STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TOMORROW RIVER EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF THE TOMORROW RIVER, Respondent.	Case IV No. 32488 MP-1532 Decision No. 21329-A

Appearances:

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

Mr. William G. Bracken, Consultant, Wisconsin Association of School Boards, Box 160, Winneconne, WI 54986, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Tomorrow River Education Association having, on November 22, 1983, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the School District of the Tomorrow River had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on January 20, 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 Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Amherst, Wisconsin, on March 8, 1984; and the parties having filed briefs and reply briefs, the last of which were exchanged on May 23, 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 Tomorrow River Education Association, hereinafter referred to as the Association, is a labor organization which functions as the exclusive collective bargaining representative of all regular full-time classroom teachers including the librarian, speech therapist and reading specialist; and that its address is: c/o David Hanneman, Central Wisconsin UniServ Council - South, 2805 Emery Drive, Wausau, Wisconsin 54401.

2. That the School District of the Tomorrow River, hereinafter referred to as the District, is a municipal employer which operates a public school system for the benefit of the inhabitants of the District and its offices are located in Amherst, Wisconsin 54406.

3. That the District and the Association have been parties to successive collective bargaining agreements including a 1981-83 agreement which became effective on July 1, 1981 and extended through June 30, 1983; that said agreement provided in pertinent part as follows:

SALARY SCHEDULE PLACEMENT

> Teachers shall be placed on the indexed salary schedule according to their training and experience evaluated upon first entering the District. The schedule will show diferentials (sic) and requirements for placement.

Credit Requirements. In order to remain on the salary schedule horizontally and vertically, a teacher must earn four (4) credits in his subject area (graduate or undergraduate not necessarily in a masters program) every five years. Contracts shall be adjusted on or about September 1 for additional credits affecting the placement on the salary schedule. All courses must have prior approval of the Board.

Pay Below Schedule. Teachers will be notified no later than the end of the first semester if they are being considered for renewal at a rate under schedule. Teachers will be notified by March 1 if they are to be contracted below schedule.

Pay Above Schedule. The Board reserves the option of paying beyond schedule.

. . .

SALARY SCHEDULE - 1981-82, 1982-83

SCHOOL DISTRICT OF THE TOMORROW RIVER
1981 TO 1982 SALARY EXPENSE PROJECTION FOR BASE $11,800.00

Exp.	BS/A....	BS/A+8..	BS/A+16.	BS/A+24.	MS/A...
0	11,800.00	12,050.00	12,300.00	12,550.00	12,800.00
1	12,160.00	12,410.00	12,660.00	12,910.00	13,160.00
2	12,520.00	12,770.00	13,020.00	13,270.00	13,520.00
3	12,880.00	13,130.00	13,380.00	13,630.00	13,880.00
4	13,240.00	13,490.00	13,740.00	13,990.00	14,240.00
5	13,600.00	13,850.00	14,100.00	14,350.00	14,600.00
6	13,960.00	14,210.00	14,460.00	14,710.00	14,960.00
7	14,320.00	14,570.00	14,820.00	15,070.00	15,320.00
8	14,680.00	14,930.00	15,180.00	15,430.00	15,680.00
9	.00	15,290.00	15,540.00	15,790.00	16,040.00
10	.00	15,650.00	15,900.00	16,150.00	16,400.00
11	.00	16,010.00	16,260.00	16,510.00	16,760.00
12	.00	.00	16,620.00	16,870.00	17,120.00
13	.00	.00	.00	17,230.00	17,480.00
14	.00	.00	.00	.00	17,840.00
15	.00	.00	.00	.00	.00
16	.00	.00	.00	.00	.00

