STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| LOCAL 70 HIGHWAYS, AFSCME, AFL-CIO: LOCAL 990 COURTHOUSE AND CLERICAL, AFSCME, AFL-CIO; LOCAL 990 WELFARE PROFESSIONALS, AFSCME, AFL-CIO: LOCAL 1090 PARKS, AFSCME, AFL-CIO; and LOCAL 1392 INSTITUTIONS, AFSCME, AFL-CIO, Complainants, vs. KENOSHA COUNTY, Respondent. | Case 70 No. 33965 MP-1635 Decision No. 22167-A |

Appearances:

Lawton and Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703, by Mr. Richard V. Graylow, appearing on behalf of the Complainants.

Mr. William P. Nickolai, First Assistant Corporation Counsel, Kenosha County Courthouse, 912 - 56th Street, Kenosha, Wisconsin 53140, appearing on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On October 16, 1984, Locals 70, 990, 1090 and 1392, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that Kenosha County had committed prohibited practices within the meaning of Sec. 111.70, Wis. Stats., by unilaterally discontinuing cost of living adjustment provisions after the expiration of the contracts containing said provisions on or about December 31, 1983, and by refusing to meet and bargain at reasonable times. The Commission appointed Christopher Honeyman, a member of its staff, as Examiner in this matter, and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Sec. 111.07(5), Wis. Stats. A hearing was held in Kenosha, Wisconsin, on January 11, 1985; both parties filed briefs, which were received by April 5, 1985. The Examiner, having considered the evidence and the arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

## FINDINGS OF FACT

1. Locals 70, 990, 1090 and 1392, AFSCME, AFL-CIO are labor organizations within the meaning of Sec. 111.70(1)(h), Wis. Stats., and have their principal offices c/o Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719.

2. Kenosha County is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal offices at Kenosha County Courthouse, 912 - 56th Street, Kenosha, Wisconsin 53140.

3. Each of the Complainant Local Unions is exclusive representative of one or more bargaining units of Kenosha County employes, as listed below:

> Local 70: All Kenosha County Highway employes, except the yearly salaried supervisory employes.

Local 990:
(A) Kenosha County Courthouse employes and Social Services clerical employes, excluding elected officials, County Board appointed administrative officials, and Building Service employes.
(B) Kenosha County Welfare Department professional employes, excluding directors, administrative assistants, elected officials, County Board appointed administrative officials, Building Service employes, clerical employes, and supervisory employes.
Local 1090: All full-time employes of the County Parks, except the yearly salaried Park Director, Assistant Park Director, Administrative Assistant, and Supervisor II employes.
Local 1392: All Brookside and Willowbrook employes except supervisory employes, administrator's stenographer and registered nurses.

Each of the Complainant Unions has been party to a series of collective bargaining agreements with Kenosha County covering employes in each bargaining unit listed opposite its name. The most recent collective bargaining agreement between each of the Complainants and Respondent expired on December 31, 1983.

4. Complainants and Respondent first bargained a cost of living adjustment (COLA) clause into their collective bargaining agreements in the 1976-78 agreements, and at all times the five contracts between the various Complainant Local Unions and Respondent have been similar in the cost of living adjustment clause. From 1976 through 1978 the formula for cost of living adjustments provided that such adjustments would be made semi-annually. In bargaining for the successor to the 1976-78 agreements, the parties agreed to change the COLA formula to a quarterly adjustment, with adjustments to be made on April 1, July 1, October 1 and January 1. The County proposed that the exact dates of adjustments be included in the agreements, while the Unions proposed that the agreements provide that the first adjustment take place on January 1, 1979 and that the language of the agreements reflect that adjustments were to be paid quarterly "thereafter". The language agreed on for the 1979-81 agreements was as follows:

ARTICLE VIII - WAGES

Section 8.1.

