STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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-B

Appearances:

Lawton & 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.

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

Examiner Christopher Honeyman having on June 7, 1985, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Complainants had not established by a clear and satisfactory preponderance of the evidence that the payment of COLA adjustments was part of the status quo Respondent was obligated to maintain upon expiration of the parties' collective bargaining agreement; and Complainants having on June 19, 1985, timely filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and the parties thereafter having filed written argument in support of and in opposition to the petition for review the last of which was received on August 30, 1985; and the Commission having reviewed the record, the Examiner's decision, the petition for review, and the parties' written arguments and being satisfied that the Examiner's Findings of Fact should be modified and his Conclusion of Law and Order reversed;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact 1-5 are affirmed.

B. That the Examiner's Finding of Fact 6 is modified as follows:

> 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 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.

C. That Finding of Fact 7 is set aside.

(See Footnote 1 on Page 2)

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

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

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

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

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

. . .

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

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

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

CONCLUSION OF LAW

That the Respondent Kenosha County, by failing to pay COLA adjustments to employes represented by Complainants during the contractual hiatus following expiration of the parties' 1982-1983 collective bargaining agreement, committed a unilateral change refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., and derivatively interfered with employes' exercise of their Sec. 111.70(2), Stats., right to bargain collectively through a representative in violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER

IT IS ORDERED that Respondent Kenosha County, its officers and agents, shall immediately:

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

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

   a. To the extent it has not already done so, make whole with interest 2/ each employe in the bargaining units represented by Complainants for wage losses experienced by the employes due to Respondent's above-noted improper failure to pay COLA adjustments.

   b. Notify its unit employes by posting in conspicous places on the premises where notices to such employes are usually posted, a copy of the notice attached hereto and marked "APPENDIX A." Such copy shall be signed by an authorized representative of the County, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on October 16, 1984, at a time when the Sec. 814.04(4) rate was "12 percent per year." Sec. 814.04(4), Wis. Stats. Ann. (1983) See generally, Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

c. Notify the Commission within twenty (20) days of the date of this decision as to steps taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

"APPENDIX A"

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes and policies of the Municipal Employment Relations Act, Kenosha County hereby notifies its employes who are represented for the purposes of collective bargaining by Local 70, Local 990, Local 1090 and Local 1392 AFSCME, that:

1. WE WILL NOT commit unlawful unilateral changes in wages, hours and conditions of employment of employes in the bargaining units represented by AFSCME.

2. WE WILL, to the extent we have not already done so, make whole all employes in the bargaining units represented by AFSCME for wage losses experienced due to Kenosha County's unlawful failure to pay COLA adjustments since January 1, 1984, and we will pay affected employes' interest on any such wage loss.

Dated at _____ , Wisconsin this _____ day of 1986

Kenosha County

By _____

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

KENOSHA COUNTY

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

THE EXAMINER'S DECISION

The Examiner concluded that because Complainants had not established by a clear and satisfactory preponderance of the evidence that the payment of COLA adjustments was part of the status quo Respondent was obligated to maintain during the instant contractual hiatus, Respondent's failure to make such payments was not violative of Sec. 111.70(3)(a)1 or 4, Stats. He found that while the parties' language and bargaining history supported Complainants' position that COLA adjustments were part of the status quo, contrary evidence of practice supporting the County's position warranted a finding that Complainants had not met their burden of proof. The Examiner concluded that this result was appropriate under the Commission's decision in School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85) or, if the Commission's analysis therein is inapplicable to COLA clauses, under existing private sector precedent.

POSITIONS OF THE PARTIES

The Union

The Union contends that the Examiner erred by concluding that the County's refusal to pay COLA adjustments on or after January 1, 1984, was not an illegal unilateral change in the status quo. The Union asserts that the specific language of the COLA provision clearly demonstrates that the parties contemplated a continuation of the obligation to pay COLA adjustments beyond the expiration of the contract. The Union argues that the Examiner ignored this clear language and also failed to give appropriate weight to the evidence of bargaining history which, in the Union's view, removes any doubt as to the language's meaning.

As the record is clear that COLA adjustments are part of the status quo, the Union alleges that the Commission's decision in School District of Wisconsin Rapids, mandates that the Examiner be reversed. The Union contends that the Examiner's hesitancy to apply the "dynamic" view of the status quo embraced by the Commission in Wisconsin Rapids is inconsistent with the Wisconsin Rapids rationale and is unsound as a matter of policy. The Union asserts that the payment of COLA adjustments during a contractual hiatus is not inconsistent with the parties bargaining over "wages" at the same time.

The Union further asserts that the Examiner misapplied the holdings in Meilman Food Industries, Inc. 234 NLRB No. 94 (1978) and Struther Wells Corp., 262 NLRB No. 136 (1983) and notes that the City of Portage decision of the Michigan Employment Relations Commission relied upon by the Examiner was reversed on appeal. Local 1467 v. City of Portage, 134 Mich. App 466 (1984).

Given the foregoing the Union submits that the Commission should reverse the Examiner and make the appropriate remedial orders.

The County

The County argues that the Examiner properly resolved the issues before him. The County submits that, given the imprecise nature of COLA clauses and the potential for decreases in wages to occur thereunder, it acted reasonably when concluding that maintenance of the status quo dictated a freeze in wage levels. The County asserts that COLA adjustments are not akin to automatic wage increases which it argues are the only form of wage modifications authorized during a hiatus. The County further contends that given the foregoing characteristics of a COLA clause and the persuasive analysis contained in Struther Wells Corp., supra, it is also inappropriate to extend the dynamic view of the status quo to COLA clauses. However, should the Commission conclude otherwise, the County asserts that application of the principles set forth in Wisconsin Rapids, supra, support the Examiner's decision. The County emphasizes its past practice

of not paying COLA adjustments during a hiatus and asserts that the inconclusive bargaining history and ambiguous contract language are not sufficient to meet the Union's burden of proof.

The County therefore urges the Commission to affirm the Examiner.

DISCUSSION

We initially conclude that there is no persuasive basis for exempting COLA clauses from application of the dynamic status quo doctrine contained in our Wisconsin Rapids decision. In School District of Webster, Dec. No. 21312-B (WERC, 9/85) at 14, we rejected the concern expressed by the Examiner herein that application of the dynamic status quo improperly removes the issue of compensation from the bargaining table if it mandates large wage payments to employes. We commented:

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

We also indicated in Webster (at p. 13) that our use of the phrase "compensation plan" in Wisconsin Rapids was generic in nature and was not an effort to exclude certain methods of compensation from the ramifications of the dynamic status quo simply because they differed from the compensation structure at issue in Wisconsin Rapids.

Given the foregoing, we reject the County's assertion that the dynamic status quo ought not apply herein. As we have defined it, the dynamic status quo doctrine calls for an examination of the language, past practice, and bargaining history relevant to the manner in which employes have been compensated to determine what the status quo as to compensation is and whether said status quo contemplates changes in compensation during a contractual hiatus. See Wisconsin Rapids, supra; Webster, supra citing City of Brookfield, Dec. No. 19822-C (WERC, 11/84). Under the static view of status quo we rejected in Wisconsin Rapids, language, practice, and bargaining history were not relevant considerations because employe compensation was invariably to be frozen at the levels existing at the expiration of the contract.

Looking first at the instant COLA language itself, we conclude that the use of the phrase "Thereafter, there shall be quarterly adjustments . . . " in Art. VIII, Sec. 8.1(e) is supportive of the Union's position that the status quo includes continuing COLA adjustments every three months. Especially so when that provision is compared with the express limitation to exact dates (e.g., December 31, 1982 and December 31, 1983) for COLA fold-in set forth in 8.1(a).

Evidence of bargaining history is also supportive of the Union's position. The record reveals that the County proposed that the 1979-81 agreements set forth the exact date (e.g., April 1, 1979; July 1, 1979; October 1, 1979, etc.) on which each COLA adjustment would be due and that the Union opposed inclusion of exact dates and proposed instead an exact start date and the language quoted above. (tr. 35-36) Uncontroverted testimony thus establishes that the County sought language which would have clearly implied that the County had no obligation to pay COLA adjustments on dates after those specifically set forth in the Agreement.

The fact that the parties agreed, instead, upon the open-ended language noted above lends further support to the Union's assertion that the parties did not intend any such limitation.

The Examiner found the foregoing implications of the language and bargaining history supportive of the Union's position, as we do. However, he found them sufficiently counterbalanced by evidence concerning the nonpayment of the January 1, 1982, COLA adjustment to lead him to conclude that the Union had not met its burden of proving by a clear and satisfactory preponderance of the evidence that the status quo included hiatus payment of COLA adjustments. He noted that the Union had not complained, grieved or otherwise objected to that nonpayment and that the Union had not offered a persuasive explanation of its conduct in that regard, leaving the Examiner with the conclusion that the Union's conduct reflected a Union understanding that hiatus COLA adjustments were not a part of the status quo. The Examiner specifically rejected any Union explanation premised on the fact that the parties ultimately agreed on a COLA freeze covering the entire hiatus period in 1982, on the grounds that the bargaining leading to those agreements did not conclude until March 8 of 1982, or more than two months after the January 1, 1982 nonpayment occurred.

In our view, the Examiner makes too much of the January 1, 1982, nonpayment, all things considered. The COLA freeze was not the result of negotiation-as-usual between these parties. Rather, it was a central element in a highly unusual (for the public sector) agreement whereby the County severely limited its rights to subcontract and layoff in return for freezes in employe compensation including COLA. Union Representative (then and now) Robert Chybowski testified that discussions of what would be done about COLA were "at the heart" of the parties' negotiations. (tr. 29). There is no evidence indicating when the parties' negotiators began to exchange serious proposals involving a COLA freeze in return for major job security measures. The terms of the 1979-81 agreement provided for notification of desire to modify or terminate to be served no later than the July (1981) meeting of the County Board preceding contract expiration, and it also provided that the "Negotiations of a new agreement, subsequent to receipt of the above-required notice, shall be processed so that a new agreement can be concluded by December 31st if possible." Given those provisions and the highly unusual and significant nature of the agreement that was reached on or before March 8 of 1982, it seems reasonable to conclude that the wage and COLA freeze for major job security pledge trade-off would have been under serious consideration between the parties before January 1, 1982; especially so when it is noted that the agreed-upon limitations on layoff were made effective January 1, 1982.

Finally, it can be noted that the 1982-83 agreements each provided in their penultimate Article that "Waiver or any breach of this Agreement by either party shall not constitute waiver of any future breach of this agreement," indicating that the parties did not intend that great weight be placed on isolated instances in which practice was inconsistent with the meaning conveyed by language and bargaining history.

For the foregoing reasons, then, it is by no means clear that the January 1, 1982 nonpayment represented a mutual understanding that hiatus COLA adjustments were not ordinarily due as a part of the status quo. The nonpayment was a single instance which occurred in unusual circumstances that are at least consistent with the notion that at the time of the January 1, 1982 nonpayment of COLA, that nonpayment was a known element in a developing agreement of major significance to both parties whereby wage and COLA adjustments were to be foregone in return for major job security pledges. Notably, the County's Director of Labor Relations and Personnel (then and now) testified, "I can't recall," when asked why no COLA adjustments were made during the 1982 hiatus. (tr. 38) His uncertainty stands in high contrast to the County's contention that the nonpayment was the result of a mutual understanding that hiatus COLA payments were not a part of the status quo.

Thus, unlike the Examiner, we find the implications of the language and bargaining history are not counterbalanced by the evidence concerning the nonpayment of the January 1, 1982 COLA adjustment so as to warrant concluding that the Union has not met its burden of proving that COLA adjustments were part of the status quo in this case. Rather, the Union has, in our view, met its burden of proving -- by a clear and satisfactory preponderance of the evidence -- that hiatus COLA adjustments were part of the status quo compensation arrangements in place between the parties during the contract hiatus that began on January 1, 1984.

Because the County has not pleaded or proven a valid defense for its failure to pay the COLA adjustments from January 1, 1984 to the present we conclude that the County thereby committed unilateral change refusals to bargain in violation of Sec. 111.70(3)(a)4 and 1, Stats. Therefore, we have reversed the Examiner's decision to the contrary.

REMEDY

Where, as here, an employer is found to have improperly unilaterally changed the status quo, the conventional remedy includes an order that the employer reinstate the status quo existing prior to the change and make whole affected employes for losses experienced by reason of the unlawful conduct. Green County, Dec. No. 20308-B (WERC, 11/84) at 17-20; School District of Webster, Dec. No. 21312-B (WERC, 9/85) at 14. Such an order places the employes in the position they would have been in had the employer not breached its duty to maintain the status quo during a contractual hiatus.

Our Order herein is consistent with the conventional remedy noted above. The status quo the County was obligated to maintain included the payment of quarterly COLA adjustments. Accordingly, we have ordered the County to reinstate the status quo (by ceasing and desisting from failing to make future adjustments that become payable until new contracts are implemented) and to make employes whole for losses suffered (by paying the money generated by the COLA adjustments to employes, with interest for the period of time the employes were illegally deprived of the use of that money, to the extent it has not already done so under a successor agreement or otherwise).

We wish to make it clear that our Order does not obligate the County to place any employe in a better position than he or she would be in had the County properly maintained the status quo, either before or after a voluntary settlement or interest arbitration award resolves pending disputes regarding wages for the period of the hiatus. Menomonee Falls School District, Dec. No. 20499-B (WERC, 10/85) at 11. For clarification, we offer the following examples.

If the parties have already implemented successor agreement(s) which obligated the County to make wage payments (including COLA, if any) to employes which are equal to or greater than the status quo wages (including hiatus COLA payments required by our Order, but not including interest) the County is not obligated by our Order to make any COLA adjustment payments and is required only to pay the affected individuals interest on the amount which they were improperly deprived of for the length of that improper deprivation. School District of Webster, supra, at 14.

If the parties have not implemented successor agreement(s), our Order obligates the County, unless the parties agree or have agreed otherwise, to immediately pay affected individuals the COLA adjustments which should have been made commencing January 1, 1984, plus interest, and to make future COLA adjustments until a successor agreement is implemented.

If, after compliance with our Order, the successor agreement ultimately provides for lower level of wage payments (including COLA, if any) for the hiatus period than was required by the status quo as determined herein, then the County shall be entitled to recoup the difference from the individuals involved, though the County shall not be entitled to recoup the interest it paid pursuant to the Order. Menomonee Falls, supra.

Or, if after compliance with our Order, the successor agreement provides for a higher level of wage payments (including COLA, if any) for the hiatus period than was required by the status quo as determined herein, then the County shall be entitled to include hiatus COLA adjustments paid pursuant to our Order as a credit in its calculation of retroactive wage payments due the individuals involved under the new Agreement. The County would not, however, be entitled to credit interest paid under the Order against its retroactive wage obligations under the successor agreement.

The parties are encouraged to discuss between themselves the matter of compliance with the terms of this Order. The Commission stands ready to assist the parties to resolve any disputes in that regard either through informal mediation or through a formal compliance adjudication.

Dated at Madison, Wisconsin this 5th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner