STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WEST CENTRAL EDUCATION ASSOCIATION,	:	
Complainant,	:	Case 12 No. 34016 MP-1641
vs.	:	Decision No. 22264-A
SCHOOL DISTRICT OF PLUM CITY,	:	
Respondent.	:	

Appearances:

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

Mr. Stephen Weld, Mulcahy & Wherry, S.C., Attorneys at Law, 21 South Barstow, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the School District of Plum City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

West Central Education Association-Plum City filed a complaint with the Wisconsin Employment Relations Commission on October 24, 1984, and an amended complaint on February 11, 1985, in which the West Central Education Association-Plum City alleged that the School District of Plum City had committed prohibited practices within the meaning of the Municipal Employment Relations Act. The Commission, on January 11, 1985, appointed Richard McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes. Hearing on the matter was conducted in Plum City, Wisconsin, on February 13, 1985. During the course of the hearing the West Central Education Association-Plum City made a motion to amend the complaint to reflect the correct legal name of the Complainant as the West Central Education Association. The Examiner granted the motion. A transcript of the hearing was provided to the Examiner on March 5, 1985. The parties filed briefs in the matter by July 5, 1985. Prior to the issuance of an Examiner decision in this matter, the Commission issued a decision in School District of Webster. 1/ The parties were offered, and accepted, an opportunity to submit supplemental argument on Webster, and submitted this supplemental argument by October 8, 1985.

FINDINGS OF FACT

1. The West Central Education Association (the WCEA) is a labor organization which has its offices located in c/o 105 - 21st Street North, Menomonie, Wisconsin 54715.

2. The School District of Plum City (the District) is a municipal employer which has its offices located at Plum City, Wisconsin 54761.

3. The WCEA and the District are parties to a collective bargaining agreement which, among its provisions, contains the following:

> 1. Recognition Clause
>
> A. The Plum City Board of Education hereby recognizes the West Central Education Association as the exclusive bargaining representative on all matters involving wages, hours, and condition (sic) of

---

1/ Dec. No. 21312-B (WERC, 9/85).

employment for all full and part time teacher certified employees of the school district according to the laws of the State of Wisconsin, excluding:

1. District Administrator
2. School Principals
3. Substitute Teachers
4. C.E.S.A. Employees
5. Practice or Intern Teachers
6. Title I employees not under regular teacher contracts
7. Office personnel, custodians, cooks, bus drivers and maintenance personnel, etc.

. . .

8. Outside Experience, Experience Factor

A. Teachers new to the district will be granted experience steps on the salary schedule for teaching experience which the administrator determines is directly relevant to their assignment. Determination of work related experience will be at the discretion of the administrator.

. . .

9. Lane Change - Basic Salary Schedule - Semester Credits or Equivalent

A. Any teacher who anticipates making a lane change for the next school year either at the beginning of the next Plum City school year or at the beginning of the second Plum City semester of the next school year must notify the administrator in written form before June 15 of that year proceeding (sic) the beginning of the school year in which the change will become effective for the first Plum City semester and by September 1 for the second Plum City semester.

B. Proof of qualification for lane change must be submitted within 7 days after a semester begins. In the event the proof is unavailable to the teacher within that period of time, a letter must be submitted to the administrator stating the lane change. Proof of the lane change then must be submitted to the administrator within five weeks of the beginning of the affected Plum City semester. There will be no limit to the number of lane changes allowed per year but lane changes will only be allowed at the beginning of a Plum City semester.

C. Definitions:

1. Lane Change - movement across the salary schedule because of credits received.

2. Steps - movement down the salary schedule due to years of teaching experience.

D. In keeping with the principle of progressive discipline, if in the judgement of the Board a teacher is not adequately performing his/her duties, the Board may take action to withhold the teacher's advancement on the salary schedule for one year.

Such action shall be subject to the following criteria:

. . .

23. Duration Clause

A. This agreement reached as a result of collective bargaining represents the full and complete agreement between the parties. This agreement shall become effective July 1, 1983 and shall conclude on June 30, 1984.

This agreement also contains a salary schedule entitled "Plum City Schools Salary Schedule Semester Credit 1983-84". This salary schedule is a grid of individual cells which set forth a specific salary figure, and which appear as a structure composed of five horizontal columns headed "B.S., +8, +16, +24, and M.S., and fourteen vertical steps numbered from 1 through 14. The "B.S." and the "+8" columns each contain eleven steps; the "+16" column contains twelve steps; the "+24" column contains thirteen steps; and the " M.S." column contains fourteen steps. At the bottom of this salary schedule appears the following:

NOTE: A teacher's step on the salary schedule does not reflect the number of years experience within the Plum City Schools.

Representatives of the WCEA negotiated this collective bargaining agreement with the District. At least one teacher employed by the District served on the bargaining team which negotiated the contract. The WCEA negotiates and administers collective bargaining agreements with eighteen school districts in the west central area of Wisconsin. District teachers elect representatives to serve as officers of the WCEA and to serve as representatives of the Plum City bargaining unit to discuss matters of teacher concern with the District regarding the negotiation and enforcement of the labor agreement. The labor agreement covering the 1983-84 school year includes, in addition to the provisions set forth above, various provisions addressing working hours, fringe benefits such as medical, clerical, life, and disability insurance, and various conditions of employment.

4. The WCEA and the District have been parties to a collective bargaining agreement since at least the 1976-77 school year. In a collective bargaining agreement covering the 1982-83 school year, Paragraph 8. A. was entitled "Outside Experience, Experience Factor" and read thus:

"A maximum of five (5) experience steps will be allowed on the salary schedule for other teaching or work related experience if the experience is within the past 7 years. If it is not within the past 7 years, the administrator will use his discretion in determining the salary step placement. Determination of work related experience will be at the discretion of the administrator."

This language first appeared in the collective bargaining agreement between the WCEA and the District covering the 1978-79 school year and remained unchanged until the collective bargaining agreement covering the 1983-84 school year. "Outside Experience and Military Service" appeared in the 1976-77 collective bargaining agreement between the WCEA and the District as Paragraph 7. Section A of that paragraph read thus:

A maximum of (5) five outside steps will be allowed at the discretion of the administrator on the salary schedule for other teaching or work related experience.

This provision, with certain minor changes, became Paragraph 8, Section A of the 1977-78 labor agreement. Paragraph 9, Sections A, B, and C have not changed in any manner relevant to the present complaint since the 1978-79 school year. Paragraph 9, Section B has not changed in any manner relevant to the present matter since the 1977-78 school year. Paragraph 9 of the parties' 1977-78

collective bargaining agreement was entitled "Lane Change - Basic Salary Schedule-Semester Credits or Equivalent". Section A of that Paragraph read thus:

> Any teacher who anticipates making a lane change for the next school year either at the beginning of the next school year or at the beginning of the second semester of the next school year must notify the administrator in written form before June 1 of that year preceeding (sic) the beginning of the school in which the change will become effective for the first semester and by September 1 for the second semester.

Section C of that paragraph read thus:

> C. Definitions
>
> 1. Lane Change - movement across the salary schedule.
>
> 2. Steps - movement down the salary schedule.

"Lane Changes" appeared in the parties' 1976-77 collective bargaining agreement as Paragraph 8 and read thus:

> A. Proof of qualification for lane changes must be submitted within seven days after teachers report for duty each year. In the event the proof is unavailable to the teacher within that period of time, a letter should be submitted to the administration stating the lane changes. Proof of lane changes must be then evaluated by the fourth Friday in September of that year to the administrator. There will be no limit to the number of lane changes allowed per year.
>
> All lane change credits in the teacher's field will be partially financed by the school district. The approved minimum shall be $15.00 per credit to be made for graduate credit with advance approval of courses given by the administration shall be financed at the rate above by the school district.
>
> B. Each teacher may take no more than one course per quarter or semester for pay credit or lane change credit during the school year.
>
> C. Each teacher must take 3 approved semester credits every 3 years. If a teacher does not fulfill this requirement at the end of 3 years, a two day pay deduction will be made.
>
> D. Financing by the school district of credits will begin June 1, 1974 and all presently employed faculty members must have earned 3 semester credits by August 30, 1976. Teachers employed after June 1, 1974 will have 3 years to earn 3 semester credits.
>
> E. This part of the negotiated agreement headed by Lane Changes will remain in effect until June 1, 1977.

The "Note" which appears at the bottom of the 1983-84 salary schedule first appeared in the 1981-82 salary schedule. That Note has appeared in each subsequent collective bargaining agreement. In the 1981-82 collective bargaining agreement, the salary schedule consisted of five horizonal lanes headed "B.S., +8, +16, +24, and M.S." and fourteen vertical steps numbered 0 through 13. The columns headed "B.S." and "+8" consisted of eleven steps; the column headed "+16" consisted of twelve steps, the column headed " +24" consisted of thirteen steps; and the column headed "M.S." consisted of fourteen vertical steps. The salary schedule of the parties' 1981-82 collective bargaining agreement contained the following sentence immediately below the grid and immediately above the "Note" discussed above: "No teacher will be advanced vertically on the 1981-82 salary schedule." This sentence has not appeared in any

subsequent collective bargaining agreement. District teachers have moved one vertical step for each year of teaching experience in each school year subsequent to 1981-82. The decision to hold teachers on step for the 1981-82 school year was mutually agreed upon by the WCEA and the District and was undertaken to raise the salary rates reflected in the individual cells of the salary schedule grid at a cost for the school year which fell within District guidelines.

5. The WCEA and the District had not reached agreement on a successor agreement to that covering the 1983-84 school year at the time the 1984-85 school year began. The parties ultimately reached impasse in their negotiations and participated in mediation/arbitration proceedings. On January 30, 1985, a mediator/arbitrator, appointed by the Wisconsin Employment Relations Commission, conducted a mediation session to attempt to bring about an agreement on the unresolved issues by the parties. On the same date, after the mediation effort proved unsuccessful, the mediatior/arbitrator conducted a hearing on the matter. The parties had not resolved the impasse in their negotiations as of February 13, 1985.

6. The District did not advance teachers one vertical step on the salary schedule contained in the 1983-84 collective bargaining agreement from the position they occupied in the 1983-84 school year, to determine their salary for the 1984-85 school year. The District did not advance teachers who had accumulated, subsequent to the 1983-84 school year, sufficient educational credits under Paragraph 9 of the 1983-84 collective bargaining agreement to advance horizontally on that salary schedule from the lane they were placed in for the 1983-84 school year. The District did not withhold movement on the salary schedule due to the teaching performance of its staff. The District hired teachers new to the District to teach the 1984-85 school year. Some of these new teachers did have prior teaching experience. The District's Administrator, James Stillman, placed the newly hired teachers at what he felt was the correct cell of the 1983-84 salary schedule. Stillman did not, in placing the new teachers on the salary schedule, directly correlate an individual teacher's years of teaching and other outside experience to the vertical step and horizontal lane of the salary schedule. Specifically, Stillman did not grant, in terms of salary schedule placement, any credit for one new teacher's experience as a juvenile court worker. The new teachers will remain at the salary cell determined by Stillman for the 1984-85 school year without regard to the collective bargaining agreement ultimately reached through the mediation/arbitration process. Lawrence Von Holtum is presently the President of the District's School Board, and has served as a School Board Member for eleven years. The District has, during that period, never moved teachers on a salary schedule grid prior to agreement on a collective bargaining agreement to cover the school year in which the movement was to occur. During that period, the District has failed to reach agreement with the WCEA on a collective bargaining agreement prior to the commencement of the school year to be governed by that agreement.

7. During the mediation session mentioned in Finding of Fact 5 above, the parties discussed whether a collective bargaining agreement could be resolved, and whether or not the prohibited practice complaint at issue here could also be resolved. The mediator/arbitrator started the mediation session with a joint meeting between the District and the WCEA and then separated the parties into separate rooms for the mediation effort. When the mediation effort broke down, the parties again met jointly and then proceeded into the hearing phase of the mediation/arbitration process. The parties did, in their separate caucuses with the mediator, discuss whether or not the prohibited practice complaint at issue here could be resolved. The District first raised this to the mediator as an issue for resolution. Von Holtum and Stillman testified that no District representative ever informed the mediator/arbitrator that settlement of the prohibited practice complaint was a condition for settlement of the collective bargaining agreement. James Begalke, the WCEA's Executive Director, and David Wolf, a District teacher who served on the bargaining committee which negotiated with the District on January 30, 1985, testified that the mediator/arbitrator informed the WCEA that the District would not reach an accord on a collective bargaining agreement without reaching an agreement by which the Association would drop the prohibited practice complaint. The parties never discussed the WCEA's dropping of the prohibited practice complaint in a face-to-face meeting on January 30, 1985.

8. The WCEA filed a complaint of prohibited practice with the Commission on October 24, 1984. Paragraph 5(a) of that complaint states: "Beginning on or about September 5, 1984, the Respondent refused to pay salary increments to employes, as set forth in Exhibit A." Exhibit A is a copy of the 1983-84 salary schedule grid described in Finding of Fact 3 above. Hearing on the complaint occurred on February 13, 1985. Counsel for the WCEA and for the District addressed horizontal movement on the salary schedule during their opening statements. Horizontal movement on the salary schedule was addressed in witness testimony.

9. The District, by its refusal to pay teachers, who were employed by the District in the 1983-84 school year and returned to teach the 1984-85 school year, for movement horizontally and vertically on a salary schedule contained in a collective bargaining agreement with the WCEA which, by its terms, concluded on June 30, 1984, did not unilaterally alter the wages and terms of conditions of employment of those teachers. The District did not, during a mediation session on January 30, 1985, demand, as a condition of reaching accord on a collective bargaining agreement, that the WCEA withdraw a pending complaint of prohibited practice.

CONCLUSIONS OF LAW

1. The WCEA is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The District's refusal to pay teachers, who were employed by the District in the 1983-84 school year and returned to teach in the 1984-85 school year, for movement horizontally and vertically on a salary schedule contained in a collective bargaining agreement with the WCEA which, by its terms, concluded on June 30, 1984, did not commit a unilateral change refusal to bargain in violation of Sec. 111.70(3)(a)1, Stats., or of Sec. 111.70(3)(a)4, Stats.

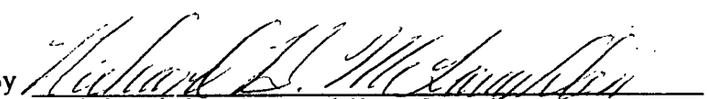
4. The District did not, during a mediation session on January 30, 1985, demand that, as a condition of reaching accord on a collective bargaining agreement, the WCEA withdraw a pending complaint of prohibited practice. The District did not, therefore, commit any violation of Sec. 111.70(3)(a)1, Stats., or of Sec. 111.70(3)(a)4, Stats., by its conduct during that mediation session.

ORDER 2/

The prohibited practice complaint filed with the Commission by the WCEA on October 24, 1984 and the amended prohibited practice complaint filed by the WCEA with the Commission on February 11, 1985, are dismissed.

Dated at Madison, Wisconsin this 31st day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

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

(Footnote 2 continued on Page 7)

(Footnote 2 continued)

order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions

The WCEA's original complaint alleges the District, by refusing to "pay salary schedule increments", violated its duty to maintain the status quo on wages following the expiration of one labor agreement but prior to the execution of a successor labor agreement and thus violated Sec. 111.70(3)(a)1, Stats., and Sec. 111.70(3)(a)4, Stats. According to the WCEA, the contractual salary schedule and Paragraphs 8 and 9 of the collective bargaining agreement establish that "the status quo on wages should include experience and educational increments. . . ." This conclusion is, according to the WCEA, well founded on Commission case law. In addition to the clear language of the collective bargaining agreement, the WCEA asserts that bargaining history "further supports the idea that advancement is anticipated by the salary schedule and accompanying language and can be reasonably expected by the employees." Specifically, the WCEA notes that the 1981-82 school year is the only school year that teachers did not advance on the salary schedule, and that because the parties inserted specific language to document that non-advancement, which was removed from the contract the following school year, it follows that "the parties otherwise assume that advancement will take place." Regarding the allegations of the amended complaint, the WCEA alleges: "Respondent violated its duty to bargain in good faith with the Association over a successor collective bargaining agreement when it conditioned settlement of the successor agreement on the Association dropping its prohibited practice complaint." After reviewing the merits of the present matter, the WCEA urges that "the appropriate remedy in this case should include reasonable attorneys' fees." Specifically, the WCEA alleges that "the internal structure of the Complainant's organization and the method by which they retain counsel is irrelevant to the issue of attorney's fees" and the WCEA concludes that current case law requires the conclusion that the WCEA is entitled to the "market value of its attorney's fees." In addition, the WCEA urges that "public policy supports the award of attorney's fees in this case" because the WCEA cannot be truly made whole without an award of attorney's fees given that the District can use the withholding of increments as a tactical advantage, and can realize the present value of the retained money. Urging that the Wisconsin Supreme Court in Watkins v. LIRC, 3/ has advanced a sound basis for the Commission to overturn its present policy against awarding attorney's fees, the WCEA concludes that an award of attorney's fees is appropriate in the present matter. Arguing that the language of the present agreement requires movement on the salary schedule, that the District has not established any past practice excusing it from granting teachers such movement, and that the District's failure to move teachers horizontally on the salary schedule cannot excuse its failure to move teachers vertically, the Association concludes that the District has "no good faith defense for its refusal to pay employees their earned experience and education increments" and that the present matter presents an "egregious unilateral action" requiring the finding that the District violated the MERA and should be ordered to make the WCEA whole.

The District acknowledges that it had the legal obligation to maintain the status quo, and asserts that it did so in the present matter. Urging that the relevant Commission case law establishes that status quo cases turn on the circumstances of each case, and that increment increases are a contractual concept, the District concludes that the agreement between the District and the WCEA and the past practices of the parties demand the conclusion that "increment advancement/pay was not considered automatic by the parties and thus, (is) not part of the "status quo"." In addition to noting the provisions of the salary schedule Note, as well as those of Paragraphs 7, 8 and 9, the District urges that the Complainant in the present matter did not challenge the District's refusal to advance teachers horizontally on the salary schedule. The District, in addition, urges that the testimony of its District Administrator and its Board President

---

3/ 117 Wis.2d 753 (1984).

establish that the District has never advanced teachers on the salary schedule contained in an expired collective bargaining agreement prior to reaching an accord on a successor agreement. A review of the circumstances of the present matter establishes, according to the District, that the most relevant precedent for the present matter is School District of Webster, 4/ in which the Examiner found no status quo violation when the School District withheld a merit and increment increase during the period following the expiration of one labor agreement but before the execution of a successor agreement. Anticipating a WCEA argument, the District urges that the Note, inserted into the salary schedule of the collective bargaining agreement covering the 1981-82 school year and subsequently removed in the successor agreement, is not applicable to the present matter because "it offers no indication as to what the parties understood the status quo to be during a contract hiatus." The District asserts that the amended complaint has no merit because "the record reveals that the Complainant has failed to present even a shred of credible and probative evidence." The evidence adduced by the WCEA on the point is, according to the District, double hearsay in marked contrast to the direct testimony of the District Administator and Board President that the District never conditioned agreement on a collective bargaining agreement on the WCEA's withdrawal of its prohibited practice complaint. Even if the mediator made the statements attributed to him by the WCEA regarding the Board's position, the District urges that this would constitute nothing more than "his method for determining if he might be able to resolve the prohibited practice complaint as well as the contract dispute." The District urges that longstanding Commission case law establishes that attorney fees may not be awarded in the present case. The Watkins decision is not, according to the District, applicable to the present matter. The District concludes its arguments by urging that "any interest which may be sought on the award by the Complainant may only accrue from the date that the Respondent receives any adverse decision."

In reply to the District's brief, the WCEA initially urges that: "The Respondent's claim that the Association is not challenging its refusal to pay educational increments is contradicted by the complaint, the arguments at hearing, and the evidence in the record." While acknowledging that the District Administrator does have discretion regarding the placement of new teachers, the WCEA asserts: "In the instant case, the District acted in accordance with the status quo in the placement of new teachers. . . . Returning teachers, on the other hand, were denied advancement based on their increased education and experience." In addition, the WCEA argues that District arguments regarding the past practice of the parties constitute nothing more than a "vague and unsubstantiated" assertion, and in any event, do not present persuasive arguments under present Commission case law. Regarding the allegations of the amended complaint, the WCEA reasserts its contention that the record demonstrates that the District initiated and insisted that the WCEA withdraw its complaint of prohibited practice in order to obtain an agreement on a successor collective bargaining agreement. Finally, the WCEA argues that "Respondent's arguments on remedy are erroneous in light of recent case law" and concludes that an award of attorney fees and costs is appropriate in the present matter.

In reply to the WCEA's brief, the District initially urges that: "The dynamic theory of status quo requires that the District withhold increment payments during the contractual hiatus." The District specifically focuses this argument on the Commission's decision in School District of Wisconsin Rapids, 5/ and urges that the second principle stated by the Commission in that decision establishes that the parties' agreement and practices are determinative on whether increments are paid and that in the present matter the parties' contract and practices demand the conclusion that increments not be paid. The District reasserts its contention that: "The Association has failed to establish that the Respondent ever conditioned voluntary settlement of the bargaining agreement upon the Association dropping its prohibited practice complaint." The District concludes its arguments by asserting "the Commission consistently has refused to

---

4/ Dec. No. 21312-A (Crowley, 6/84). The District's brief was submitted prior to the Commission's review of this decision. See footnote 1.

5/ Dec. No. 19084-C (WERC, 3/85).

award attorney fees in prohibited practice matters" and that the Watkins decision does not present mandatory or persuasive precedent for the present matter.

In supplemental written argument, the WCEA asserts that the Commission in Webster, has followed a series of cases holding that increment payments do constitute a part of the status quo, and has underscored the strength of that holding by extending it to a factual situation unlike the prior cases. According to the WCEA the Commission in Webster examined the salary schedule and language of the collective bargaining agreement to determine whether the parties intended to establish a compensation arrangement involving increment and merit increases or a singular set of salaries. The WCEA asserts: "The mere existence of a grid implies that the parties established a system of compensation rather than a singular set of salaries." This conclusion demands, according to the WCEA, that salary schedule movement be considered part of the status quo. That the parties established a system of compensation is underscored, according to the WCEA, by the language of the labor agreement which demands salary schedule movement. The WCEA asserts that because evidence of the past experience of the parties regarding salary schedule movement during a contract hiatus "falls short of establishing a mutually agreed upon past practice", it follows that Commission case law demands that salary schedule movement be considered part of the status quo in the present matter.

In its supplemental argument, the District asserts that Webster underscores the trend of Commission cases to decide increment cases on the facts of each case. Noting Webster did not involve evidence of prior practice, the District urges the present case is distinguishable from Webster, and demands a different result. The present case, unlike Webster involves, according to the District, an expired agreement setting forth "a singular set of salaries." In support of this assertion, the District points to the language of the expired agreement which establishes salary schedule movement is not automatic, and to "unrefuted bargaining history" which constitutes "a clear, long-standing, unrefuted past practice of not granting increments."

DISCUSSION

Both the original and the amended complaints turn on alleged District violations of Sec. 111.70(3)(a)1 Stats. and of Sec.111.70(3)(a)4, Stats. The allegations of the original complaint will be addressed first.

The parties do not dispute that the District was obligated to maintain the status quo during the period between the expiration of the labor agreement covering the 1983-84 school year and the resolution of a successor collective bargaining agreement to cover the 1984-85 school year. The parties dispute the precise definition of the status quo regarding the facts of the present matter and specifically whether the District was obligated to compensate teachers for movement vertically or horizontally on the salary schedule contained in the expired collective bargaining agreement. 6/

The debate over what constitutes the status quo regarding an expired salary schedule has been an ongoing one and whatever clarity present case law can bring to that debate must, in my opinion, focus as narrowly as possible on Wisconsin Rapids. In that case, the Commission stated:

> 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

---

6/ Contrary to the District's assertion, horizontal movement on the salary schedule has been placed at issue by the WCEA. The complaint at paragraph 5 (a) alleges ". . . the Respondent refused to pay salary increments to employees, was set forth in Exhibit A." Exhibit A is the salary schedule from the labor agreement covering the 1983-84 school year. While "increments" can be interpreted to mean vertical movement only, the WCEA's opening statement at the hearing as well as the examination of witnesses by counsel for both parties addressed horizontal movement.

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.)

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. 7/

Before attempting to apply the controlling principles of Wisconsin Rapids to the facts of the present matter, it is necessary to address a number of disputes raised either by the parties or by the Wisconsin Rapids decision itself. The discussion of examiner decisions by the parties will not be specifically addressed in the hope of tying status quo analysis to one precedent. Other Commission cases will be discussed only to the extent necessary to clarify the intent of Wisconsin Rapids.

The most noteworthy of these decisions is School District of Webster. 8/ Webster is noteworthy for two reasons. First, the Commission, in Webster, applied Wisconsin Rapids to a teacher grid, though a grid unlike that at issue here. Second, the Commission in Webster addressed four "basic points" before applying the controlling principles of Wisconsin Rapids. Because the Commission expressed the controlling principles as a "partial statement", 9/ it is impossible not to address the four basic points of Webster. Even if the "basic points" are not express additions to the controlling princples of Wisconsin Rapids, they constitute factors deemed significant by the Commission, and the attempt in the present case will be to apply Wisconsin Rapids as ministerially as possible. The impact of the four basic points of Webster will be addressed below.

Wisconsin Rapids turns on a case-by-case analysis guided by the controlling principles noted above. That the Commission chose to express the controlling principles as a "partial statement" is troublesome, but will be ignored in the present decision which will assume that the controlling principles have been fully stated in Wisconsin Rapids.

One final point regarding the application of the Wisconsin Rapids case to the present matter remains to be discussed and concerns the WCEA's assertion that the present salary schedule grid and the accompanying language creates "the strong presumption of movement." This assertion is well rooted in Wisconsin Rapids if salary schedule movement horizontally or vertically from one school year to the next is considered a "change in compensation" occurring "during its term and/or after its expiration." The assertion is given further support by the Commission's analysis in Webster, which focuses in large part on contract language which anticipates movement at some point beyond the expiration of the contract. The structure of the grid at issue here implies such movement, and Paragraph 9 of the parties' 1983-84 labor agreement expressly provides for such movement.

Although the WCEA's asserted presumption of movement has support in Wisconsin Rapids and Webster, that presumption can not be accepted since the Commission did not, in either decision, analyze the evidence with recourse to

---

7/ Dec. No. 19084-C at 17.

8/ See footnote 1.

9/ Dec. No. 19084-C at 17.

presumptions, affirmative defenses, or shifting burdens of proof. In each case the Commission analyzed the factors of contract language, bargaining history and the historical application of the language separately on their own merits. Footnote 16 of Wisconsin Rapids appears to underscore this type of analysis by asserting that the absence of a past pattern of advancement does not preclude the need to analyze the language of the agreement at issue. 10/ Finally, the Commission has, in another case, refused to define the status quo solely, or even presumptively, on the basis of expired language. In City of Brookfield, the Commission stated:

> We agree with the City that the terms of the expired 1980-81 agreement ought not be viewed in isolation in determining what the status quo was regarded summer hours as of the beginning of the summer of 1982. On the other hand, the terms of that agreement cannot be entirely ignored in determining the status quo, either. In addition to their expired overall agreement, the parties' practices and history of negotiation (including side agreements) on the subject in question can also have a bearing on what the status quo is on a given subject as a given point in time. 11/

It would appear, then, that the Commission intended the definition of the status quo to turn on the facts of a given case with no particular "controlling principle" being given exclusive or presumptive force.

While it is clear that the Commission, in Wisconsin Rapids, expressly disavowed the Menasha "majority's status quo dictum" and expressly adopted a "dynamic view of the status quo", 12/ I think it is necessary to speculate on the policy considerations underlying this decision before undertaking the case-by-case analysis dictated by Wisconsin Rapids in order to define the purpose of that analysis. By disavowing the static view of the status quo and by refusing to make movement on an expired salary schedule automatic, the Commission has indicated that the clarity of the definition of the status quo as a matter of law is not the controlling policy consideration. An extreme view of the status quo, either denying or granting movement automatically on the salary schedule would clarify the law, but would do so at the cost of ignoring the parties' perceptions of the conditions of employment which survive the expiration of the contract. Arguably, this cost would be translated into an adverse bargaining environment depending on which party's perception of the underlying conditions of employment was ignored. The Commission focused, in Brookfield, Wisconsin Rapids, and Webster, on the parties' expectations by defining the status quo in terms of contract language, bargaining history, and the historical application of contract language, all factors within the parties' control. In cases in which the parties have expressly addressed the effect of contract terms after the agreement's expiration, the Commission, in Wisconsin Rapids, has stated that those expressed expectations must be given effect. In cases such as the present, where the parties have not expressly addressed the issue, the case-by-case analysis is something more than an issue of contract interpretation. Ultimately, the goal the Commission has set appears to be the definition of as neutral a bargaining environment as possible. The Commission has in Wisconsin Rapids apparently established a case-by-case analysis to grant the parties, to the greatest extent possible, the bargaining environment they themselves have created in the past. Presumably, a bargaining environment which meets the parties' expectations will foster the purposes of collective bargaining and assure that changes in conditions of employment occur, to the greatest extent possible, at the bargaining table.

10/ Footnote 16/ reads as follows: "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." Ibid.

11/ Dec. No. 19822-C (WERC, 11/84) at 7. This language was expressly approved in Wisconsin Rapids.

12/ Dec. No. 19804-C at 17.

It is now necessary to apply the controlling principles of Wisconsin Rapids to the facts of the present matter. As noted above, the parties' agreement does not expressly address the effect of contract terms after its expiration date. The parties' arguments regarding the agreement provisions defining the status quo center on Paragraphs 8, 9, and the salary schedule. Paragraph 8A grants the District Administrator discretion to determine if teaching experience "is directly relevant" to a new teacher's assignment, or if "work related experience" should be considered in determining salary schedule placement. This Paragraph has been altered somewhat over time, but the Administrator's discretion in both areas is historically well established. The District Administrator did exercise his discretion in placing newly hired teachers for the 1984-85 school year and did effect placement so that those new teachers would not move on the salary schedule once it is decided in arbitration. That Paragraph 8 grants the District Administrator some discretion in the placement of new teachers is clear, but this discretion affords little, if any, guidance regarding the movement of existing staff during the period between contracts. The WCEA's assertion that the District Administrator's treatment of new teachers makes the present matter analogous to the situation addressed by then Commissioner Torosian in his dissent to Menasha will be addressed below. The language of Paragraph 8A, then, affords little guidance regarding whether or not the WCEA and the District expected teachers to move vertically and horizontally during the period after the expiration of one labor agreement but before accord on a successor agreement.

As the WCEA asserts, the provisions of paragraph 9 A-D anticipate movement on the salary schedule grid. Paragraph 9A and B, analogously to the case in Webster, anticipate movement beyond the expiration date of the collective bargaining agreement. As the District points out, however, these provisions do not unambiguously address when the movement is to occur, or to become effective if a successor agreement is not in effect. The provisions of paragraph 9A and B do support the conclusion that the parties anticipate movement beyond the effective date of the collective bargaining agreement, but one examiner has, with summary Commission affirmance, asserted: "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 accumulation of experience. Either the schedule is to be applied automatically as a whole, or none of it should be applied." 13/ The Commission does not afford deference to Examiner decisions which have been summarily affirmed. 14/ Thus, it is impossible to know what ultimate effect this decision will be given. At most, for the present matter, the provisions of paragraph 9A - D, especially paragraphs A and B, anticipate movement beyond the expiration of the collective bargaining agreement without clearly addressing when that movement must occur if a succesor agreement is not in effect.

As the parties' arguments demonstrate, the Note contained in the expired salary schedule and the added paragraph attached to the collective bargaining agreement governing the 1981-82 school year, admit conflicting inferences which preclude a definite conclusion regarding the impact of the language of the salary schedule on the issue of salary schedule movement beyond the expiration date of an agreement. The WCEA correctly observes that the Note, which first appeared in the 1981-82 school year, permits the inference that the parties anticipated salary schedule movement in the absence of contract language precluding it. As the District correctly observes, however, this Note also permits the inference that movement is governed by a settled collective bargaining agreement and does not address when movement is to occur in the absence of a settled agreement. That the expired agreement expressly notes salary schedule placement is not equal to years of experience permits the inference drawn by the District that such movement is not automatic. As the WCEA counters, however, the note permits the inference that where the placement is not equal to actual years of experience, the difference has resulted from negotiations. In sum, the salary schedule note does not permit a clear conclusion regarding salary schedule movement in the absence of a settled collective bargaining agreement.

13/ School District of the Tommorrow River, Dec. No. 21329-A (Crowley, 6/84) at 12; aff'd by operation of law, Dec. No. 21329-C (WERC, 7/84).

14/ See, for example, Green County, Dec. No. 20308-B (WERC, 11/84).

Against this background, evidence regarding bargaining history and the historical application of contract language assumes controlling importance and, in this case, dictates the conclusion that the status quo does not include salary schedule movement. The critical testimony is that of Board President Lawrence Von Holtum who testified thus:

> Q How long have you been a member of the school board?
>
> A I think I'm on my eleventh year.
>
> Q In your eleven years of experience on the board, have you been involved in negotiations?
>
> A About seven years of that, I think.
>
> Q Are you aware of any years in which settlement was not reached prior to the start of the subsequent school year?
>
> A Repeat that.
>
> Q Are you aware of any years in which settlement of negotiations for collective brgaining agreement were not completed prior to the start of the school year?
>
> A Certainly.
>
> . . .
>
> Q In those eleven years on the board, are you aware of any situation or instance in which the employees were moved on the grid prior to settlement?
>
> A None. 15/

The WCEA persuasively argues that this testimony is broad and conclusory and that testimony regarding specific years would be preferable. However, even with this qualification, the testimony is sufficient to dictate the conclusion that the status quo does not include salary schedule movement. Contrary to past practice evidence in an arbitration setting which is utilized to ascertain the parties' agreement on certain points, testimony on the historical application of the language implementing the salary schedule is, as noted above, utilized to ascertain the parties' expectations regarding the bargaining context. Von Holtum's testimony, though broad, was unrebutted. If Von Holtum's broad testimony violated the WCEA's expectations regarding the bargaining context it is reasonable to conclude some rebuttal would have been made. The ultimate burden of proof rests, under the operation of Sec. 111.07(3), Stats., on the WCEA as the Complainant, and whatever specificity is lacking in Von Holtum's testimony cannot be resolved against the District, in the absence of any rebuttal evidence.

The final issue to be addressed concerns the "basic points" of Webster.

The first of these has already been addressed above by noting the agreement at issue here does not expressly state whether or not salary schedule increases are "understood to be payable during a contract hiatus . . ."

The second point has also been addressed since evidence of prior practice has been found to be controlling.

The third "basic point" of Webster appears to incorporate then Commissioner Torosian's dissent from Menasha. 16/ Stillman's testimony in the present case may be read to imply he credited newly hired teachers with one year of experience for the 1983-84 school year. Torosian's dissent is not, however, applicable to the present case. First, unlike Menasha, the agreement at issue here expressly

---

15/ Transcript at 91-92.

grants the District Administrator the authority to determine whether a teacher's prior teaching experience is "directly relevant" to their teaching assignment, and whether any "work related experience" will play a role in salary schedule placement. Second, while it can be inferred that Stillman gave new teachers one year of credit for the prior school year, that inference is without persuasive factual support in the record, which is silent on the years of experience possessed by new teachers, as well as on their actual placement on the salary schedule.

The final "basic point" of Webster concerns "evidence of a practice of increment increases and/or merit increases being paid to teachers at various points during the term of a given salary schedule." Paragraphs 9A and B provide for salary schedule movement beyond the expiration date of the contract, and for the possibility of more than one such movement per year. This is not the "anniversary date" type of increase alluded to in Webster. However, the Commission, in Webster, seems to indicate that the more advances an employe can make on a salary schedule during its term, the more likely it will be that such advancement will be considered part of the status quo. Why this should be is not immediately apparent. If either frequency or expectation of movement is the key factor, it is difficult to know why "anniversary date" increases should be distinguished from cases where an agreed upon grid has been in effect over time. Movement on such a grid, viewed over time, would be periodic and regular, as is an anniversary date type of increase. In any event, I do not believe this basic point, whatever its ultimate significance, offers a basis to ignore the evidence of prior practice and bargaining history discussed above. The bargaining history and prior practice evidence bears directly on the parties' behavior during the interim between contracts, while the operation of this "basic point" rests on an inference based on contract terms not directly addressing the effect of the contract during that interim.

In sum, the language of the parties' expired collective bargaining agreement does not dictate a definite conclusion regarding salary schedule movement after the expiration of the labor agreement. The provisions of paragraph 9, especially Sections A and B, indicate the agreement anticipates movement after the expiration of the contract. The agreement does not, however, definitely address the effect of the expired language in situations where no successor agreement has been reached. Evidence of bargaining history and the historical application of the expired language does expressly address the effect of contract language in situations where no successor has been reached, and that evidence indicates that the District has not moved teachers in situations where no successor agreement has been reached. This evidence, though broad and conclusory, is unrebutted and dictates the conclusion that the status quo, in the present matter, under the controlling principles of Wisconsin Rapids, does not include movement on the salary schedule. Accordingly, the allegations presented by the original complaint that the District violated Sec. 111.70(3)(a)1, Stats. and Sec. 111.70(3)(a)4, Stats., by not moving teachers on the expired salary schedule grid is not persuasive. Thus, that part of the complaint has been dismissed.

It is now necessary to address the alleged District violations asserted by the WCEA in its amended complaint. For the purpose of resolving those issues, I will assume that the WCEA's citation of the following passage from The Developing Labor Law represents an accurate statement of the law the Commission would apply in this matter:

> Neither party is compelled to negotiate with the other about the settlement of unfair labor practice charges filed with the Board. Thus, if a party demands that charges against it be withdrawn as a condition to negotiating, or if it seeks to condition wage increases upon the withdrawal of charges against it, it violates the Act. Similarily, when one party insists to impasse that the other party abandon litigation or withdraw a grievance for which the union is seeking arbitration, a violation occurs. 17/

16/ Menasha Joint School District, Dec. No. 16589-B (WERC, 9/81) at 6-7.

17/ Footnote from original text omitted. C. Morris, The Developing Labor Law, (Second Edition, BNA, 1983) at 861.

To resolve this issue it is necessary to take an overview of the relevant evidence. Stillman testified without contradiction that the January 30, 1985, mediation session started with a joint meeting during which the mediator/arbitrator explained his role, but at which no direct talks between the District and the WCEA occurred. The District and the WCEA did not, according to Stillman's uncontroverted testimony, ever meet jointly to discuss bargaining issues face-to-face prior to the arbitration hearing which followed the mediation session. Stillman and Von Holtum testified that the District never attempted to condition accord on the successor labor agreement on the WCEA's withdrawal of the prohibited practice complaint. Stillman testified that the mediator/arbitrator indicated to the District that the prohibited practice issue would be dropped by the WCEA if the parties could reach agreement on the monetary issues in dispute regarding the successor agreement. Begalke and Wolf testified that the mediator/arbitrator indicated to the WCEA that the District would not reach agreement on a successor labor agreement without the WCEA dropping the complaint. District and WCEA witnesses agreed that the District did not make any offer of settlement specifically directed at the prohibited practice complaint.

Ultimately, resolution of the allegations of the amended complaint turn on statements attributed by each party to the mediator/arbitrator. That the District did not make any offer to settle the complaint permits either the inference that the District linked agreement on the successor contract to the withdrawal of the complaint, or the inference that the District regarded the issues as each deserving settlement with settlement of the prohibited practice complaint a certainty if settlement on the successor labor agreement could be reached. Neither inference is inherently more probable than the other in the absence of additional evidence. That additional evidence focuses on statements attributed to the mediator/arbitrator.

The issue ultimately presented is whether to credit the statements attributed to the mediator/arbitrator at all and, if so, which statements to credit. The procedural posture of the present matter presents this issue as a question of weight and not of admissibility. 18/

I find no persuasive reason to grant any weight to the hearsay statements attributed by either party to the mediator/arbitrator. None of the exceptions expressed in Sec. 908.03 or 908.04, Stats., would cover the present situation. While, as noted above, the present matter does not present issues of admissibility, the exceptions are a guide to the weight that can be afforded hearsay statements since they constitute "circumstantial guarantees of trustworthiness." 19/ Thus, no exception grants the hearsay offered by either party any circumstantial guarantee of trustworthiness. Significantly, in the present matter, the hearsay suffers from further defects. Each witness questioned regarding the mediator/arbitrator's statements is interested in the outcome of the present litigation and this interest increases the risk that the witnesses'

18/ No attempt will be made to defend, for future cases, addressing this issue as an issue of weight rather than admissibility. Some discussion of the procedural posture of the case is perhaps necessary, however. Hearsay, in an administrative proceeding, is not admissible over objection where direct testimony as to the same facts is attainable. Outagamie County v. Town of Brookland, 18 Wis.2d 303 (1962). No attempt will be made to address the issue, not presented here, of whether the declarant is unavailable given ERB 13.04(1), which is set forth below. The District did object to the hearsay nature of the mediator/arbitrator's statement of the District's position to the WCEA bargaining team in their caucus. This objection was overruled in significant part because both the District and WCEA had, prior to any objection, questioned Stillman regarding hearsay statements made by Board members to the mediator/arbitrator in the District's caucus. In addition, the WCEA counsel had, prior to any District objection, questioned Stillman on statements made by the mediator/arbitrator regarding the WCEA position as communicated to the mediator/arbitrator by the WCEA bargaining team in their caucus. The hearsay door, having been opened, was not closed by the admissibility ruling requested by the District.

19/ See Sec. 908.03(24), Stats. and 908.04(6), Stats.

initial perceptions and ultimate recall could be colored by their interest. In addition, the hearsay offered is, in certain points, multi-level hearsay which increases the risk of inaccuracy in the transmission of the information. In addition, there is no relevant non-hearsay evidence or narrative testimony to fit the hearsay statements of the mediator/arbitrator into. As noted above, the parties did not discuss the matter jointly and there has been no pattern of bargaining behavior demonstrated by either side which could indicate which hearsay statements, if accurately reported, are the more probable. The speculation offered by the parties on the mediator's motives or tactics is nothing more than speculation and offers no reliable basis to gauge the probability that the mediator/arbitrator made the statements attributed to him, or that these statements, even if made, accurately reflect the views of either the District or the WCEA.

There has been, in addition, no demonstration that the statements attributed to the mediator/arbitrator constitute the only source of evidence on these allegations. The absence of non-hearsay evidence in the present matter is noteworthy. As noted above, the failure of the District to specifically offer to settle the complaint permits the conflicting inferences asserted by each party without affording a basis to make either inference more probabale. The absence of face-to-face discussions, against this background, is significant. If, as the WCEA asserts, the District effectively coerced the WCEA in an illegal manner, is difficult to understand why the matter was not discussed jointly or how an Examiner can be expected to infer the illegality of the District's bargaining behavior in the absence of such discussions. As an evidentiary matter, there is no reason to encourage recourse to hearsay evidence when non-hearsay evidence could be available. While it can be asserted that the District would be unlikely to acknowledge illegal bargaining conduct face-to-face, it is more desirable, if inferences must be made, that the inferences be based to the greatest extent possible on the District's bargaining behavior directly perceived. As a matter of collective bargaining, there is no reason to encourage parties not to bring bargaining issues to the table. Recourse to the hearsay offered in this case would only encourage parties not to do so. Also, as a matter of collective bargaining policy recourse to the hearsay offered in the present matter appears highly questionable.

The confidentiality of the mediation function has been addressed by the Commission in ERB 13.04(1) which states:

> CONFIDENTIAL NATURE OF FUNCTION. Any information disclosed by the parties to the mediator in the performance of his duties shall not be divulged voluntarily or because of compulsion unless approved by the party involved. All files, records, reports, documents, or other papers received or prepared by the mediator in his confidential capacity shall be classified as confidential and such confidential matter shall not be disclosed to any unauthorized person without the prior consent of the commission. The mediator shall not produce any confidential records of or testify with regard to, any mediation conducted by him, on behalf of any party to any cause pending in any proceeding before any court, board, including the Wisconsin employment relations commission, investigatory body, arbitrator, or fact finder without the written consent of the commission and failing same, the mediator shall respectfully decline, by reason of this rule, to produce or present confidential records or documents of any nature or given (sic) testimony with regard thereto. 20/

While neither party has raised the confidentiality issue, it is worth some mention that the purpose of the rule would be subverted by granting the hearsay offered by each party any weight. Granting weight to the statements attributed to the mediator/arbitrator by the parties would, in effect, compel the mediator/arbitrator's testimony without the Commission's or the mediator/arbitrator's advance approval. Doing so would subvert the confidentiality essential to the mediation process.

20/ The provisions of ERB 13 are incorporated into ERB 31, which governs mediation-arbitration procedures, at ERB 31.16(3).

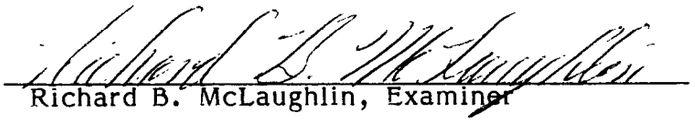
Even if a reason to grant weight to the hearsay existed, it would be impossible in the present matter to credit one party's hearsay over the other's. As noted above, there is a dearth of non-hearsay evidence, and all the witnesses are interested in the outcome. There was no reason at the hearing based on witness demeanor to conclude any of the testifying witnesses related anything other than their honest view of the facts. Because they are irreconcilable, the conflicting hearsay statements preclude any definitive conclusion regarding the WCEA's allegations. Because there is no persuasive proof to support the WCEA's allegations apart from the hearsay, I must conclude that the WCEA has failed to prove that the District conditioned accord on a successor agreement on the WCEA's withdrawal of the prohibited practice complaint. Thus, the allegations of the amended complaint regarding District violations of Sec. 111.70(3)(a)1, Stats. and of Sec. 111.70(3)(a)4, Stats., have been dismissed.

The conclusions reached above make it technically unnecessary to address the parties' conflicting assertions regarding attorney fees. The status quo issue involved an attempt to apply Wisconsin Rapids, and if that application is erroneous, then, arguably, the attorney fees issue can be presented in an appeal of this decision. To complete this decision for appellate purposes, the attorney fee issue will be briefly discussed.

Even assuming the WCEA is correct that Watkins grants the Commission the statutory authority to award attorney's fees, it remains the case that the Commission in United Contractors, Inc., 21/ and in Madison Metropolitan School District, Board of Education, Madison Metropolitan School District, 22/ has expressly refused to exercise that authority. To the extent ambiguity exists in that precedent, it is traceable to then Commissioner Torosian's dissent to Madison Metropolitan School District, in which he argued for "a policy, which would enable it to grant attorney fees in exceptional cases where an extraordinary remedy is justified." 23/ There has been no evidence of bad faith on the District's part in the present matter. Thus, in the absence of the complete overturning of established Commission case law, there is no basis for an award of attorney fees. The present record does not, in my opinion, offer any basis for overturning that precedent, and if this established precedent is to be overturned, that task must be left to the Commission.

Dated at Madison, Wisconsin this 31st day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

21/ Dec. No. 12053-A (Gratz, 12/73) aff'd by operation of law Dec. No. 12053-B (WERC, 1/74); but expressly approved in Madison Metropolitan School District, footnote 22.

22/ Dec. No. 16471-D (WERC, 5/81).

23/ Ibid, at 12.