(a) Wages. A "Job Classification and Rate Schedule" for January 1, 1979 shall be attached to this Agreement as Appendix "A", and made a part hereof. A "Job Classification and Rate Schedule" for July 1, 1979 shall be attached to this Agreement as Appendix "B" and made a part hereof. As of December 31, 1979, one-half (1/2) of the total cost of living allowance being paid to employees covered the total cost of living allowance being paid to employees covered by this Agreement will be "folded in" to the rates of pay in each of the categories listed in Appendix "B". The remaining monies shall carry over and remain in the cost of living adjustment.

On January 1, 1980, each base rate, as adjusted in the preceding paragraph, will be increased by three (3) percent. Employees in the LPN classification will receive an additional

As of December 31, 1981, one-half (1/2) of the total cost of living allowance being paid to employees covered by this Agreement will be "folded in" to the rates of pay in each of the categories listed in Appendix "B". The remaining monies shall carry over and remain in the cost of living adjustment.

(b) A cost of living adjustment shall be granted as described below to each regular full-time and part-time employee. The allowance shall be paid in equal installments corresponding to the salary payment.

(c) The amount of cost of living adjustment shall be determined and redetermined quarterly on the basis of the Bureau of Labor Statistics Consumer Price Index - Urban Wage Earners and Clerical Workers - Revised - All Cities - 1967=100.

(d) No adjustments, retroactive or otherwise, shall be made to these allowances due to any revision of the Consumer Price Index which may be published at a later date.

(e) The first adjustment shall become effective April 1, 1979. Each regular full-time and regular part-time employee will receive an adjustment of one (1) cent per hour for each three-tenths (3/10) rise in the Bureau of Labor Statistics Consumer Price Index between November 30, 1978, and February 28, 1979. Thereafter, there shall be quarterly adjustments with each adjustment to become effective on the first day of each calendar quarter and computed in the same manner, based on the difference between the Index figures at the start and at the end of each appropriate preceding quarter.

(f) The base rate will not be affected by a drop in the Bureau of Labor Statistics Consumer Price Index.

(g) In the event that the Consumer Price Index, defined in this clause, shall be discontinued, changed or otherwise becomes unavailable during the term of this Agreement, and if the Bureau of Labor Statistics issues a conversion table by which changes in the present Index can still be determined, the parties agree to accept such conversion table. If no such table is issued, the parties will promptly undertake negotiations solely with respect to agreeing upon a substitute formula for determining a comparable formula. Any conversion table or substitute formula will retain the same limitation, if any, negotiated in this Agreement.

(h) The cost of living allowance shall be included for all hours paid, but shall not be used to calculate overtime.

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5. Respondent did not pay a COLA adjustment payment on or about January 1, 1982. At that time agreement had not been reached on the collective bargaining agreements to succeed the 1979-81 agreements, and agreement was not reached until about March 8, 1982. Complainant Unions did not file either a complaint with the WERC or a grievance concerning the County's failure to pay a COLA adjustment payment on or about January 1, 1982. The language agreed to for the COLA clause of the Local 1392 agreement for 1982-83 is as follows:

ARTICLE VIII - WAGES

Section 8.1.

(a) Wages. A "Job Classification and Rate Schedule" for January 1, 1982 through December 31, 1983 shall be attached to this Agreement as Appendix "A" and made a part hereof. A "Job Classification and Rate Schedule" for all employees hired after April 1, 1982 through December 31, 1983 is attached hereto as Appendix "B".

On December 31, 1983, one-half (1/2) of the total cost of living allowance being paid to employees covered by this Agreement will be "folded in" to the rates of pay in each of the categories listed in Appendices "A" and "B". The remaining monies shall carry over and remain in the cost of living adjustment.

(b) A Cost of living adjustment shall be granted as described below to each regular full-time and part-time employee. The allowance shall be paid in equal installments corresponding to the salary payment.

(c) The amount of cost of living adjustment shall be determined and redetermined quarterly on the basis of the Bureau of Labor Statistics Consumer Price Index - Urban Wage Earners and Clerical Workers - Revised - All Cities - 1967=100.

(d) No adjustments retroactive or otherwise, shall be made to these allowances due to any revision of the Consumer Price Index which may be published at a later date.

