STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

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

Mr. Stephen L. 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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Richard B. McLaughlin having on October 31, 1985, issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he dismissed a prohibited practices complaint filed by the West Central Education Association against the School District of Plum City because he concluded that: (1) the District's refusal to pay teachers for additional experience or educational credits attained during a contractual hiatus was not a unilateral change refusal to bargain in violation of Secs. 111.70(3)(a)1 or 4, Stats.; and (2) that the District did not condition agreement upon a successor contract on Association withdrawal of a pending prohibited practice complaint and therefore did not violate Secs. 111.70(3)(a)1 or 4, Stats.; and the Association having timely filed a petition with the Commission pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats., seeking review of the Examiner's decision as of the salary increment issue; and the parties having filed written argument the last of which was received April 2, 1986; and the Commission having considered the record, the Examiner's decision, the parties' arguments on review and concluded that the Examiner should be affirmed;

NOW, THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of June, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Danae Davis Gordon, Commissioner

I dissent

Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by

(Footnote 1 continued on Page 2)

(Footnote 1 continued)

following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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.

SCHOOL DISTRICT OF PLUM CITY

MEMORANDUM ACCOMPANYING ORDER AFFIRMING
EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND:

The Pleadings

In its initial complaint, the WCEA alleged that the District had unilaterally altered employe wages by failing to pay salary increments during a contractual hiatus and had thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. The WCEA subsequently amended its complaint to add the additional allegation that the District had also violated Secs. 111.70(3)(a)1 and 4, Stats., by stating during bargaining that it would not agree to a successor agreement unless the WCEA withdrew the initial salary increment complaint.

The District submitted written and oral answers which denied that the District had committed any of the alleged prohibited practices.

The Examiner's Decision

The Examiner dismissed the WCEA complaint in its entirety concluding: (1) that the District's failure to pay horizontal and vertical salary schedule increments to employes during a contractual hiatus was not a unilateral change refusal to bargain in violation of Secs. 111.70(3)(a)4 and 1, Stats., and (2) that the District did not demand that the WCEA withdraw the salary increment complaint as a condition to settlement of the successor agreement and thus did not violate Secs. 111.70(3)(a)1 or 4, Stats.

The Examiner began his analysis of the salary increment issue by indicating that he would attempt to focus as narrowly as possible upon the principles 2/ set forth by the Commission in School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85) with special attention being paid to the Commission's later application of those principles in School District of Webster, Dec. No. 21312-B (WERC, 9/85). Before applying the above-referenced principles, the Examiner rejected a WCEA assertion that the implication of movement which admittedly existed in the salary grid structure and accompanying language created a presumption of employe entitlement to the increments. He concluded that the Commission intended the definition of the status quo to turn on the facts of a given case with none of the three identified controlling principles (language and structure, bargaining history, and past practice) being given presumptive force.

2/ At page 17 of Wisconsin Rapids, 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 any--provides for changes in compensation during its term and/or after its expiration upon employe attainment of specified levels of experience, education, licensure, etc., the employer is permitted and required to continue to grant such changes in compensation upon the specified attainments after expiration of the compensation schedule involved. (To do otherwise would undercut the majority representative and denigrate the bargaining process in a manner tantamount to an outright refusal to bargain.)
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> 2. Where the expired compensation plan or schedule, including related language--by its terms or as historically applied or as clarified by bargaining history, if any--provides that there is to be no advancement on the schedule during its term or no advancement on the schedule after its expiration, then the employer is prohibited by its duty to bargain from unilaterally granting such advancement.

The Examiner surmised that the Commission had chosen such a case-by-case approach to grant the parties, to the greatest extent possible, a neutral bargaining environment they themselves had created and which assured that changes in wages, hours and conditions of employment occur as much as possible at the bargaining table.

Looking first at the provisions of the expired contract, the Examiner initially concluded that the expired agreement did not contain a provision which expressly addressed the issue of salary increment payment during a contractual hiatus. Turning to an analysis of the significance of the salary grid and the accompanying implementing language, the Examiner found that Paragraph 8 and the salary schedule "Note" provide little guidance as to the parties' expectations regarding increment payment. He did determine that Paragraph 9 A - D, especially A and B thereof, anticipate movement beyond the expiration of the contract but found that the Paragraph did not clearly address when that movement is to occur if a successor agreement is not in effect.

Reasoning that the language discussed above was inconclusive, the Examiner found the following testimony from the school board president regarding past practice and bargaining history dictated a conclusion that the status quo did not include salary schedule movement.

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 bargaining 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.

The Examiner stated:

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 ment on certain points. Testimony on the historical application of the

Commissioner Torosian's dissent in Menasha Joint School District, Dec. No. 16589-B (WERC, 9/81). He concluded that the contract gave the District discretion as to placement and noted that the record was less than definitive on the actual placement of new teachers vis-a-vis experience.

The Examiner summarized his analysis thusly:

> 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.

As to the second allegation in the complaint, the Examiner determined that the WCEA failed to meet its burden to prove that the District conditioned accord on a successor agreement on the WCEA's withdrawal of the increment complaint. He therefore found no violation.

POSITIONS OF THE PARTIES ON REVIEW:

WCEA Initial Brief

The WCEA only seeks review of the Examiner's resolution of the salary increment issue. It commences its analysis of that issue with a review of existing Commission precedent which concludes with the following summation of the WCEA's view of the current status of the law:

> When the Webster and Wisconsin Rapids cases are read together, it appears that the Commission, although it has affirmatively adopted a dynamic view of the status quo, has not established a per se rule that the status quo will include monetary increases in every situation in which there is a salary schedule in the expired agreement. Rather the Commission will look at the terms of the expired agreement, along with bargaining history and historical application, to determine whether the expired agreement establishes an ongoing system of increases based on objective criteria of the employee, such as education and experience, or whether the agreement was intended to establish a singular set of salaries such that following expiration of the agreement, the employer's must freeze those wages until the parties have bargained a successor agreement.

Applying the law to the facts of this case, the WCEA argues that when the salary schedule and accompanying language are viewed as a whole, it is clear that the parties have established a "system of compensation" within the meaning of Webster which dictates increment movement during a contractual hiatus as a teacher gains education and/or experience. As to horizontal increment advancement linked to attainment of additional education, the WCEA argues:

> With respect to educational advancement, the procedures for such advancement are specifically laid out in paragraphs 9(a) and (b). They provide that in order to be eligible for a lane change at the beginning of the "next school year", the teacher must notify the superintendent in writing by June 15. In order to be eligible for a change at the semester, the teacher must notify the superintendent by the September 1 preceding that semester. Although there is no limit to the number of

lane changes allowed per year, the lane changes can only take place at the beginning of a semester.

It is difficult to conceive of a way in which the parties could have more definitely provided for raises on an ongoing basis. The requirements for one year (notification by June 15) can only apply to movement for the next year. These provisions are similar to those in Webster which provided that the performance level for one year determined the merit increase for the following year. As with Webster, the language becomes meaningless unless it is viewed a part of a system which spans more than the current agreement. Certainly teachers who have followed the procedures set forth in paragraphs 9(a) and (b) have a reasonable expectation that they will receive advancement. They have already earned the credit and followed the procedures required by the District.