SCHOOL DISTRICT OF THE TOMORROW RIVER
1982 TO 1983 SALARY EXPENSE PROJECTION FOR BASE $12,700.00

Exp.	BS/A....	BS/A+8..	BS/A+16.	BS/A+24.	MS/A...
0	12,700.00	12,950.00	13,200.00	13,450.00	13,700.00
1	13,123.00	13,373.00	13,623.00	13,873.00	14,123.00
2	13,546.00	13,796.00	14,046.00	14,296.00	14,546.00
3	13,969.00	14,219.00	14,469.00	14,719.00	14,969.00
4	14,392.00	14,642.00	14,892.00	15,142.00	15,392.00
5	14,815.00	15,065.00	15,315.00	15,565.00	15,815.00
6	15,238.00	15,488.00	15,738.00	15,988.00	16,238.00
7	15,661.00	15,911.00	16,161.00	16,411.00	16,661.00
8	16,084.00	16,334.00	16,584.00	16,834.00	17,084.00
9	.00	16,757.00	17,007.00	17,257.00	17,507.00
10	.00	17,180.00	17,430.00	17,680.00	17,930.00
11	.00	17,603.00	17,853.00	18,103.00	18,353.00
12	.00	.00	18,276.00	18,526.00	18,776.00
13	.00	.00	.00	18,949.00	19,199.00
14	.00	.00	.00	.00	19,622.00
15	.00	.00	.00	.00	.00
16	.00	.00	.00	.00	.00;

and that the agreement expired, by its terms, on June 30, 1983.

4. That at the commencement of the 1983-84 school term the parties had not reached agreement on the terms of a successor agreement to the 1981-83 agreement; that at the commencement of the 1983-84 school year the District did not grant any experience increments to returning teachers pursuant to the salary schedule in the expired contract; that on or about August 29, 1983, the Association's president sent a letter to the District requesting that the 1982-83 salary schedule be maintained and that experience increments be granted to eligible teachers; that on or about September 9, 1983, this request was repeated; that on or about September 13, 1983, the District responded to the Association indicating that it would not pay the teachers any experience increment based on the expired contract; that at the commencement of the 1983-84 school year the District did pay or advance teachers, who had qualified for such movement on September 1, 1983, horizontally to the appropriate educational column in the salary schedule of the expired agreement; that the parties continued negotiations for the terms of the successor agreement, and agreement was reached on the terms of the new agreement on or about February 7, 1984; and that on March 1, 1984, all teachers were paid all amounts due under this new agreement retroactive to July 1, 1983.

5. That for the 1980-81 school year, the parties did not reach agreement until November, 1980 and increments for experience were not paid until December 1, 1980; that for the 1981-82 school year, agreement was not reached until September, 1981 and experience increments were not paid until October 1, 1981; and that in the school years beginning 1975-76 through 1979-80 the parties had always reached agreement on a successor agreement prior to the start of the school year.

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

CONCLUSION OF LAW

1. That the District's failure at the beginning of the 1983-84 school year to grant experience increments to eligible teachers pursuant to the salary schedule contained in the expired 1981-83 agreement was a unilateral change in the status quo, and thus was a refusal to bargain in good faith in violation of Secs. 111.70(3)(a)4 and 1 of MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 1/

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

1. Cease and desist from refusing to bargain in good faith with the Association by failing to maintain the status quo by not granting its eligible teachers the experience increment in accordance with the salary schedule contained in the expired agreement.

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

A. Pay all teachers who, at the beginning of the 1983-84 school year, were eligible to receive an experience increment pursuant to the salary schedule in the expired agreement, interest at the rate of 12% per year on the amounts due them commencing on September 1, 1983, and each pay date thereafter until March 1, 1984, the date the District granted retroactive pay to the employes pursuant to the 1983-85 agreement.

B. Notify all employes by posting in conspicuous places in its offices where bargaining unit 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 this 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 any material.

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

Dated at Madison, Wisconsin this 29th 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.

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, absent impasse, unilaterally change the method of advancing teachers on the salary schedule in the expired contract.

2. We will make whole bargaining unit employes represented by the Tomorrow River Education Association for losses incurred by reason of this action by the payment of interest at the rate of 12% on the amounts withheld during the period of September 1, 1983, through March 1, 1984.

3. We will not in any other or related manner interfere with the rights of our employes pursuant to the provisions of the Municipal Employment Relations Act.

