been waived.

The District asserts that the only possible violation in the instant matter is a breach of contract under Sec. 111.70(3)(a)5. The District denies that its conduct in failing to pay increments to returning teachers violated the terms of the parties' agreement. It claims that the contractual provisions set forth in Article X are ambiguous and that past practice must be considered to interpret these provisions. It notes that past practice has not included the payment of increments, and in 1981-82 the District followed the same practice as it did for the 1983-84 school year. It further points out that the title of Section B of Article X is "1982-83 SALARIES", and that the last sentence of Section B, together with the provision specifying the contract term, specifically limits the application of the salary schedule to the 1982-83 school year. Thus, the District asks that the complaint be dismissed in its entirety.

DISCUSSION:

Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Section 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides for a grievance procedure with final and binding arbitration, and such procedure has not been exhausted. 2/ Here, the 1982-83 collective bargaining agreement between the parties does not provide for the final and binding arbitration of grievances arising under the agreement, and the District waived the procedural requirements for the filing of a grievance on the denial of experience and educational increments. 3/ Therefore, the Examiner has asserted the jurisdiction of the Commission to determine whether the District has violated the terms of the 1982-83 agreement, and consequently Sec. 111.70(3)(a)5, Stats., by its failure to pay the increments at the start of the 1983-84 school year to returning teachers. It is undisputed that the 1982-83 collective bargaining agreement continued in effect until September 11, 1983, which was after the start of the 1983-84 school year, and a day after the first pay day for the 1983-84 school year. Article X, Section B of the parties' 1982-83 agreement states, in part, that "All teachers shall be placed on the salary schedule (Appendix B) according to their years of experience and their degree status, including approved credits beyond the degree." Appendix B, the salary schedule, consists of columns of salary amounts for certain education levels, and each salary in a column corresponds to an experience level. For example, a teacher who had a BA + 12 credits and 9 years of experience at the start of the 1982-83 school year would be paid $18,253.50, and a teacher with BA + 12 credits with 10 years of experience at the beginning of the 1982-83 school year would be paid $18,834.00. At the beginning of the 1983-84 school year, the teacher who had a BA + 12 credits and 9 years of experience at the start of the 1982-83 school year would now have 10 years experience at the BA + 12 credit column, and in accordance with the above-cited language, it would appear that the placement of the teacher would be at $18,834.00. It must be noted that the contractual language remained unchanged but the teacher changed by bringing greater experience to the District.

The Examiner concludes that the plain language of Article X, Section B requires the teacher to be placed on the salary schedule at the start of the 1983-84 school year according to his/her experience and education. This conclusion is supported by the District's placement of new hires for the 1983-84 school year. The District gave teachers hired for the 1983-84 school year credit for experience including that gained during the 1982-83 school year. For example, the District gave Hundt 5 1/2 years experience at the BA + 24 level for a salary of $17,124.75. 4/ A returning teacher with 5.5 years experience at the BA + 24 level would have been paid $16,544.25, the same amount the teacher would have received at the start of the 1982-83 school year with 4.5 years of experience. The District argued that the agreement was in effect when it hired the new

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2/ Jt. School District No. 1, City of Green Bay, et al., 16753-A, B (12/79); Board of School Directors of Milwaukee, 15825-B, C (6/79); Oostburg Joint School District, 11196-A, B (12/72).

3/ Ex-1, TR-5.

4/ Ex-2A.

teachers and has attempted to distinguish the new hires by reference to Article X, Sections C and E. The record failed to show that any more or less credit than that actually earned by a new hire had been given by the District in its placement of him/her on the salary schedule. It follows that the new hires were placed in accordance with the first sentence of Section B for their actual experience and education as of the start of the 1983-84 school year. Nothing distinguishes the new hires from returning teachers and and the same interpretation of the agreement must be applied to all returning teachers because the agreement was in effect at the time placement on the basis of experience and education should have occurred.

The District argues that Section B is entitled "1982-83 SALARIES", and the duration clause infers a school year contract, so that Section B must be interpreted as providing placement only for the 1982-83 school year and not for the 1983-84 school year. The duration clause merely provides the date which is the earliest the agreement can be terminated and does not provide a definite duration as the agreement indicates it continues until its termination on ten days' notice. The District could have easily terminated the agreement before the start of the 1983-84 school year by giving an earlier notice. It did not do so and therefore it continued the agreement into the 1983-84 school year and was bound by all of its terms. While the agreement states "1982-83 SALARIES", such term does not specifically limit it to 1982-83 school year, particularly where the duration clause does not provide for expiration before the start of the next school year. The term "1982-83 SALARIES" is not limited specifically to that year but can mean commencing that year and continuing thereafter. 5/ The duration clause establishes a continuing agreement beyond the 1982-83 school year, and therefore it is concluded that the title of Section B did not limit its application solely to the 1982-83 school year.

The District further argues that the contractual language is not clear and unambiguous and resort to past practice to interpret the agreement is appropriate. It points out that in the 1981-82 school year, no salary adjustments were made based on the 1980-81 contract. It contends that this indicates that the parties intended that no increments would be paid where a new agreement had not been reached by the start of the school year. Article X, Section A states that all previous policies relative to salary were rescinded and, when coupled with the plain language of Section B, it is concluded that there is no ambiguity in the language of Article X requiring resort to past practice. Furthermore, the mere failure to grant increments at the start of a single school year in the past is not sufficient to establish a binding past practice on the parties in light of the contractual language and the District's conduct with respect to new hires. Finally, the District argues that the Association has failed to prove that anyone other than one returning teacher was denied an increment. The District admitted that experience and education increments were not paid for the 1983-84 school year. 6/ By this admission, it was unnecessary for the Association to show that increments were denied to those entitled to them by the terms of the agreement. All that it was required to do was demonstrate that the Agreement required the payment of increments to teachers at the commencement of the 1983-84 school year. The Examiner finds it has met this burden. Accordingly, the District's failure to pay increments to eligible teachers at the commencement of the 1983-84 school year violated Article X, Section B of the agreement, and therefore, the District has violated Section 111.70(3)(a)5, Stats.

The Association contends that the district's failure to pay increments to returning teachers not only constitutes a breach of the agreement but constitutes a breach of the duty to bargain as well. It cites Fennimore Joint School District No. 5, 7/ in support of its contention. The Association's reliance on Fennimore Joint School District No. 5, supra, is misplaced. The duty to bargain during the term of an existing collective bargaining agreement extends to any mandatory subject of bargaining which the labor organization has not waived its

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5/ Jt. School District No. 8, 16000-A (10/79).

6/ TR-4.

7/ Decision No. 11865-A (6/74).

right to bargain over, or which is not addressed in the existing agreement. 8/ Having previously concluded that the District breached the agreement by its failure to pay the increments, it follows that this subject was addressed in the existing agreement and that the District did not have a duty to bargain on this during the term of the agreement. The express language on the subject contained in the agreement established a waiver of the obligation to bargain on it. Therefore, the District cannot breach the terms of the agreement as well as its duty to bargain during the term of the contract by its conduct on the same mandatory subject of bargaining.

Inasmuch as the Examiner has concluded that the District has violated the agreement and has directed the District to pay the appropriate increments to eligible teachers, it is unnecessary to consider the status quo arguments advanced by the parties, or the refusal to bargain allegations after the expiration of the parties' agreement because, if the District had complied with the terms of the 1982-83 agreement, the status quo would have been that argued for by the Association and, hence, no finding is necessary or required in that respect. With respect to the remedy, the Examiner has determined that a cease and desist order, along with a backpay order, is appropriate for the the contractual violation. The Examiner has also ordered interest on the amount of any back pay due. 9/

Dated at Madison, Wisconsin this 7th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

8/ Racine Unified School District No. 1, 18848-A (6/82); City of Kenosha, 16392-A (12/78); Madison Metropolitan School District, 15629-A (5/78); Nicolet Education Association, 12073-B (10/74).

9/ Madison Teachers, Inc. v. WERC, 115 Wis 2d 623 (Ct. App. 1983); Wilmot Schools, 18820-B (12/83). The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed on November 18, 1983. At that time, the rate was 12% per year.