(e) The first adjustment shall become effective April 1, 1979. Each regular full-time and regular part-time employee will receive an adjustment of one (1) cent per hour for each three-tenths (3/10) rise in the Bureau of Labor Statistices Consumer Price Index between November 30, 1978, and February 28, 1979. Thereafter, there shall be quarterly adjustments with each adjustment to become effective on the first day of each calendar quarter and computed in the same manner, based on the difference between the Index figures at the start and that the end of each appropriate preceding quarter.

(f) The base rate will not be affected by a drop in the Bureau of Labor Statistics Consumer Price Index.

(g) In the event that the Consumer Price Index, defined in this clause, shall be discontinued, changed or otherwise becomes unavailable during the term of this Agreement, and if the Bureau of Laobr Statistics issues a conversion table by which changes in the present Index can still be determined, the parties agree to accept such conversion table. If no such table is issued, the parties will promptly undertake negotiations solely with respect to agreeing upon a substitute formula for determining a comparable formula. Any conversion table or substitute formula will retain the same limitation, if any, negotiated in this Agreement.

(h) The cost of living allowance shall be included for all hours paid, but shall not be used to calculate overtime.

(Note (b) through (h) - these wages are subject to a freeze agreement for 1982 and the first six months of 1983.) 1/

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6. In bargaining over successor agreements to the 1982-83 agreements, the County took the position that the COLA clause should be deleted from each such agreement, while the Unions took the position that the COLA clause should be continued unchanged. Up to the date of the hearing, the negotiations for said

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1/ The length of time that the COLA was frozen varied among the different contracts, but by July 1, 1983, COLA payments had resumed in all contracts. The language of the COLA clauses also varies in other respects not material to the issue herein.

successor agreements had not been resolved. The County did not pay a COLA adjustment payment on or about January 1, 1984 or at any time since the expiration of the 1982-83 agreements; up to the date of the hearing herein.

7. Complainants have failed to establish by a clear and satisfactory preponderance of the evidence that the payment of COLA adjustments after the end of a collective bargaining agreement was the status quo prevailing at the time of expiration of the 1982-83 agreements.

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

## CONCLUSION OF LAW

The failure and refusal of the Respondent County to pay COLA adjustments on and after January 1, 1984 was not a unilateral change in wages, hours or working conditions and therefore does not violate Sec. 111.70(3)(a)1 or 4, Wis. Stats.

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

## ORDER 2/

That the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 7th day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Clen. Ty. Honeyman
Christopher Honeyman, Examiner

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2/ 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.

KENOSHA COUNTY

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complaint alleges that the County violated unspecified sections of the Municipal Employment Relations Act by failing and refusing to pay further COLA adjustment payments after expiration of collective bargaining agreements on December 31, 1983, and by refusing to meet and bargain collectively at reasonable times. At the hearing Complainants withdrew the allegations relating to refusing to meet and bargain at reasonable times. There is no dispute of any substance concerning the facts as detailed in the findings.

### COMPLAINANTS' POSITION:

Complainants contend that both the terms of the collective bargaining agreements and the "status quo" doctrine were violated by the County's refusal to continue the payment of COLA adjustments on a quarterly basis after the expiration of the contracts. Complainants argue that a number of cases stand for the proposition that an employer employing teachers on a fixed salary schedule violates MERA by failing to advance teachers on that salary schedule after the termination of the contract. 3/ Complainants argue that there is no functional difference between the payment of automatic increases to teachers based on length of service and the payment of automatic increases pursuant to a COLA formula. Complainants further argue that the circumstances of the change in language between the 1976-78 agreements and the 1979-81 agreements reinforce its position that the contract language clearly provides for continuation beyond the expiration of the agreement, because the reference to fixed dates of adjustment was replaced by language incorporating the concept that adjustments would be made on one fixed date and "quarterly thereafter". In this respect Complainants note testimony to the effect that specific dates had been agreed to by both parties, even in the 1979-81 agreements, for the occasions on which COLA adjustments would be "folded in" to base wage rates. Complainants argue that this shows that the parties fully understood the difference between the two concepts. Finally, Complainants argue that under the Commission's decision in City of Brookfield, 4/ an employer is precluded from making unilateral changes in wages, hours and working conditions even after impasse is reached in negotiations and the prior contract has expired, if the new contract dispute has been submitted to mediation-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats. Complainants request that the Commission order the Respondent to pay the quarterly COLAs as set forth in the expired agreements, with backpay and interest.