By _____
for the School District of the
Tomorrow River

Dated this _____ day of _____, 1984.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, the Association alleged that the District refused to bargain in good faith in violation of Secs. 111.70(3)(a)4 and 1, Stats., by its failure to maintain the status quo during the hiatus period between contracts by unilaterally withholding the experience increment which was set forth in the expired agreement. The District answered the complaint denying that it had unilaterally changed the status quo in violation of Secs. 111.70(3)(a)4 and 1, Stats. The District further contended that the case was moot because the parties had reached agreement on a successor agreement which included retroactive payment to employes for all amounts due them. The District, citing the retroactivity clause, asserted that all provisions of the successor agreement were retroactive, and hence the issue raised by the complaint must be deferred to the contractual grievance procedure.

Association's Position:

The Association contends that the settlement of the 1983-85 collective bargaining agreement which provided for retroactive payments did not render the instant complaint moot. It points out that while it agreed to a collective bargaining agreement with retroactive payments, it specifically reserved the right to pursue its complaint. It claims that the settlement of the collective bargaining agreement did not resolve the central issue in this matter as to what constitutes the status quo during the hiatus period between contracts, an issue which can easily arise again. It also asserts that the settlement did not provide the complete remedy for a prohibited practice violation in that the settlement did not provide for interest on pay wrongly withheld and did not require the posting of a compliance notice. It maintains that the case presents a very live controversy which must be addressed to adjudge the rights of the parties. It further contends that the issue presented is one of public importance which is capable of repetition and the decision of the Commission is of great significance to school districts and labor organizations across the state, and therefore a decision on the merits is required.

The Association contends that the issue presented here is not appropriate for deferral to the grievance procedure of the successor collective bargaining agreement. It points out that the issue involves a statutory question as to the duty to bargain rather than a contractual dispute over the meaning of its terms. It notes that the issue arose at the time when no collective bargaining agreement was in effect, and that it could not have arbitrated the dispute at that time. It asserts that the arbitrator would have no jurisdiction to determine the statutory obligation as to bargaining in good faith as his jurisdiction would be limited to interpreting the contract. It argues that as the issue is a statutory rather than a contractual issue, deferral is inappropriate.

With respect to the merits of the complaint, the Association contends that the District's obligation to maintain the status quo during the hiatus period between agreements required it to pay the experience increments specified in the expired contract. Citing Commission decisions and cases from other jurisdictions, the Association argues that the status quo is dynamic. It points out that the grid system provides for a salary which is tied to experience and education. It notes that at the beginning of the 1983-84 school year the District maintained the status quo by its payment for a change in educational level, but unilaterally and without bargaining to impasse, it discontinued the salary schedule by refusing to pay employes their experience increment. It asserts that the District arbitrarily chose which aspects of the status quo would be maintained and which it would disband. The Association claims that maintenance of the status quo in the instant case required the District to pay the increments set forth in the expired agreement. It contends that the incremental increases had customarily been granted at the beginning of each school year, and the employes had a reasonable expectation that these would be automatically applied. It notes that the District measures experience from July 1 through June 30, and that adjustments would be paid as of the first of July. It also points out that the contract contains requirements for remaining on the schedule horizontally and vertically. The Association also points out that while no full-time teachers were hired, the District did hire one part-time teacher, and although she was not covered by the

terms of the collective bargaining agreement, the District's treatment of her by granting her a prorated portion of a new experience increment evidences the continuing nature of the schedule in the expired agreement. It claims that the requirements of the expired agreement and the practice of the parties with respect to the determination of the salaries clearly indicate that the status quo included the experience increments. The Association admits that in previous years, when the parties had not settled on a successor agreement, increments were not paid at the beginning of the school year; however, it asserts that this factor is not controlling with respect to the status quo at the expiration of the 1981-83 contract. It points out that the past failure to grant increments was of a very brief duration and that the decision not to litigate the issue at that time is understandable where settlement on a successor agreement was imminent. The Association concludes that the status quo as to employes' salaries during the hiatus period included automatic increases for education and experience, and the District's unilateral action withholding the experience increases constituted a change in the status quo as to a mandatory subject of bargaining and violated Secs. 111.70(3)(a)4 and 1 of MERA.