As to vertical increment advancement, the WCEA asserts:

With respect to movement for increased experience, the expired agreement does not establish the date on which an employee is perceived to have another year of experience. This is unlike the Wisconsin Rapids case in which employee advanced on the anniversary date of their employment. However, with teachers, unlike many other employees, the anniversary date generally will coincide with the start of the school year. Thus, it is sensible administratively to have all movement take place at the start of the school year. In any event, the practice since at least 1981 has been that employees are credited with another year of experience at the start of each new school year.

The definition of "steps" in paragraph 9(c) of the agreement supports the fact that additional years of experience will result in "movement" down the salary schedule. That section reads:

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.

If the parties did not presume that there was to be movement on the schedule based on increasing experience, they would not have established definitions which included movement. Again, the language only has meaning as a part of an ongoing system of compensation. If the parties intended a static set of salaries for that year only, they would not have used language which called for movement based on experience and credits.

The progressive discipline provisions of section 9(D) of the Agreement also presume that employees will advance vertically on the salary schedule, unless the District evaluated the teacher at least twice before March 1st of the preceeding (sic) year and established that the teacher was not complying with required employment practices. The agreed-upon procedure for withholding increment parallels the procedure found to require advancement in Webster. In that case, the expired agreement contained provisions requiring that an employee be evaluated between February 1 of one year and January 31 of the next. The performance level would then determine the employee's increase for the following year. If the employee was evaluated at less than 2.5, the employee would receive no increase, 2.5-2.99, the employee would receive only an increment, and at performance levels of 3.0-5.0, the employee received a merit increase. Likewise, in the instant case, if the employee is evaluated and found to not meet standards, the employee can receive no increase. However, if the employee is not evaluated, or is evaluated and not found to be deficient, the employee will receive the increment. As in Webster, these provisions create a reasonable expectation that, if the employee is performing adequately, the employee can presume that s/he will be credited for an additional year of experience. The teacher has, in effect, already earned the advancement by another year of satisfactory performance with the District. To

define the status quo as the amount paid the previous year, despite the attributes which the parties have mutually agreed will determine wages, is not consistent with the terms and conditions established by the expired agreements or with the status quo on wages.

The WCEA asserts the Examiner failed to give the appropriately determinative weight to the clear contractual grid and implementing language which the Examiner conceded did provide for salary movement. The WCEA further contends that bargaining history regarding the specific 1981-1982 agreement not to advance employes vertically for that year only provides additional support for the WCEA position. While arguing that it is unclear from existing Commission precedent exactly what level of significance past practice has in a hiatus case, the WCEA asserts that even if practice can change the clear meaning of a salary schedule and implementing language, such a practice was not established in this case.

The WCEA argues that the most that can be said about the testimony regarding past practice is that there may have been a year in the past eleven in which the employer failed to advance employes on the expired schedule prior to agreement on a new contract. The record does reveal that the most recent situation in which there was a possibility of non-payment was the summer of 1979. The WCEA asserts that other than the testifying board president, none of the witnesses at hearing had knowledge of any practice prior to 1979. However, if the District had specified the year in which the practice occurred, the WCEA could have had the opportunity to uncover the circumstances existent at that time. The WCEA contends:

> Perhaps the parties were very close to settlement that year and therefore the Association chose not to interject another dispute into the process, knowing that they would be receiving the increase shortly anyway. Perhaps it was during the period in which the Menasha case was before the Commission and the Association chose not to litigate the matter since it would result in duplicative litigation. Perhaps the expectations of the parties were different at that time based on other factors. 7 But by presenting only the fact that the Board President was not aware of a time in which teachers were given increments prior to settlement, the Association really had nothing to rebut.

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7. Even if the Union had no good reason for failing to challenge the District's previous unilateral freezing of wages on one, or even two, occasions, should that forever waive its right to claim that the expired agreement called for pay based on education and expenses? This dilemma is discussed in the final section of this brief.

The WCEA contends that it met its burden of proof when it established that the expired agreement contained a system of paying wages according to experience and education. The WCEA argues that the District failed to establish a past practice sufficient to overcome the clarity of the salary grid and implementing language.

The WCEA urges the Commission to use this case as a vehicle to give further guidance on the role of past practice in a salary grid case. It argues that, consistent with City of Greenfield, Dec. No. 14026-B (WERC, 11/77) and City of Brookfield, Dec. No. 19822-C (WERC, 11/84), the Commission should adopt a policy which presumes that the terms and conditions of the expired agreement represent the status quo but allows either party to rebut that presumption by external evidence (bargaining history, historical application, side bar agreements) which establishes that the parties' mutual understanding is contrary to the terms of the expired agreement. The WCEA notes that there are really two types of bargaining history and past practice potentially involved in a salary grid case. One type serves as an interpretive aid in determining the meaning of the parties' contract language. The Examiner, in the WCEA's view, specifically rejected this approach. The other use of practice is to actually establish the status quo which may even be contrary to the parties' language. While the WCEA agrees that a showing of a consistent historical practice with union acquiescence could rise to the level of a mutual understanding, it asserts that, as noted earlier herein, there is good reason to be cautious about assuming that lack of union protest can be equated with agreement.

Given the foregoing, the WCEA asks that the Commission overturn the Examiner's decision as to the non-payment of salary increments and grant the affected employes appropriate relief.

District Responsive Brief

The District asserts that the Examiner properly applied existing Commission guidelines for the analysis and resolution of a salary grid hiatus case. It contends that the WCEA is seeking to use this case as a vehicle for having the Commission adopt a blanket policy that all salary schedules are "dynamic compensation plans," regardless of accompanying contract language, past practice or bargaining history. The District urges the Commission to reject the WCEA's invitation and to maintain the sound case-by-case approach which maintains the neutral bargaining environment which meets the parties' expectations.

The District argues that the multi-factor approach developed by the Commission in Brookfield, Wisconsin Rapids and Webster provides the proper balance between contract language, past practice and bargaining history. It contends that the WCEA's effort to give primacy to contract language was properly and persuasively rejected by the Examiner and represents an effort to have the Commission ignore the evidence of past practice in this case while rewriting case law developed over the past two decades.

Ultimately, the District alleges that the case turns on what the parties understood the status quo on increment pay to be during a contract hiatus period. The District contends that the language of the contract and the practice of the parties establish that the status quo does not provide for automatic movement on the salary grid during a contractual hiatus.

The District argues that a detailed examination of all the contract language which accompanies the salary grid in the expired contract yields the conclusion that the contract does not expressly provide for automatic advancement on the salary grid during a hiatus. The District cites the Commission to the Examiner's detailed analysis of the language in question and emphatically disputes the accuracy of the analogies which the WCEA seeks to draw between this case and Webster.

Turning to the WCEA's effort to diminish the impact of the past practice evidence the Examiner found determinative, the District argues that the WCEA's alternative explanations are transparent and hollow excuses for the failure to offer any rebuttal evidence. The District urges the Commission to embrace the Examiner's finding that evidence of past practice dictates the conclusion that the status quo herein does not include movement on the salary grid.

WCEA Reply Brief

Contrary to the District's contentions, the WCEA asserts that it is not advocating reversal or modification of existing Commission case law but rather is urging the Commission to take the opportunity to continue to develop and clarify the case law as to the role which past practice is to play in salary grid cases. The WCEA contends that past practice can play a meaningful part in the determination of the status quo but argues that a prior unilateral withholding of increments by an employer should not assume determinative importance absent some evidence that the "practice" evinces a mutual understanding of the parties. The WCEA notes with approval the Commission's analysis of the interplay between language and practice in Kenosha County, Dec. No. 22167-B (WERC, 3/86). The WCEA also reiterates its belief that the analogy between this case and Webster

accordance with what it had done in the past on at least one other occasion, it continued paying its returning teachers exactly what they had been paid under the terms of the expired 1983-84 contract which, on its face, contained no provision expressly mandating that teacher salaries would be increased during any contract hiatus.

However, I also believe that the time is ripe to reconsider the vitality of the "dynamic status quo" doctrine as it has been applied in the past by the Commission, particularly in light of the confusion it apparently has generated among some advocates searching for certainty in this area. In order to provide such guidance, it is necessary to first review in detail the evolution of prior Commission decisions on point.

Any such analysis must start with Menasha where a majority of the Commission consisting of Chairman Gary L. Covelli and Commissioner Morris Slavney found that school districts were not required to raise teacher salaries during a contractual hiatus. In doing so, the majority wrote:

> The issue raised by the instant dispute involves the parties' differing view regarding the application of the foregoing doctrine to a salary schedule which contains experience increments and educational achievement lanes. The basis for resolving said dispute can be derived from an examination of the underpinning of the status quo doctrine - the concept that the absence of change in wages, hours and working conditions is the best and most neutral atmosphere in which the realities of the collective bargaining process may take their course after a contract has expired.
>
> The maintenance of the status quo during the contract hiatus is not dependent upon the continuation of a contractual obligation in a pre-existing contract, but in the continuation of the wages, hours and conditions of employment which existed at the time when said agreement was in effect. Here, the District, during the contract hiatus, maintained the same salary payments which it has paid to the employes during the term of the agreement, thus maintaining the status quo.
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> Acceptance of the Complainants' position would constitute a rejection of the doctrine of maintaining the status quo, as it would require change in the form of a salary increase. It is simply this change, not its cost, not the expectations of the employes, not the absence of past practice, not whether the salary schedule is at issue during bargaining, which requires rejection of the position of the Complainants in this proceeding. Therefore we agree with the Examiner's conclusion that the District was not statutorily obligated to grant experience increments to employes in fulfilling its duty to maintain the status quo during the contract hiatus.

Commissioner Herman Torosian dissented from the majority, finding that the school district "extended the salary schedule beyond the expiration date of the agreement, and applied same. . ." by moving certain returning teachers across the horizontal steps of the grid and by moving other teachers across the vertical lanes. He concluded that the salary schedule is part of the status quo and therefore all teachers covered by the schedule who are qualified were entitled to a step advancement on the schedule. Menasha was subsequently reversed by the Circuit Court of Winnebago County (Circuit Judge William H. Carver) when it ruled that it was "inconsistent" for the school board to move some, but not all, teachers under the grid and that the grid therefore remained in effect after the contract expired. 3/

The Commission--whose composition had changed in the interim and whose members at that time consisted of then Chairman Herman Torosian and Commissoners Marshall L. Gratz and Danae Davis Gordon--in Wisconsin Rapids subsequently overruled Menasha stating:

3/ Menasha Teachers Union, Local 1166, WFT, AFT, AFL-CIO and Wisconsin Federation of Teachers, AFT, AFL-CIO vs. Wisconsin Employment Relations Commission, Case No. 81-CU-1007 (7-14-83).

we expressly disavow the Menasha majority's static view dicta and adopt, instead, a dynamic view of the status quo.

The Commission then added:

> As we are applying it, the dynamic status quo doctrine calls upon parties to continue in effect the wages, hours and conditions of employment in effect at the time of the expiration of the predecessor agreement or the time of the union's initial attainment of exclusive representative status. In applying that doctrine to periods of time after expiration of wage or benefit compensation plans and schedules relating level of compensation to levels of employe experience, education or other attainments, we consider the dynamic status quo doctrine to require adherence to the following partial statement of controlling principles: 16/ (footnote citation omitted).
>
> 1. Where the expired compensation plan or schedule, including any related language--by its terms or as historically applied or as clarified by bargaining history, if any--provides for changes in compensation during its term and/or after its expiration upon employe attainment of specified levels of experience, education, licensure, etc., the employer is permitted and required to continue to grant such changes in compensation upon the specified attainments after expiration of the compensation schedule involved. (To do otherwise would undercut the majority representative and denigrate the bargaining process in a manner tantamount to an outright refusal to bargain.)
>
> 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.

Accordingly, the Commission held that the school district acted unlawfully in refusing to grant wage and vacation benefit increases to its nonteaching employes based on their length of service when the district was engaging in ongoing collective bargaining negotiations with their collective bargaining representative.

The Commission in Webster reiterated these principles and ruled that the district acted unlawfully when it refused to advance teachers on the grid of an expired collective bargaining contract. In so ruling, the Commission stated:

> 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.

The foregoing raises several key points:

One, the Commission in Wisconsin Rapids erroneously characterized Menasha when it claimed that the majority's decision in that case represented "dicta"; in fact, the majority in Menasha ruled the way it did precisely because the question of what constituted the status quo was expressly litigated by both

parties and formed the very heart of the controversy before the Commission. Accordingly, Wisconsin Rapids overruled the legal principle--not mere dicta--found in Menasha, hence making a major doctrinal change in Commission case law.

Two, while the Commission's prior application of the dynamic status quo asserts that it merely continues that which is already provided for, it has provided for significant change and marks a major departure from the status quo when the parties have not agreed to same. Here, for example, the Association maintains that teachers must be advanced on the salary grid because the parties agreed in the expired contract that additional education credits and an additional year's teaching would result in more compensation. But this argument overlooks what is really involved here, i.e. the payment of three different teacher salaries: one for the 1983-84 school year which the parties have agreed to; a second for the beginning of the 1984-85 school year which the District has never agreed to and which is to be in effect only as long as the contractual hiatus lasts, during which time teachers get their 1983-84 salary, plus an additional step and/or lane change; and a third for the 1984-85 school year whenever a successor contract has been reached. The record here, after all, shows that the parties in negotiations for a successor contract bargained over whether the expired salary grid should be changed by increasing or decreasing the number of lanes and steps to be effective for the 1984-1985 school year, thereby establishing that both parties well understood that the yearly salaries and increments provided for in the expired 1983-1984 salary grid were to be in effect for that year, and that year only, and that the size and frequency of any increments for the 1984-1985 school year would have to be negotiated. Viewed in this light--which is the only correct way to truly understand what is at issue--it therefore becomes clear that the Association is really seeking an unagreed to interim wage increase pending successful negotiations for hoped for higher increases for the next school year. This interim raise for each teacher differs from the yearly salary that each earned under the expired contract, just as it will probably differ from the ultimate yearly salary negotiated for the 1984-85 school year.

Three, past Commission decisions involving the dynamic status quo have failed to appropriately apply the requisite burden of proof standard provided for in Sec. 111.07(3) which is incorporated by reference in Sec. 111.70(4)(a) Stats., and which states:

> . . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

In Webster, however, the Commission disregarded this mandatory burden of proof requirement, finding as it did:

> First, there is no specific statement in the expired agreement to the effect that increment increases and/or merit increases are or are not understood to be payable during a contract hiatus following expiration.
>
> Second, since the instant parties have historically reached agreement on their successor agreements before expiration, there is no practice of paying or not paying such increases during contract hiatuses in the past.
>
> Third, this is not a case in which the District granted increment increases to any bargaining unit personnel during the instant hiatus.
>
> And fourth, there is no 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.

Yet despite the lack of such evidence, the Commission, based upon the language set forth in the compensation plan, ruled that increments had to be paid because, in its words, "our outcome requires that the existing (and in this case dynamically ongoing) compensation agreements between the parties be maintained . . ." unless either party "prefers a different status quo for future hiatuses . . ." and secures same during the collective bargaining process. The Association's brief picks up this theme and goes even one step farther by now asking the Commission "to adopt a rebuttable presumption that the terms and conditions of the collective

bargaining agreement represent the status quo following expiration of the agreement."

The Commission's view in Webster is inconsistent with my understanding of the burden of proof required by the Statute. We are, after all, dealing with a matter of interpretation of the parties' compensation plan and salary schedule which turns on what the parties have agreed to in their bargaining relationship, thereby necessitating that we focus on whether there was a mutual agreement between the parties to provide for such post contract wage increases, just as we look for similar mutual agreement in determining whether parties have agreed to other contractual provisions. Absent any such clear proof to that effect, it is inappropriate to grant such a significant contractual benefit when parties have never even raised it in their collective bargaining negotiations, let alone mutually agreed to it.

Reviewing the foregoing, one therefore sees that the dynamic status quo, at least as applied by the Commission in the above noted cases: (1) provides for unagreed-to interim wage increases at the very time parties are negotiating over what those wages should be, thereby significantly changing the status quo; and (2) fails to impose on complainants the statutorily provided burden of proof which mandates that they prove their cases through "a clear and satisfactory preponderance of the evidence."

Accordingly, I conclude that the Commission's prior application of the dynamic status quo doctrine must be rejected in favor of the status quo principle enunciated by Commission in Menasha, but with one caveat: While the majority in Menasha declared that it would not consider certain extrinsic parole evidence in cases such as this, I believe that it is proper, indeed necessary, to consider such matters as bargaining history and how the disputed language has been historically applied, since those are the kinds of factors traditionally considered in ascertaining what parties have mutually agreed to in their contractual relationship. Therefore, in cases involving salary schedule and compensation plan issues, when ascertaining what level of compensation an employe should receive during a contractual hiatus, employes ought to be paid the identical compensation they were receiving when the contract expired unless the moving party can demonstrate by a clear and satisfactory preponderance of the evidence that the parties intended a different result.

Since the Examiner conducted such a thorough and detailed analysis, there is no need here to duplicate his efforts in applying these principles to the facts at hand. It suffices to say that I agree with his conclusions that: (1) the expired contract on its face did not contain any provision expressly addressing whether increments had to be paid during a contractual hiatus; and (2) although paragraph 9 a through d of the contract anticipates lane (horizontal) movement beyond the expiration of a contract, the contract does not clearly address when the movement is to occur if a successor agreement is not in effect and it certainly does not address vertical movement during a contractual hiatus (i.e., movement as a result of increased experience) since the Association's own brief at page 3 concedes: "the agreement does not set forth procedures or timeliness as to when movement will take place." Moreover, and as noted above, the fact that the parties negotiated over the size and frequency of the increments to be granted for the 1984-85 school year clearly shows that the increments provided for in the expired 1983-1984 contract were to be limited to that year only and that they would not be automatically forthcoming at the beginning of a new school year. This is why it is not surprising that the record shows that on at least one occasion in the preceding (10) years there was a hiatus which extended beyond the start of the school year and that employes did not "move on the grid" prior to the ultimate settlement, thereby undercutting the Association's claim that the parties have always understood the contractual language to mandate such payment.

In this connection, Examiner McLaughlin found in Finding of Fact 4 that the operative contract language has "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." He therefore went on to conclude in his memorandum that this language was in effect when the District on at least one occassion failed to grant teacher increments during a contractual hiatus. The Association must agree with this finding because it never filed any exceptions to it and because it even acknowledges in its brief: "Since at least 1976 the method for determining employee wages has remained the same, and has been dependent on a teacher's education and experience levels: the greater the level of experience and education the greater the salary."

In any event, even if one were to assume arguendo that there was no such linkage and that this one incident should be discarded, that would not affect the ultimate disposition of this case since the Association still has failed to prove that the parties had ever mutually agreed--either through contract language, bargaining history, or the historical application of the expired language--that teachers would be entitled to automatic movement on the salary grid during a contract hiatus. Accordingly, it follows that adherence to the status quo in this case only required the District to keep teachers at their existing salaries until such time as the parties negotiated a successor contract governing what their new yearly salaries and new increments would be for the 1984-85 school year. It is for the foregoing reasons that the Examiner's decision should be sustained.

Commissioner Torosian, of course, reaches the opposite conclusion in his dissent by maintaining that the Commission's prior reversal of Menasha was correct and that we should continue adhering to the dynamic status quo doctrine as he applies it. In doing so, he raises several issues that warrant a brief response.

He argues that I have relied upon the Association's claims for the proposition that interim wage increases will be the norm under the dynamic status quo doctrine as applied to salary grid and compensation plan cases. To the contrary, my analysis in fact is based upon those prior Commission cases involving teachers' and other empoyes' compensation plans where the Commission has awarded interim wage increases in each salary schedule and compensation plan case it has considered, thereby clearly showing just how this principle is being applied in practice. This is why I disagree with his representations that "experience under the dynamic status quo theory is very limited and hardly sufficient to support any broad conclusions"; that our differences are "yet to be determined"; and why I respectfully submit that we have a major policy difference in this matter.

Commissioners Torosian and Gordon disagree with my burden of proof comments and Commissioner Torosian asserts that he has failed to find any cases in other jurisdictions which discuss this subject. Whether this is so or not, however, is immaterial since the Commission must base its decisions upon applicable Wisconsin Statutes, including the specific burden of proof requirement found in Section 111.70(4)(a), rather than the statutes of other jurisdictions. To do otherwise, I submit, is to render nugatory this important statutory precept.

It therefore becomes evident why the dissent takes issue with me on this point inasmuch as it finds for Complainant even though:

1. There is no evidence that the parties here ever discussed this issue in any of their prior collective bargaining negotiations.

2. There is no evidence that the parties here ever mutually agreed in any of those negotiations to the interim wage increases in issue.

3. The 1983-1984 contract--which on its face was applicable only for that school year--was totally silent on whether teachers would receive any vertical movement during a contractual hiatus and it likewise failed to specify either the amount or timing of any possible horizontal increments, thereby showing that this was a matter for further negotiations.

4. The parties in negotiations for a successor contract for the 1984-1985 school year bargained over the structure of the expired salary grid, thereby reflecting their own understanding that the increments provided for in the expired 1983-1984 salary grid were to govern only that school year.

All this is why the 1983-1984 contract itself does not specifically address this issue and why any attempts to claim otherwise must rest on unwarranted inferences and suppositions which fall far short of the statutory burden of proof which requires the Association to prove by "a clear and satisfactory preponderance of the evidence" that the parties mutually intended that teachers were to advance on the salary schedule during a contractual hiatus. By deciding otherwise, it can only be concluded that application of the dynamic status quo--at least in Commissioner Torosian's view--does indeed provide for automatic wage increases.

The dissent rhetorically asks "Where, in this case, is there proof of mutual agreement to pay existing salaries." This, I submit, is not the real issue before us since this case turns on whether Complainant Association has fulfilled its statutory duty to prove that the parties mutually agreed to the interim wage increases it seeks. By seeking to frame the issue as Commissioner Torosian enunciates it, the dissent in effect shifts to Respondent School District the burden of proof which the statute imposes on the Complainant Association.

The dissent also asserts, "Part of the Employer's agreement with the Association was a compensation plan that based teacher salaries on years of service and level of education." This statement is true as far as it goes; unfortunately, it does not go far enough since it ignores the one overriding fact which is of controlling importance: the fact that said salaries were to be in effect for the 1983-1984 school year, and for that school year only. That is why both parties negotiated over a new compensation plan for the 1984-1985 school year since both well understood that the prior 1983-1984 compensation plan lapsed with the termination of the predecessor bargaining agreement and that new yearly salaries and increments for the 1984-1985 school year would have to be negotiated.

Along this same line, the dissent argues that while the compensation plan lapsed "as a matter of contract law," it nevertheless became a part of the status quo and that, as a result, "movement on the schedule does not constitute a new compensation plan or new yearly salary ...." With all due deference to my colleague, I submit that Complainant here is seeking a "new yearly salary" for the beginning of the 1984-85 school year and that no amount of gloss can overcome the fact that the dissent is willing to grant it even though the 1983-1984 contract only provided for yearly salaries for that school year period.

In further support of his position, Commissioner Torosian asks what would happen in a situation where the expired agreement provides clear language reposing to management the right to subcontract bargaining unit work, and although management had not exercised its prerogatives under this provision during the contract, it chose to do so during a contractual hiatus. Since the case before us only involves an expired salary grid rather than a subcontracting question, I believe it is inappropriate, and indeed improper, for us to now reach out and decide such an extraneous issue, particularly when we may be called upon to rule upon it in the future. It suffices to say for present purposes that the hypothetical posed--of where a contract clearly gives an employer the right to subcontract--is materially different from the salary issue now before us.

Elsewhere, the dissent implies that my views would lead to inconsistent results in this area of the law. This charge in fact is baseless since this is the very first case where I have addressed this issue and since I intend to consistently apply the above rationale to all subsequent related cases. It therefore is immaterial that the particular facts of different cases may produce different results since the Commission is required to make such independent judgments on a case-to-case basis rather than to adopt an ideological approach which holds that employes are always entitled to interim wage increases in any and all circumstances, even absent any clear mutual agreement to that effect.

The dissent also asserts that the "status quo is not necessarily, and in most cases is not determined by the parties' agreement of what the terms of status quo should be" and that, as a result, the instant case does not turn on whether there was mutual agreement to that effect. This is a rather odd claim to make since the Commission in Wisconsin Rapids indicated that it was appropriate to review the expired compensation plan or schedule, including any language, and expressly acknowledged that "the dynamic status quo doctrine calls upon parties to continue in effect the wages, hours and conditions of employment in effect at the time of the expiration of the predecessor agreement. . ." That is why the Commission in all post-Menasha status quo cases has looked to contractual language, its historical application, and bargaining history in an attempt to find out what the parties have agreed to, and why I believe we should continue to do so.

I, of course, agree with Commissioner Torosian's assertion that the outcome in status quo cases is not merely governed by contract law and that the status quo doctrine arises from a statutory obligation to retain all of the terms and conditions of employment flowing from the terms of an expired contract. For as noted by the majority in Menasha:

> The issue raised by the instant dispute involves the parties' differing view regarding the application of the foregoing doctrine to a salary schedule which contains experience increments and educational achievement lanes. The basis for resolving said dispute can be derived from an examination of the underpinning of the status quo doctrine - the concept that the absence of change in wages, hours and working conditions is the best and most neutral atmosphere in which the realities of the collective bargaining process may take their course after a contract has expired.
>
> The maintenance of the status quo during the contract hiatus is not dependent upon the continuation of a contractual obligation in a pre-existing contract, but in the continuation of the wages, hours and conditions of employment which existed at the time when said agreement was in effect. Here, the District, during the contract hiatus, maintained the same salary payments which it has paid to the employes during the term of the agreement, thus maintaining the status quo.

However, in order to ascertain what the wages, hours, and conditions of employment are during a contract hiatus, it is also necessary to determine what they were upon a contract's expiration since the status quo seeks to preserve the intent of the parties as expressed in their predecessor agreement. This is why we search for mutual agreement and why its absence here dictates dismissal of the complaint.

The dissent likewise takes issue with my observation that the Association's request, if granted, would result in the payment of three (3) separate salaries, only two of which will have been agreed to by the parties. That, says the dissent, is no problem because that same situation can arise in initial contract cases when an employer is required during contract negotiations to continue paying whatever automatic wage increases it paid in the past. Such a comparison, however, is off the mark because of a major material difference between these two situations: In the latter, employers must continue making such payments because that is the only way of maintaining the status quo, i.e. what had happened in the past. Here, however, there is absolutely no evidence indicating that the interim wage increases sought have been provided for in the past. This is why they are a new benefit and why they need not be paid absent mutual agreement to the contrary.

Lastly, the dissent alleges that my disagreement arises over the fact that "we do not agree with his (i.e. my) definition of the status quo." This is an inaccurate representation of my views since our differences in fact are based upon our differing views regarding the burden of proof requirement, along with the importance we attach to contract language, its historical application, and bargaining history, matters which--at least up until today--have been the very factors supposedly relied upon by the Commission in post-Menasha cases.

Dated at Madison, Wisconsin this 23rd day of June, 1987.

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Concurring Opinion of Commissioner Davis Gordon:

I concur with Chairman Schoenfeld only to affirm the Examiner's dismissal of the complaint. It appears that my new colleague feels the need to revisit, from his perspective, the Commission's unanimous and recent decisions in Wisconsin Rapids, supra, and Webster, supra, a need, for obvious reasons, I do not share. Suffice it to say, I do not agree with Chairman Schoenfeld's historical analysis or most of his rationale for affirming the Examiner's ultimate conclusion. Moreover, I continue to adhere to the Commission's adoption of dynamic status quo and its application in Wisconsin Rapids and Webster. I agree with most of the Examiner's thoughtful decision. First, I agree with his ultimate conclusion that the District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1 and 4, Stats., when it failed to advance teachers a step or make lane changes, with resultant additional compensation, upon attainment by the teachers of an additional year's teaching experience and/or educational credits, after the parties' 1983-84 collective bargaining agreement expired.

I also agree that paragraphs 9A-D of the expired 1983-84 contract create an inference of payment of additional monies at times beyond the expiration of the contract based upon acquisition of additional education or an additional year's experience with satisfactory performance during the preceding year. Under our analysis in Wisconsin Rapids and Webster, this inference would support a conclusion that the duty to maintain the status quo obligated the District to pay these additional monies.

However, our analysis does not end here. We must also look to evidence of bargaining history and/or historical application of the language to ascertain whether the parties intended movement upon expiration of the contract. For the reasons set forth below, I find consideration of these factors persuades me that the status quo the District was obligated to maintain did not require payment of increments, vertically or horizontally above amounts being paid upon expiration of the parties' 1983-84 agreement and prior to agreement on a 1984-85 successor agreement.

We all agree that the contract's language does not specifically state when teachers are to move vertically or horizontally on the salary schedule during a hiatus between agreements. However, I believe such language would be rare indeed and certainly would not be present in a case before the Commission. Thus, since the language of the expired agreement does not address hiatus matters, under our dynamic status quo analysis of Wisconsin Rapids we look to evidence of bargaining history and the historical application of contract language as regards the compensation plans to ascertain the status quo existent upon expiration the 1983-84 agreement. 4/

While the specific language of compensation plans present in collective bargaining agreements between these parties since the 1976-77 contract has varied in ways discussed by the Examiner at pp. 3-5 of his decision, the record does not reveal language in those contracts 5/ to rebut Board President Lawrence Von Holtum's following testimony:

> 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 bargaining 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. 6/

4/ I agree with the Examiner that the salary schedule note present in agreements between the parties since their 1981-82 contract does not permit a clear conclusion on this point. See, Examiner's decision at 13.

5/ See, Joint exhibits 1-7.

6/ Tr. 91-92.

In fact, the language contained in paragraphs 9A-D of the 1983-84 agreement is virtually identical in all agreements since at least 1976-77. 7/ Thus, in my view, Von Holtum's unrebutted testimony that he "certainly" remembered years in which settlement was not reached prior to the start of the school year and that he remembered no instance in which teachers were moved on a grid prior to settlement is dispositive of the issue. For, the District was required to do no more in the hiatus between the 1983-84 and 1984-85 agreements than what it had done in any prior hiatuses. On this point, Chairman Schoenfeld and I agree; Von Holtum's testimony coupled with parallel language in the parties' agreements since 1976-77, lead us to conclude the District has not paid increments during any hiatuses. Therefore, it was not required to do so upon expiration of the 1983-84 agreement.

While Von Holtum's testimony is indeed broad and conclusory and testimony of specific years would be preferred, I am satisfied that the District's obligation to maintain the status quo did not include the payment of horizontal and vertical increments.

A word about burden of proof. I think part of Chairman Schoenfeld's struggle with interpreting the Commission's past application of burden of proof in prior status quo unilateral change refusal to bargain cases, is based on the fact that the Commission has not specifically analyzed those cases in terms of allocation of proof. Rather, the written decisions are based on a determination of what the status quo is, whether the status quo was maintained, and where it had not been, a conclusion as to whether a refusal to bargain violation has occurred. In my view the allocation of burden of proof was implicit. 8/

Where we determined the status quo included movement on a salary grid or schedule, and the Employer did not pay said adjustments, in essence the Union met its burden of proving, by clear and satisfactory preponderance of the evidence, that a violation has occurred. The converse is also true, where the Commission determines the status quo does not include increased compensation and the Employer did not pay said increases, the Union has not met of burden of proof and no violation occurs.

Chairman Schoenfeld, erroneously in my view, criticizes the Commission's prior decisions as having "failed to appropriately apply the requisite burden of proof standard." It appears to me that what he really has problems with is the outcome of prior Commission decisions in this area; Wisconsin Rapids, Webster, particularly. I don't agree with my colleague's contention that in order to meet its burden of proof requirement, a complainant must show "there was a mutual agreement." For, in many cases there will be no mutual agreement as to what should happen during a hiatus, yet the evidence will clearly demonstrate the status quo either through clear contract language, historical application or bargaining history. I find my colleague's test much too stringent to be applied.

7/ The only exception is that paragraph 9D is not contained in any contracts prior to 1979. I find this omission to be inconsequential.

8/ An exception can be found in Kenosha County, Dec. No. 22167-B (WERC, 3/86), Petition for Rehearing Pending, at p.8, wherein the Commission concluded:

> 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.

The Commission further concluded that because the County had not plead nor proven a valid defense for its failure to pay the COLA adjustments it therefore committed a Sec. 111.70(3)(a)4 and 1, Stats., violation.

For me, these cases do not solely turn on burden of proof, but rather, the Commission's determination of what constitutes the status quo, based on the evidence presented, including contract language, historical application and bargaining history.

In the instant case, I have concurred with Chairman Schoenfeld that the Examiner's decision should be affirmed, for the reasons set forth above. In so doing I also agree with the Examiner's conclusion regarding Complainant's burden of proof: "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." In that statement lies a correct application of the burden of proof analysis. In applying the ultimate burden of proof herein, I conclude that the WCEA has failed to sustain its burden of proving by a clear and satisfactory preponderance of the evidence that the District was obligated to pay salary increases based on additionally acquired education and experience during the hiatus between the parties' 1983-84 and 1984-85 collective bargaining agreements. Therefore, in the circumstances herein, I concur in the affirmance of the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 23rd day of June, 1987.

By Danae Davis Gordon, Commissioner

Dissenting Opinion of Commissioner Herman Torosian:

I concur with much of the Examiner's well-crafted decision. However, because I am persuaded that the Examiner understated the analytical impact of the language accompanying the salary grid which contemplates movement after contract expiration and because I find the evidence of past practice to be of little analytical value, I conclude that the District's obligation to maintain the status quo during the contractual hiatus did include the payment of horizontal and vertical increments to employes. Therefore, I would reverse the Examiner's Conclusion of Law to the contrary.

As the Commission indicated in Wisconsin Rapids and Webster, where the disputed compensation plan is written, the language used to set forth the plan is the focal point of the status quo analysis. The role of past practice or bargaining history in such circumstances is to assist the decisionmaker in its effort to determine whether the language used requires changes in employe compensation at various times after the expiration of the compensation plan. Thus while the Examiner correctly noted we have determined that a case-by-case analysis is appropriate with language, practice and bargaining history all being potentially relevant considerations, the ultimate goal is to reach the most reasonable interpretation of the language used by the parties. I proceed with that task.

The Examiner correctly noted that there is no language present herein which expressly states that during a contractual hiatus employes either will or will not receive vertical or horizontal increments. However, the Examiner also correctly noted that paragraph 9 anticipates movement on the grid, based upon attainment of additional credits or an additional year's experience with satisfactory performance, at points in time beyond the expiration of the 1983-1984 contract. The Examiner shied away from what I find to be the determinative status quo implications of this language because of his finding that the language did not clearly address when the movement is to occur if a successor contract is not in effect. I think the Examiner asks for too much. He and I agree that the parties have not expressly crafted a clause which sets forth an agreement on status quo/hiatus matters. As evidenced by this case, parties may well have widely differing views on that subject and thus I presume it is somewhat unrealistic to expect to encounter such clauses with any regularity. Indeed, if parties have such an agreement, I suspect that they will have no need for our services. Here, Paragraph 9 A, B and D establish that additional monies will be paid at times beyond the expiration of the contract based upon acquisition of additional education or an additional year's experience with satisfactory performance during the preceding year. As in Webster, I find such provisions to be supportive of a status quo which mandates increment payments.

The sketchy evidence of past practice in this record establishes at most that one person remembers that on at least one occasion in the preceding 10 years there was a hiatus which extended beyond the start of the school year and that employes did not "move on the grid" prior to the ultimate settlement. Nothing more. This is hardly sufficient to offset the language of the agreement which, when most reasonbly interpreted, provides for movement on the schedule and establishes a reasonable expectation on behalf of employes of receiving same.

In summary, I find language here which can reasonably be interpreted as a compensation plan warranting horizontal and vertical movement on the expired grid. Evidence of past practice is of no persuasive value, and there is no evidence of bargaining history. In such circumstances, I find that the District's obligation to maintain the status quo includes the payment of horizontal and vertical increments.

Lastly, a few comments on Chairman Schoenfeld's opinion.

Schoenfeld defines status quo as "the status quo principle enunciated by the Commission in Menasha except that he would also consider certain parole evidence and that it would be necessary to consider such matters as bargaining history and how the disputed language has been historically applied. Under certain fact situations this definition anticipates that changes during hiatus are proper and allowable. It seems that given the right fact situation he is saying that after consideration of extrinsic evidence he may find that status quo requires hiatus change based on the intent of the parties. Further, I assume intent can be direct or inferred.

It is interesting to note that while my colleague appears to be taking exception with the dynamic status quo doctrine, his status quo definition is also dynamic. This is so because unlike the "static" view of just freezing wages and conditions of employment at time of contract expiration he will consider bargaining history and historical application in determining the mutual intent of the parties. Thus while my colleague claims that the Commission's application of the dynamic status quo has created confusion, his application of the dynamic status quo, while perhaps less confusing, will not alleviate the problem he claims exists.

In the final analysis, while application of my colleague's definition and that of Davis Gordon and mine, which takes into consideration the language in question, past practice, and bargaining history, may result in different outcomes, we all view status quo dynamically although at varying degrees and with possible different outcomes.

Chairman Schoenfeld states that he has problems with the Commission's dynamic status quo and its application because it: (1) provides for unagreed-to interim wage increases at the very time parties are negotiating over what those wages should be, thereby significantly changing the status quo; and (2) fails to impose on Complainant's the statutory burden of proof which mandates that they prove their cases through "a clear and satisfactory preponderance of the evidence." With respect to (1) I have two observations. First, Schoenfeld analyzes the Commission's status quo theory relying on the Association's claims made in this case. His discussion of interim raises is in response to the Association's claim and leads one to believe that in all or most cases interim raises will be the norm under the dynamic status quo application. Yet the instant case itself is an example of where the application of the dynamic status quo, by colleague Davis Gordon, does not result in requiring the payment of an interim increase. Under what fact situations interim wage increases will be considered part of status quo-whether it be under the majority definition of dynamic status quo or Chairman Schoenfeld's definition - is yet to be determined. Thus, the actual difference in result between the dynamic status quo as defined by myself, Commissioner Davis Gordon or Chairman Schoenfeld with respect to interim raises as well as other status quo issues is yet to be determined. In this regard, it should be noted that this case is only the fourth status quo case and only the second teacher salary grid case since the adoption of the dynamic status quo theory. Thus, experience under the dynamic status quo theory is very limited and hardly sufficient to support any broad conclusions.

Chairman Schoenfeld takes issue with my analysis and conclusion in this regard and concludes that there is a major policy difference between himself and his colleagues' application of the dynamic status quo. It is surprising to me

that he would make such a claim when in this very case he and Commissioner Davis Gordon reach the same conclusion. While there are some differences, I think Chairman Schoenfeld's broad conclusions at this time are premature and primarily based on conjecture.

Second, my colleague criticizes the dynamic status quo because its application leads to a situation he finds offensive, that is: "the payment of three different teacher salaries" and "that the Association is really seeking an unagreed to interim wage increase pending successful negotiations for hoped for higher increases."

But is this any different than initial contract cases where the equivalent of interim raises are required to be implemented to maintain status quo in cases where such increases are normal, automatic or fall within the expectation of employes. It is well settled law that the withholding of such raises constitutes a change in status quo and therefore a violation of the duty to bargain. Thus, in such cases the payment of three different salaries is very possible; one prior to the normal, automatic or expected increases, a second including the increase, and yet a third negotiated by the newly certified bargaining agent. Chairman Schoenfeld disagrees with my initial contract analogy but his response misses the point. The initial contract example is not cited for the proposition that it is really the same as the fact situation here but only to illustrate that the payment of three different salaries in itself is not a basis for determining the status quo. What is important is whether the payment of an increase during the hiatus constitutes a change or whether the withholding of same constitutes a change. 9/

In initial contract cases the payment of an interim raise is not a change if it is the result of a normal or automatic increase and, therefore, within the expectation of the employes. In the instant case movement in the salary schedule is no change either. Here there is no dispute that the parties agreed to a compensation plan or over what the plan means. Part of the Employer's agreement with the Association was a compensation plan that based teacher salaries on years of service and level of education. The Employer was not at liberty to unilaterally change this plan without bargaining just because the parties' collective bargaining agreement had expired. Therefore, when the Employer did not move teachers on the salary schedule it had agreed to, it unilaterally changed the status quo without bargaining. Thus, notwithstanding what Chairman Schoenfeld has characterized as an interim raise, the fact remains the plan (schedule) calls for such a movement and, as such, does not constitute a change. For example, under the schedule the Employer agreed to pay fifth year teachers with a BA degree a set dollar amount. It must therefore continue to pay fifth year teachers with a BA degree the same dollar amount until changed through the bargaining process. To do otherwise would be treating fifth year teachers differently contrary to the agreed-upon compensation plan which, upon expiration of the agreement, becomes part of the status quo. Stated differently, it is necessary to continue paying employes in a like manner, not a like amount in order to maintain the status quo.

Chairman Schoenfeld takes issue with the above claiming that one overriding fact is ignored and that is that "said salaries were to be in effect for the 1983-1984 school year, and for that school year only." He reasons, "That is why both parties negotiated over a new compensation plan for the 1984-1985 school year since both well understood that the prior 1983-1984 compensation plan lapsed with the termination of the predecessor bargaining agreement and that new yearly salaries for the 1984-1985 school year would have to be negotiated." This is all true. Chairman Schoenfeld fails to recognize, however, the difference between a contractual obligation and a status quo obligation. True, the compensation plan did lapse as a matter of contract law, but it continues on as part of the parties status quo. Movement on the schedule does not constitute a new compensation plan or new yearly salary but rather is an increase generated by an agreed upon plan that is part of status quo. The salaries appearing on the schedule do not change during the hiatus period. BA teachers, for example, with 5 years service still receive the amount negotiated in the expired agreement for BA teachers with 5 years experience. As pointed out by my colleague, new

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9/ As discussed later, the Employer has a statutory duty to bargain any changes primarily related to wages, hours and conditions of employment.

yearly salaries, must be negotiated and, as we all know, this is accomplished by negotiating new figures on the salary schedule and/or by changing the schedule. However, until then the old compensation plan remains in effect as part of the status quo.

Also, in another context I wonder if my colleague's own definition would result in the same type of problem, i.e. three different sets of hours and conditions of employment. For example, suppose the expired agreement provides clear language reposing to management the right to subcontract bargaining unit work. The situation could easily arise where, during the effective term of the agreement, employes enjoy one set of conditions (no subcontract of work) during the hiatus, another set of conditions (subcontract of some work) and yet a third set of conditions in a successor agreement (subcontract of work only under certain conditions). The Union would argue, consistent with the Employer's rationale here, that the Employer should not be allowed to change conditions of employment during the hiatus by entering into subcontract arrangements while those very issues are being negotiated. Under the facts described, would the fact that three sets of conditions of employment might result lead one to conclude that the Employer cannot make any unagreed-upon changes in conditions of employment such as subcontracting during the hiatus. Must the Employer prove by a clear and satisfactory preponderance of the evidence that the parties' intent during hiatus was to allow the Employer to unilaterally subcontract work? Is the status quo the actual terms and conditions of employment at the time of contract expiration and that anything else requires a showing that the parties intended otherwise? While such cases must, of course, be decided on a case-by-case basis, it seems to me the rationale relied upon by Chairman Schoenfeld in this case would make it difficult to find that an employer who has the sole right to contract out unit work under the terms of the expired agreement but who has not exercised that right, would be able to unilaterally subcontract work during a contract hiatus period, unless the Employer could establish that the parties mutually agreed that the employer has such right during hiatus to unilaterally subcontract work.

In raising these two examples, my intent is not to foreclose Chairman Schoenfeld from developing his status quo definition on a case-by-case basis, but I raise them only to stress the importance of developing consistent rationale in applying the status quo principle. Of course, the facts of the examples are different than those of the instant case but the parties should be able to rely on and apply the rationale and principles enunciated here in future cases with different fact situations. Chairman Schoenfeld somehow mistakenly interprets the purpose of the examples to be that the Commission should "adopt an ideological approach which holds that employes are always entitled to interim wage increases". Quite to the contrary, the purpose is to stress the importance of consistency regardless of outcome. Thus, if "mutual agreement" is a requirement in interim increase cases, then the same should be required in a condition of employment type case.

With respect to Chairman Schoenfeld's burden of proof problem it appears to me that my colleague's burden of proof analysis is closely tied to his finding that the status quo is limited to that which the parties have mutually agreed status quo should be. He states:

> This view (referring to the Commission's analysis in Webster finding automatic increases as part of status quo) is inconsistent with my understanding of the burden of proof required by the Statute. We are, after all, dealing with a matter of interpretation of the parties compensation plan and salary schedule which turns on what the parties have agreed to in their bargaining relationship, thereby necessitating that we focus on whether there was a mutual agreement between the parties to provide for such post contract wage increases, just as we look for similar mutual agreement in determining whether parties have agreed to other contractual provisions. Absent any such clear proof to that effect, it is inappropriate to grant such a significant contractual benefit when parties have never even raised it in their collective bargaining negotiations, let alone mutually agreed to it.

I disagree. If burden of proof in status quo cases is dependent on "mutual agreement" as suggested then shouldn't there be proof of what the parties agreed to pay during the contract hiatus period. Where, in this case, is there proof of "mutual agreement" to continue to pay existing salaries? My colleague avoids the

question pointing out that the issue raised is not really in dispute here. That is true. However, the question is only raised for clarification purposes in an attempt to better understand Chairman Schoenfeld's burden of proof requirement and analysis and his definition of status quo.

Contrary to mutual agreement, status quo is not necessarily, and in most cases is not determined by the parties' agreement of what the terms of status quo should be because in almost all cases there is no such agreement. As stated earlier, it is rare indeed to find a case where the parties have specifically considered and agreed to the wages, hours and conditions of employment to be in effect during the contract hiatus period. Thus, as the Commission stated in the Rapids case we will look at the language in issue, its historical application and bargaining history in determining what wages, hours and conditions of employment the parties must continue in effect after expiration of their agreement. However, in many cases, such as here, historical application and bargaining history do not establish what must be continued during the hiatus as part of status quo. Thus in most cases status quo is determined by what the law (MERA) imposes upon the parties when no contract is in effect. The law and its duty to bargain requirement obligates the employer to bargain (absent a valid defense) any changes in existing wages, hours and conditions of employment to the extent they are mandatory subjects of bargaining. The existing wages, hours and conditions of employment at time of contract expiration is the status quo. The basis of the obligation to maintain what is and to bargain any changes is not grounded in contract law but in the labor law of this State that imposes a duty to bargain any changes in mandatory subjects of bargaining.

Thus, the question in most status quo violation cases is whether there has been a unilateral change in existing wages and conditions of employment regardless of whether these existing conditions derive from the contract or from custom and practice. The Complainant, then, does not have to prove "mutual agreement" as may be required under contract law, but must prove what wages, hours and conditions of employment were in existence at the time of contract expiration and that the employer made a unilateral change in same without first fulfilling its duty to bargain the change. Since the compensation plan in the instant case was in effect and existing at the expiration of the contract, it had to be continued during the hiatus period. To do otherwise would constitute a change in wages and conditions of employment without bargaining.

For the reasons discussed above, I disagree with Chairman Schoenfeld's claim that a finding of "mutual agreement" is a requirement imposed by the statutory burden of proof. It only becomes a necessary element if one accepts my colleague's definition of status quo. In this regard I find interesting that in the scores of cases I have researched in the public, private, state and federal sectors, and in jurisdictions that we can reasonably assume to have substantially the same burden of proof requirements, many of which are cited in the Rapids and subsequent status quo cases, I have yet to find one case where the adoption of the static or dynamic view of status quo was based on burden of proof.

In the final analysis, the problem my colleague has with the dynamic status quo theory is not that the Commission in Webster and other dynamic status quo cases failed to appropriately apply the requisite burden of proof standard as alleged; but rather how the Commission has defined what constitutes status quo. In essence Chairman Schoenfeld is claiming the Commission has not appropriately applied the burden of proof because we do not agree with his definition of status quo. The Commission allegedly misapplied the burden of proof requirement in the Webster case because the Commission concluded that movement on the schedule was required even though there was no finding that the parties had "mutually agreed" to do so. But the burden of proof was sustained by the contractual language itself which provided for movement on the salary schedule, and the fact that since the compensation plan was in existence at the expiration of the contract it had to be continued during the contract hiatus period.

Dated at Madison, Wisconsin this 23rd day of June, 1987.

By Herman Torosian, Commissioner