### RESPONDENT'S POSITION:

Respondent contends that its obligation to maintain the status quo prevailing at the time of expiration of the collective bargaining agreements is satisfied only by the course of conduct it has followed, namely refusal to alter wages by payment of additional COLA adjustments. With respect to the Complainants' argument that the Commission and the courts have previously required payment of automatic pay increases to teachers pursuant to fixed salary schedules in expired collective bargaining agreements, Respondent argues that teachers' "experience increments" are readily determined and can be budgeted for, while cost of living adjustments are not known until the Consumer Price Index is published. Respondent contends that for this reason cost of living adjustments are not in the nature of automatic pay increases, because the index is not known in advance. Respondent notes that a policy requiring it to pay increases pursuant to COLA decrease pay during bargaining if that were what the Consumer Price Index

COLA after the expiration of the 1979-81 agreements, even though agreement on successor contracts was not reached until approximately two months later. Respondent contends that this shows that the parties' past practice is consistent with the position it takes now.

DISCUSSION:

It is settled law that, as a general principle, unilateral changes in the status quo in wages, hours or conditions of employment are per se violations of the duty to bargain. 5/ Less clear, however, is just what pattern of conduct constitutes the status quo in a number of situations. Prominent among these are various types of contract provisions or practices which provide for periodic increases in compensation. In both the private and public sectors, numerous decisions can be found standing either for the "static" view, that existing levels of wages and other terms and conditions of employment should be considered frozen as of the end of a collective bargaining agreement, or for the "dynamic" view, which is that pre-existing patterns of change should be expected to continue following the expiration of an agreement.

Under Wisconsin law, cases have arisen concerning movement of teachers and other school employes on expired salary grids and payment of automatic increases in health insurance costs, 6/ but this is the first case to present a related issue concerning cost of living adjustments. I do not find convincing Respondent's argument that COLA provisions are less definite than teacher salary grids and should therefore be excused from application of the "dynamic" rule if that view would otherwise apply. It is worth noting in this connection that in Midstate Vocational, Technical and Adult Education District 7/ the "dynamic" view was applied by the Commission in a case which involved payment by the employer of health insurance cost increases pursuant to an expired contract which had called for "full payment" by the employer. The amount of the increases was no more foreseeable there than the size of an increase or decrease in compensation pursuant to a COLA formula is here.

Nevertheless, there does appear to be some difference in practice, at least in the private sector, between the treatment given COLA formulas and that given to some other forms of automatic increase in compensation. In Wisconsin Rapids 8/ the Commission noted generally that "case law under the National Labor Relations Act has essentially recognized a need to view the status quo dynamically". The cases thereafter cited 9/ support this statement. In Meilman Food Industries, Inc., 10/ the NLRB found an employer obligated to pay a COLA increase after expiration of the contract involved:

> We find, in agreement with the Administrative Law Judge, that the Respondent violated Section 8(a)(1) and (5) of the Act when it refused to pay the cost-of-living increase effective the first pay period after January 1, 1975. In doing so, however, we rely on the fact that the cost-of-living clause in the collective-bargaining agreement is clear on its face and requires no construction or interpretation beyond its plain meaning. The pertinent part of article 8.02 reads as follows: "If as of any May 15 or November 15 of any year during the life of this agreement the Consumer Price Index . . . is at a level higher than 162.1, then effective with the

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5/ NLRB v. Katz, 396 U.S. 736, 50 LRRM 2177 (1962); City of Brookfield, supra.

6/ See generally School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85) and cases cited therein.

7/ Decision No. 14958-B (5/77), aff'd, Dec. No. 14958-D (WERC, 4/78).

8/ Supra.

9/ See Wisconsin Rapids, supra at 14.

10/ 234 NLRB No. 94, 97 LRRM 1372.

first pay period beginning on or after the following July 1 or January 1 . . ." (Emphasis supplied.) Clearly as long as the May 15 or November 15 date falls within the life of the agreement, and as long as the cost-of-living level reaches or exceeds 162.1, then the cost-of-living increase is payable on the following July 1 or January 1. Since the collective-bargaining agreement expired on December 6, 1974, and the Consumer Price Index level exceeded 162.1 on November 15, 1974, then the cost-of-living raise was payable on January 1, 1975. The Respondent's refusal to effectuate that increase on January 1, 1975, was a unilateral change in the existing wage structure in violation of Section 8(a)(1) and (5) of the Act, 11/ as found by the Administrative Law Judge. 2

This decision was upheld on appeal. In Struthers Wells Corp. 12/ the Board subsequently found that an employer could not refuse to pay a COLA increase even if the date of the applicable Consumer Price Index measurement occurred after the expiration of the contract:

> The Administrative Law Judge found that Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to pay the cost-of-living adjustment relying in part on Meilman Food Industries, Inc., 234 NLRB 698, 97 LRRM 1372 (1978). In that case, as here, the collective-bargaining agreement contained a cost-of-living clause. The clause in Meilman provided that, if the Consumer Price Index were at a certain level on May 15 or November 15 of any year during the life of the agreement, then a cost-of-living increase would be payable on the following July 1 or January 1. In Meilman, the agreement expired on December 6; therefore the Consumer Price Index determination of November 15 occurred before expiration. The Board found in those circumstances that Respondent's refusal to effectuate the increase on January 1 was a unilateral change in the existing wage structure in violation of Section 8(a)(5) and (1) of the Act. Here, the Administrative Law Judge notes that the agreement expired on November 1, before the November 15 Consumer Price Index determination, and on this ground alone finds that Respondent was not obligated to effectuate the increase. He concludes that to find otherwise would effectively be writing a contractual term to which the parties had not agreed the last time they signed a contract. We disagree.
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> The Board's discussion of the refusal to implement the adjustment in Meilman was addressed to the contention that the issue turned on contract interpretation and therefore should be deferred to arbitration. The Board found that the clause clearly set forth the preconditions for its implementation, those preconditions had been met, no contract interpretation

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11/ The Board did not then indicate an intent to apply the "dynamic" view as a matter of principle, noting:

> 2 "We further agree with the Administrative Law Judge's recommended remedy for the cost-of-living increase violation, but we note that the Administrative Law Judge inadvertently included the boning division employees among those entitled to backpay for the increases withheld by the Respondent. It is undisputed that the boning division employees were covered by a separate cost-of-living clause which had terminated upon the expiration of the collective bargaining agreement. Therefore, the remedy herein excludes the boning division employees from those entitled to backpay for the cost-of-living increases withheld by the Respondent."

12/ 262 NLRB No. 136, 111 LRRM 1018.

was required, and deferral, therefore, was not appropriate. Thus, the Board's finding of a violation was based upon the clear meaning of the clause and its application to the facts in that case. There is nothing in Meilman to suggest that a different result is required when the refusal to implement the COLA occurs after the expiration of the contract. Indeed, to so find would go against Board precedent concerning employer obligations after expiration of a collective-bargaining agreement. (footnote omitted)

Here, the cost-of-living adjustment was an existing term and condition of employment as established by the recently expired collective-bargaining agreement. It is axiomatic that such a condition of employment survives the expiration of a collective-bargaining agreement and cannot be altered without bargaining. (footnote omitted) An employer is permitted to institute a unilateral change either where the union has waived bargaining on the issue or where the unilateral change is a result of a rejected company offer after impasse has been reached. (footnote omitted) Otherwise, the employer has a duty to continue the terms of the expired collective-bargaining agreement. Here, there is no contention nor is there any evidence that the Union waived its right to bargain with regard to the cost-of-living adjustment. Nor is there any evidence that the parties had reached impasse in December 1980. On the contrary, Respondent's bad-faith bargaining prevents any finding that impasse occurred. (footnote omitted) Thus the Administrative Law Judge found that, from the commencement of its bargaining, Respondent insisted upon certain proposals which by their nature served to frustrate collective bargaining. From these facts alone it is evident that Respondent was obligated to continue to implement the COLA as required by the expired agreement. Thus, we find that its failure to do so violated Section 8(a)(5) and (1) of the Act.

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But the Third Circuit Court of Appeals reversed the Board as to this issue: 13/

The Board argues that the failure to pay the COLA violated the Act for several reasons. First, it contends that the COLA is an existing term and condition of employment that survives the expiration of the collective bargaining agreement. This contention is contrary to the Board's own case law. In Meilman Food Industries, Inc., 234 NLRB 698, 97 LRRM 1372 (1978), the Board held that the refusal to pay a COLA after the expiration of a collective bargaining agreement, where the adjustment is to be calculated as of a date prior to the expiration of the agreement, is a unilateral change in the existing wage structure and a violation of Section 8(a)(1) and (5) of the Act. The Board further held that there is no violation of the Act for a unilateral change where the calculation date occurs after the expiration of the agreement. Meilman, 234 NLRB at 698 n.2.

Under Meilman, the company did not violate the Act by refusing to grant a COLA because the calculation date of November 15, 1980 was beyond the term of the expired agreement. The COLA was not a condition of employment that survived the expiration of the contract. For the Board to impose an obligation on the company to pay the adjustment would be an improper writing of the contract for the parties.

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13/ 114 LRRM 3553.

It is apparent that Meilman presented a narrow issue: the specific contract language there required the single COLA payment ordered, and there was apparently no contention that such increases should be continued indefinitely pending execution of a new agreement. The union's argument in Struthers Wells was more akin to that made here, in that a full and continuing application of the "dynamic" view was sought. This would have required regular COLA adjustments at intervals unless and until the employer's bargaining obligation was satisfied. And in Struthers Wells the company's argument was, if anything, weaker than Respondent's here, for two reasons: There, the company had taken the position at the bargaining table that it sought no change in the COLA, while here Respondent has sought to exclude it from the successor contracts; and the employer in Struthers Wells reversed its prior position in order to exert bargaining leverage on the union, while here Respondent's position has been consistent.

It therefore appears that the general applicability of the "dynamic" view of status quo in the private sector is not necessarily extended to COLA clauses. This may be because a COLA cannot be considered simply as a "benefit": in the real world of collective bargaining, the money received by employes pursuant to a COLA is normally viewed and costed, at least in part, as the equivalent of a general wage increase. Few would expect that a contract clause providing, e.g., that the annual across-the-board wage increase of 50 cents per hour be paid to all employes "each January 1" contemplates on its face an additional 50 cents per hour each year, ad infinitum, after the contract expires: To the extent that COLA substitutes for part or all of the general wage increase, it may be considered in the same light.

The Commission's most recent analysis of status quo questions, however, is written in somewhat different terms from those cited above. In Wisconsin Rapids 14/ the Commission noted the divergence of opinion in other public sector jurisdictions concerning the "dynamic or static" question 15/ and stated:

> In our recent City of Brookfield decision, 14/ 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/
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> 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

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

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.

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14/ Supra.

15/ See cases cited at pages 15-16, including in re City of Portage, Michigan ERC No. C791268 (1981) "COLA increases are not automatic after contract expires unless clear and convincing language in contract shows adjustments were intended to survive".

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.)
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> 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.

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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.

I note that the Commission identified these principles as applying to "plans and schedules relating levels of compensation to levels of employe experience, education or other attainments" and left open the question of whether adjustments in compensation unrelated to employes' attainments should be included. COLA, for reasons already noted, is closer in its effect to a general wage increase than to an experience--or other attainment-related increment. But because the Wisconsin Rapids rationale does not clearly exclude COLAs, it is necessary to consider the tests there applied.

Here both the bargaining history and the previous practice of the parties are relevant. It is impossible to overlook the uncontradicted testimony that in the 1979 negotiations the County argued for language specifying particular dates of adjustment throughout the successor contract, but settled for the concept that adjustments would be made on one set date and quarterly "thereafter". While Complainants' witnesses' testimony does not go so far as to allege a discussion at the bargaining table concerning the meaning of this formulation, the fact that it was disputed and then adopted in this form could imply recognition that there might be continuation of the adjustments indefinitely.

Prior to the instant case, continuation of the present COLA language was tested on only one occasion, in 1982. But that experience is at odds with Complainants' proposed interpretation of the language. While the record is unclear as to the exact date on which agreement on any of the 1982-83 contracts was reached, 16/ the earliest date ascribed to agreement in principle by

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16/ "Letters of agreement" were executed in April, 1982, but the actual contracts were not signed until months afterwards.

any witness was March 8, 1982. This leaves a two months' hiatus between the presumable "due date" of a COLA adjustment on January 1, 1982 and agreement on the successor contracts.

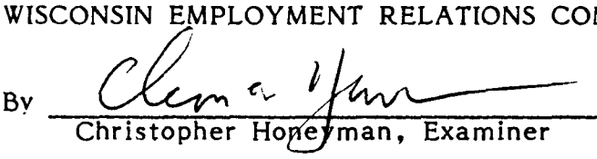
Testimony by Complainants' witnesses was to the effect that the issue of continuing the COLA clauses into the 1982-83 agreements was resolved by the parties agreeing to freeze the operation of the COLAs for part of the period covered by the contracts. Yet there is nothing in the record to suggest that agreement on the freeze was reached prior to January 1, 1982, and simultaneously nothing to suggest that the Union so much as mentioned to the County that the January 1, 1982 adjustment was owing. The fact that at least two months then passed without evidence of either a COLA payment, a grievance, a complaint filed with the Commission, a side agreement between the parties to defer the adjustment pending settlement, or an explanation in testimony, undercuts Complainants' contention that continuation of the COLA adjustments was contemplated by the language of the agreements. At the same time, though I have noted above that the change in COLA language between the 1976-78 and 1979-81 agreements somewhat favors Complainants' position, that change is hardly free from ambiguity.

The Commission's Wisconsin Rapids discussion does not specify the quantum or burden of proof required to show the "historical" meaning of disputed language. But because of a COLA clause's close relationship to a central issue in most collective bargaining disputes--the size of the general wage increase--the full application of the "dynamic" status quo would be as extreme a result of that view as is likely to be found. The likelihood that much of the financial "pot" involved in the bargaining would thus be transferred automatically in the midst of bargaining compels me to hold that if the Wisconsin Rapids tests are to apply to a COLA clause, a complainant must meet those tests at least by a clear and satisfactory preponderance of the evidence. This requirement is consistent in effect with the federal courts' distinction between Meilman and Struthers Wells. 17/

In the present case, I have already noted that the bargaining history, while favoring Complainants' position more than Respondent's, is less than conclusive. The parties' 1982 practice, meanwhile, is consistent with Respondent's position. I find, therefore, that Complainants have not shown by a clear and satisfactory preponderance of the evidence that continuation of COLA adjustments after expiration of a contract was provided for by the language or circumstances of these agreements. If Wisconsin Rapids should not apply to a COLA clause, then as already noted the general "dynamic" application rejected in Struthers Wells would apply here, while the specific fact-situation-related application upheld in Meilman would not. Under either Wisconsin Rapids or Struthers Wells, Respondent is not shown to have altered unilaterally the status quo, or violated its duty to bargain, by failing to make additional COLA payments. For these reasons, the complaint is dismissed.

Dated at Madison, Wisconsin this 7th day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

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17/ It is also consistent with Portage (supra), the only COLA status quo case cited by the Commission in its survey of public-sector rulings in Wisconsin Rapids.