District's Position:

The District contends that the complaint should be dismissed and the matter deferred to the contractual grievance procedure. It points out that the Association's argument that the District violated the status quo is based on the salary schedule contained in the contract, and that therefore this contractual violation should be deferred to the grievance procedure which culminates in arbitration. The District argues that the Commission's criteria for deferral to the contractual grievance procedure has been met, and therefore, deferral is appropriate. It further points out that the 1983-84 collective bargaining agreement contained a duration clause which is fully retroactive and the contractual hiatus period no longer exists but has been "bridged", and since the issue would be the same as that submitted to an arbitrator, it requests that the complaint be dismissed and the matter be deferred to the contractual grievance procedure.

The District also contends that the issue raised by the complaint is moot in that the parties have reached a successor agreement which provides for retroactive wage adjustments including experience increments and these were paid to teachers on March 1, 1984, and therefore, the issue raised by the complaint has been resolved by the parties.

The District also claims that the Association waived its right to bargain the increment issue. It points out that while the Association requested that experience increments be paid during the hiatus period, they never brought this issue to the negotiation table. The District maintains that its position on the payment of increments had been established by its past practice in 1980-81 and 1981-82 where increments had not been paid until a successor agreement was in place. It asserts that the Association never made a bargaining request or demand that the District continue to pay the experience increments after the expiration of the collective bargaining agreement and therefore the Association has waived its right to bargain the increment issue.

With respect to the merits of the complaint, the District contends that it maintained the status quo by not paying the yearly experience increments pursuant to the salary schedule in the expired agreement. It claims that the maintenance of the status quo during the contract hiatus is the continuation of the monetary amounts employes were previously paid and granting experience increments would violate the status quo. It points out that no new teachers were hired or rehired so that there was no evidence of any change in the status quo which required payment of the experience increments. The District admits that it advanced ten teachers who had earned sufficient credits to qualify for a horizontal movement on the salary schedule; however, it contends that this action was based on the specific contractual provision which requires adjustment on or about September 1, and the expectation of the parties that such horizontal movement would occur on that date. It maintains that the status quo required the horizontal movement; however, with respect to the experience increments, no such movement was expected nor required. It notes that the complaint does not raise the issue of horizontal placement, only vertical. It distinguishes the vertical advancement from the horizontal placement on the basis that the contract is silent on vertical placement and does not expressly require the teachers to be paid the experience increment. It argues that had the parties intended such a

result they could have easily so stated. It points out that nothing in the contract guarantees either vertical or horizontal movement on the salary schedule. It also relies on past practice by noting that when a successor agreement was previously not reached at the start of the school year, the experience increments were not granted but were only given when the successor collective bargaining agreement was reached. The District further contends that the Association has failed to sustain its burden of proof by failing to offer evidence that any employes were eligible for an experience increment. It contends that its admission in the answer that certain employes were eligible for increments and were denied them does not alleviate the Association's burden of proving by a clear and satisfactory preponderance of the evidence that the District violated MERA by denying increments to eligible teachers. The District requests that the complaint be dismissed in its entirety.

Discussion:

Deferral

In raising this argument the District has apparently misconceived the nature of the issue. The Commission in City of Greenfield, 2/ stated as follows:

> "Second, most mandatory subjects of bargaining must remain intact per the terms of the expired agreement, not because the Commission sua sponte extends the contractual terms, but as a result of the employer's duty to maintain the status quo at least to the point of impasse, in respect to such mandatory subjects as being an inseparable part of the employer's duty to bargain over changes in mandatory subjects of bargaining."

The Commission further stated in Menasha Joint School District, 3/ as follows:

> "The maintenance of the status quo during the contract hiatus is not dependent upon the continuation of a contractual obligation in a pre-existing contract, but in the continuation of the wages, hours and conditions of employment which existed at the time when said agreement was in effect."

The terms of the contract are not extended, rather the preexisting wage system must be continued in effect until the bargaining obligation on it has been satisfied. The issue raised by the complaint is a statutory issue as to the scope of the duty to bargain and not an issue with respect to the obligations under the contract. The issue involves the statutory obligation of the District when no agreement between the parties is in effect. While the successor agreement contained a general retroactivity clause which applied all terms of the successor agreement back to the expiration date of the pre-existing contract, the issue here does not involve the application of any of those provisions. The complaint does not raise any issue with respect to the application of the salary schedule contained in the successor agreement. Rather, the complaint raises the issue as to the statutory obligation of the District to bargain in good faith during the hiatus period; and therefore, under these circumstances, the issue is clearly statutory and not contractual and deferral is not appropriate.

Mootness

The District claims that the complaint is moot because the parties have reached agreement on a successor collective bargaining agreement which included retroactive payments that were made on March 1, 1984, and thereby resolved the issues raised by the complaint. The Wisconsin Supreme Court has given the following definition of a moot case:

> "A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing

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2/ Decision No. 14026-B (WERC, 11/77).

3/ Decision No. 16589-B (WERC, 9/81).

> 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." 4/

The Commission has applied this definition in determining that a prohibited practice complaint is not moot even though the parties have subsequently reached an agreement. The Commission stated as follows:

> "The activity in question violates the public policy of Wisconsin as expressed in MERA and the Complainant has a legal right to ask that the Respondent be directed to cease engaging in that activity and take such affirmative action as might be appropriate to insure its non-recurrence. The controversy is certainly not "pretended" and the Complainant is not merely seeking a "decision in advance", since the complaint in this case was not filed until after the conduct had actually taken place. The only possible basis on which the controversy could be found to be moot would be on the claim that a judgment in the matter would not have any "practical legal effect".
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> Even though the activity complained of has ceased, the terms of the current collective bargaining agreement is subject to renegotiation beginning in January, 1974 and the agreement can be terminated by either party as early as August 25, 1974. If the Commission were to dismiss the case as moot at this point in time, the Respondent could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy expressed in MERA and would have the "practical legal effect" of leaving the Complainant without an effective remedy." 5/

The Commission's rationale is similar to that of the National Labor Relations Board which has determined that a refusal to bargain charges does not become moot because the parties have entered into a collective bargaining agreement. That rationale has been stated as follows:

> ". . ., it is well settled that an employer's execution of a contract with a union with which it previously refused to bargain in violation of the Act does not render the issue of such violation moot. (Footnote omitted) This principle is premised on the theory that the Board does not oversee the settlement of private disputes but, rather, is entrusted with the responsibility of protecting public rights under the Act. These rights are not protected, and the effects of the unfair labor practices found are not expunged, merely because of a private settlement of the dispute by the parties, which may or may not serve to remedy the adverse effect on the Section 7 rights of the employees." 6/

In the instant complaint, the Association has alleged that the District has refused to bargain in good faith by unilaterally changing the status quo. The Association is entitled to know whether or not the District's conduct violated MERA. If it is determined that the District has violated MERA, the Association then has the right to such affirmative relief as will prevent any further recurrence of such conduct. There is no guarantee that a party charged with a

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4/ WERB v. Allis Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436, 32 N.W. 2d 190 (1948).

5/ Unified School District No. 1, Racine County, Dec. No. 11315-D (WERC, 4/74).

6/ Massillon Publishing Co., 88 LRRM 1040 (1974).

prohibited practice who voluntarily ceases such conduct will not in the future resume such improper conduct. The imposition of an appropriate order to conform its conduct to the law is the best means for preventing such recurrence. 7/ Therefore the instant complaint is not moot. In addition, the complaint involves legal questions of public interest and importance and presents a factual situation which is apt to recur in the future, hence the rule of mootness is not applicable to the complaint. 8/

Waiver

The District's arguments with respect to waiver are misplaced. The evidence must prove a clear and unmistakable waiver. 9/ Inasmuch as the parties were negotiating on the issue of wages during the hiatus, the evidence fails to establish any waiver of the District's obligation to maintain the status quo.

Merits

The general rule with respect to the status quo was stated by the Commission in City of Greenfield, supra, as follows:

> ". . . we begin with the general rule that an employer must, pending discharge of its duty to bargain, maintain the status quo of all terms of the expired agrement which concern mandatory subjects of bargaining. Thus, even though the amount of wages owing originally was established by the expired agreement an employer may not change the established wage rates without first discharging its duty to bargain over that item."

In formulating its general rule the Commission relied on cases arising under the National Labor Relations Act. 10/ Decisions interpreting that Act have held that the status quo with respect to the granting of wage increases requires the employer to refrain from granting any increases except increases pursuant to a long-standing practice or policy of automatic pay increases which involve little or no discretion by the employer. 11/ The determination of the status quo in any particular case depends upon the unique facts and circumstances of that case. In Wisconsin Rapids Board of Education, 12/ the employer had a policy of wage progression that provided for automatic increases at the end of six, twelve, twenty-four and thirty-six months respectively. The employer's policy also provided for increases in the amount of vacation at eight and fifteen years of service respectively. During the negotiations for an initial collective bargaining agreement, the employer froze the wages and vacation amounts of each employe and refused to apply its wage and vacation progression policies. The Examiner held, in that case, that the employer had failed to maintain the status quo by its conduct. The Examiner found that the employer's unilateral policies provided for automatic increases in salary and vacations based on the increasing length of service of its personnel and that the discontinuance of the policies was an impermissible change in the organizational status quo. In Menasha Joint School District, 13/ the parties' expired collective bargaining agreement

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7/ Galloway Board of Education v. Ed. Assn., 100 LRRM 2250 (N.J., 1978).

8/ Local 150, SEIU, 16277-C, (Henningsen, 10/80).

9/ City of Milwaukee, Dec. No. 13495 (WERC, 4/75); City of Menomonie, Dec. No. 12674-A (McGilligan, 10/74).

10/ NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962); NLRB v. Frontier Homes Corp., 371 F. 2d 974, 64 LRRM 2320 (8th Cir. 1967).

11/ NLRB v. Katz, supra; NLRB v. Southern Coach & Body Co., 336 F. 2d 214, 57 LRRM 2102 (5th Cir. 1964); NLRB v. Phil - Modes, Inc., 406 F. 2d 556 (5th Cir. 1969).

12 Decision No. 19084-B (Honeyman, 7/82).

13/ Decision No. 16589-B (Greco, 4/80).

contained a salary grid similar to the salary schedule involved in the instant case, which consisted of columns listing the salaries for teachers with a certain educational attainment and each column made up of vertical steps of salary amounts which correspond to the number of years of experience. Under this grid a teacher who had gained additional education credits necessary to move from one column to the next would receive an increase in pay for the "lane change", and with another year of experience, a teacher would receive an increase, an increment, by moving vertically to the next step within the lane. During the contractual hiatus period, the District moved teachers who had gained the additional educational credits from one lane to the next but refused to grant any of the returning teachers the experience increment. The Examiner held that the District maintained the status quo by not granting the teachers the increment increases set forth in the grid of the expired contract. The Commission, with Commissioner Torosian dissenting, affirmed the Examiner's decision that the status quo did not require the District to grant experience increments during the contractual hiatus period. 14/ Commissioner Torosian based his dissent on the District's granting increases to teachers on a "lane change" and, additionally, on the basis that experience increases had been granted to new hires and to teachers who had been non-renewed and then rehired. 15/ On appeal to the Circuit Court, the Commission decision was reversed on the same basis as Commissioner Torosian's dissent. 16/ The issue presented in the instant case is whether the salary schedule in the expired agreement establishes a policy or practice of automatic increases which involve little or no discretion on the part of the District, such that the District was required to grant the experience increments in order to maintain the status quo during a hiatus period. The Association relies on Wisconsin Rapids, supra, and the dissent in Menasha, supra, as well as cases from other jurisdictions holding that increments on experience and educational attainment pursuant to a salary grid in an expired contract are automatic increases. 17/ On the other hand, the District distinguishes Wisconsin Rapids, supra, on the basis that that case involved organizational status quo rather than hiatus status quo. It relies on the majority Commission decision in Menasha that the experience increments are not automatic increases and distinguishes the instant case from the dissent and circuit court decision in Menasha on the basis that the District here did not grant experience increments to any new teachers or to any rehires.

The District argued very persuasively in its brief that the horizontal movement of teachers pursuant to the expired contract was required to maintain the status quo. It stated:

> "The teachers entered the process of obtaining additional credits with the expectation and reliance that such horizontal movement would occur September 1. The Board has a responsibility and obligation to move teachers horizontally on September 1 for those teachers whose total number of credits qualify themselves for new lane placement. These mutual expectations and responsiblities were bargained between both parties. The language above clearly spells out the obligations each party must perform: teachers must earn credits; the board must move them on the salary schedule.
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> The status quo is determined by the express contract language stated above. The underlying obligation to move teachers upon earning sufficient credits by September 1 does

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14/ Menasha Joint School District, Dec. No. 16589-B (WERC, 9/81).

15/ Id.

16/ Menasha Teachers Union, et al., v. WERC, No. 81-CV-1007 (CirCt Winn., 8/83).

17/ Galloway Board of Education v. Galloway Education Association, 100 LRRM 2250 (N.J., 1978); Indiana Educ. Employment v. Mill Creek Teachers, 456 N.E. 2d 709 (Ind., 1983). Arguably, these cases can be distinguished on the basis that they involve interpretation of local statutes which have no counterpart in Wisconsin.

> not change upon the contract termination. It continues. Once the committment (sic) is made by the teacher, the Board cannot refuse to honor its committment (sic) to reward said teacher. This mutual committment, (sic) once started, must be finished. This is what the status quo requires. It would be grossly unfair for the Board to "derail" the teacher who has started the process and completed his end of the bargain." 18/

It would appear that these same arguments would apply equally to the experience increment. The District has attempted to distinguish these on the basis that the contract contains an express provision for the horizontal movement but not for the vertical movement. The District's superintendent testified that the experience year was measured from July 1 through June 30 and adjustments are paid as of the first of July. 19/ Therefore, it would appear that although the contract is silent, the common understanding of both parties was that a year of experience would have been completed and credited in July. Therefore, the mere silence of the contract with respect to a date for crediting experience does not distinguish the horizontal movement from the vertical movement. The District also relied on past practice to support its position that the schedule is not automatic; however, it is noted that the 1980-81 school year was the second year of a two-year contract and the parties reached settlement on the reopener on wages in November of 1980 and the increments were paid on December 1, 1980. In 1981-82, the parties reached a settlement in September 1981 and the increments were paid on October 1, 1981. These delays were of short duration, and, while it supports the District's argument, the Examiner is of the opinion that the evidence of the District's application of the horizontal movement to all teachers and the structure of the salary schedule itself outweigh the evidence with respect to past practice. The District has further argued that the absence of new hires and rehires sufficiently distinguishes the instant case from the rationale relied on by the dissent and Circuit Court in Menasha. The Examiner concludes that it does not. The granting of horizontal movement sufficiently establishes the automatic nature of the salary schedule. There is no logical reason to separate the horizontal and vertical elements of the same salary schedule which by its structure provides for movement due to the attainment of educational credits and the accumulation of experience. Either the schedule is to be applied automatically as a whole, or none of it should be applied. The granting of one movement evidences the parties intent that the schedule provides automatic increases. The evidence that for short periods of time the District has not granted the experience increment is not sufficient evidence to establish that one movement is automatic and the other is not. On the basis of the entire facts and circumstances presented in this case, the Examiner concludes that the salary schedule contained in the expired agreement provided for automatic increases in both horizontal and vertical movements based on educational attainment and experience, respectively, and therefore, the District's refusal to grant the experience increment violated the status quo during the hiatus period. Inasmuch as the District has made a change in the status quo as to a mandatory subject of bargaining, it is concluded that the District has violated Secs. 111.70(3)(a)4 and 1 MERA.

The District argued that the Association failed to meet its burden of proving that any employes were entitled to receive experience increments; however, the District, in its answer, admitted that certain employes who were eligible for increments were denied them. The undersigned concludes from this admission that the Association was not required to demonstrate that particular employes were eligible for increments and were denied them. 20/ With respect to remedy, the Examiner has directed the District to cease and desist from making unilateral changes in the status quo, has directed the posting of a compliance notice and

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18/ Respondent's brief pp.12-13.

19/ TR-6.

20/ See Wis. Adm. Code section ERB 12.03(7).

and has ordered interest on the amount of the increments withheld. Inasmuch as the successor collective bargaining agreement provided for retroactive payments of the increments and that has been done, no other back pay order is necessary.

Dated at Madison, Wisconsin this 29th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner