STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUN PRAIRIE EDUCATION ASSOCIATION,		
Complainant,	:	Case 53 No. 34765 MP-1694
vs.	:	Decision No. 22660-A
SUN PRAIRIE JOINT SCHOOL DISTRICT NO. 2,		
Respondent.		

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, WI 53708, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. John T. Coughlin and Mr. Kurt Strang, 131 West Wilson Street, Suite 202, Madison, WI 53703, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Sun Prairie Education Association having, on March 19, 1985, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Sun Prairie Joint School District No. 2 had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on May 10, 1985, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and the hearing in the matter having been held in abeyance pending settlement discussions by the parties which ultimately proved unsuccessful; and hearing on the complaint having been held in Sun Prairie, Wisconsin on March 18, 1986; and during the course of the hearing, Complainant made a motion to amend the complaint to include a derivative violation of Sec. 111.70(3)(a)1 Stats. and to include the scope of its charge to the 1985-86 contract reopener hiatus period; and the Respondent having no objection to said amendment, the Examiner granted said motion; and the parties having filed briefs and reply briefs, the last of which were exchanged on July 22, 1986; and the Examiner having considered the evidence and arguments of counsel and being fully advised on the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Sun Prairie Education Association, hereinafter referred to as the Association, is a labor organization which functions as the exclusive bargaining representative for all professional staff members employed by the Sun Prairie School District except for principals, director of business and support services, director of educational services, athletic director and the School District Administrator; and that its address is c/o Philip Borkenhagen, Executive Director, Capital Area UniServ-North, 4800 Ivywood Trail, McFarland, Wisconsin 53558.

2. That Sun Prairie Joint School District No. 2, hereinafter referred to as the District, is a municipal employer which operates a public school system for the benefit and education of the inhabitants of the District; and that its principal offices are located at 220 Kroncke Drive, Sun Prairie, Wisconsin 53590.

3. That the Association and the District have been parties to successive collective bargaining agreements including a 1983-84 agreement which by its terms was in effect as of August 11, 1983 until August 10, 1984; that said agreement, in pertinent part, provided as follows:

XXXI. COST OF LIVING ADJUSTMENT (COLA)

A. Base Salary

1. 1983-84 Base: The 1983-84 beginning BA base salary is determined by this agreement to be $14,156.* This shall determine the salary schedule set forth in Appendix A-1. The actual salary for 1983-84 shall be the actual base wage received as provided by the salary schedule and the actual cost of living payment received by using the twenty-six (26) individual applications of COLA.

A hypothetical example of a bargaining unit member's pay at BA, Step 0, for 1983-84 would be as follows:

Beginning Base Salary $14,156
For pay period salary (26) $544.46

Payroll Periods	Example of COLA	Per Period Salary	Actual Salary Received
Sept. 2, 1983	1.00	$544.46	$544.46
Sept. 16, 1983	1.00	544.46	544.46
Sept. 30, 1983	1.01	544.46	549.90
Oct. 14, 1983	1.01	544.46	549.90
Oct. 28, 1983	1.02	544.46	555.35
Nov. 11, 1983	1.02	544.46	555.35
Nov. 25, 1983	1.02	544.46	555.35
Dec. 9, 1983	1.02	544.46	555.35
Dec. 23, 1983	1.02	544.46	555.35
Jan. 6, 1984	1.03	544.46	560.79
Jan. 20, 1984	1.03	544.46	560.79
Feb. 3, 1984	1.03	544.46	560.79
Feb. 17, 1984	1.04	544.46	566.24
Mar. 2, 1984	1.04	544.46	566.24
Mar. 16, 1984	1.05	544.46	571.68
Mar. 30, 1984	1.05	544.46	571.68
Apr. 13, 1984	1.05	544.46	571.68
Apr. 27, 1984	1.05	544.46	571.68
May 11, 1984	1.05	544.46	571.68
May 25, 1984	1.06	544.46	577.13
June 8, 1984	1.06	544.46	577.13
June 22, 1984	1.06	544.46	577.13
July 06, 1984	1.0603	544.46	577.29
July 20, 1984	1.0603	544.46	577.29
Aug. 03, 1984	1.0603	544.46	577.29
Aug. 17, 1984	1.0603	544.46	577.29
		Total salary received BA, Step 0	$14,679.27

*In the event this base is altered as a result of the pending grievance arbitration on the application of the 1982-83 cost of living guaranteed adjustment, this provision and Appendix A-1 shall reflect said altered BA base.

2. Subsequent Negotiations: The beginning BA base salary which shall serve as a basis in negotiations for a successor agreement shall be the actual wage received for the BA base, Step 0, during the term of the 1983-84 contract. The beginning BA base salary which shall serve as a basis in negotiations for a successor agreement will not be the last pay period salary (1983-84) earned multiplied by 26.

B. Consumer Price Index (CPI)

The Consumer price index to be utilized herein shall be the Consumer Price Index for urban wage earners and clerical workers, U.S. City average, as reported by the U.S. Bureau of Labor Statistics.

C. Computation of Increase in the CPI

A reading of the CPI shall be taken the first day of every month. During the contract year, there will be twelve (12) readings taken. The June, 1983 CPI reading shall be used as the base for the 1983-84 contract. The first CPI reading for a salary adjustment shall be the month of July. Any increase in the July CPI reading will be reflected on the September checks. The last CPI reading for 1983-84 contract year will be taken for the month of June, 1984, and any increase reflected on the August, 1984 checks. The exact level of the cost of living earnings in any contract year shall be controlled pursuant to paragraph D. below.

An example of this method of application of the CPI index to a hypothetical bargaining unit member's per pay period salary check is as follows:

September checks

July CPI reading increased .3 one percent over the base reading. Per pay period salary: $544.46 + $1.63 or $546.09

October checks

August CPI reading decreased .5 of one percent from July reading. Factor remains .3 of one percent. October checks same as September or $546.09

November checks

September CPI reading increased .5 of one percent from August reading. Factor remains .3 of one percent. November checks same as October checks or $546.09.

December checks

October CPI reading increased one percent from September reading. October factor 1.0 and July factor .3 equals December adjustment of 1.3 of one percent. December checks: $544.46 + $7.08 or $551.54.

D. Determination of COLA and Salary Schedule Increases

The average salary for the bargaining unit for 1983-84 will be a guaranteed 6.03% as set forth herein.* The average salary for the bargaining unit will include present salary increment, lane changes, cost of living adjustment as provided herein, and a longevity factor of five percent (5.0%) for those employees off the salary schedule as defined in Appendix A-1. The average bargaining unit salary shall be determined by utilizing all personnel in the bargaining unit excluding terminations (terminations include retirees) and their replacements in the first year of the replacement's employment.

The 6.03% average guaranteed salary increase maximum for the bargaining unit may result in a ceiling on the cost of living adjustment factor; that is, should the cost of implementing the base salary increase, the salary increment, lane changes and longevity factor, combined with the COLA factor exceed the 6.03% average increase, no further adjustment in the COLA factor will be made.

Example of ceiling on COLA in the event average salary increase exceeds 6.03%:

Average salary of bargaining unit-Base Year	$20,714.00
Beginning Average Salary-Subsequent Year	21,383.00
Beginning Average Monthly Salary	1,781.92

Payroll Month** Applied	COLA	Salary With COLA	Salary with Ceiling Applied	
September	1.0000	$1,781.92	$1,781.92	
October	1.0025	1,786.38	1,786.38	
November	1.0075	1,795.29	1,795.29	
December	1.0150	1,808.65	1,808.65	
January	1.0100	1,799.74	1,799.74	
February	1.0200	1,817.56	1,817.56	
March	1.0245	1,825.58	1,825.58	
April	1.0251	1,826.65	1,826.65	
May	1.0400	1,853.20	1,853.20	
June	1.0603	1,889.37	1,889.37	-Ceiling
July	1.0700	1,906.66	1,889.37	on COLA
August	1.0750	1,915.57	1,889.37	would apply
		$22,006.56	$21,963.07	at
		(20,714.00)	(20,714.00)	this point
		$ 1,292.56 or 6.24%	$ 1,249.07 or 6.03%	

*SPEA does not waive its right to grieve application of this provision.

** Actual application of example computed on per period salary (26 periods) rather than monthly.

Should the cost of living factor and salary schedule application result in a less than 6.03% average increase, no further adjustment in the COLA factor will be made, by virtue of the salary adjustment on the BA base, to achieve the 6.03% guaranteed average annual increase. Instead, an adjustment on the BA base will be made to accomplish the required guaranteed 6.03% increase.

E. Changes in the Consumer Price Index

In the event that the CPI defined in B of this article shall be discontinued, changed, or otherwise become unavailable during the term of this agreement, and if the Bureau of Labor Statistics issues a conversion table by which changes in the present index can still be determined, the parties agree to accept such conversion table. If no such table is issued, the parties will promptly undertake negotiations solely with respect to agreeing upon an index which will effectuate a comparable cost of living adjustment;

that the agreement also provided a salary schedule, Appendix A-1, consisting of a grid of salary "cells", the result of a series of vertical step increments based on experience and horizontal steps based on educational attainment; and that Appendix A-1 contained a longevity provision for those at the top of the salary schedule as follows:

The following contract provision on longevity will be effective only for the 1983-84 Master Contract Agreement: Those bargaining unit members who have taught so long as to be at the top of the salary schedule (years experience continuous) shall receive an annual increase of five percent (5%) plus cost of living as provided by this contract. The five percent (5%) shall be computed on the gross salary at the

last step of the appropriate lane on the salary schedule and added to that person's present salary, or take the last step in the lane if that is greater or five percent (5%) of their present salary if that amount is greater.

4. That the parties had not reached agreement on a successor agreement to the 1983-84 agreement when it expired by its terms on August 10, 1984; that at the start of the 1984-85 school year, the District did not make any COLA payments but did pay the step increment, credit changes and longevity factor; that on or about September 24, 1984, a grievance was filed on the District's failure to pay COLA for the 1984-85 school year; that the District refused to proceed to arbitration on the grievance because no agreement was in effect and, on March 19, 1985, the instant complaint was filed; that thereafter the parties reached agreement on a successor collective bargaining agreement for the period 1984-86 which provided for a reopener on wage issues in the 1985-86 school year; that the 1984-85 agreement provided the same COLA provision from the predecessor agreement but with a 5.8% average salary guarantee; that agreement was not reached on the wage issue for the 1985-86 school year prior to the start of the 1985-86 school year and the District again made no COLA payments until agreement on wages was reached; that all monies including COLA have been paid retroactively for both the 1984-85 and 85-86 school years.

5. That the parties' have had a COLA provision in their agreement since at least the 1974-75 school year; that the parties 1975-77 collective bargaining agreement contained the following provision:

> XIV. COST OF LIVING ADJUSTMENT
>
> The 1976-77 base salary will be $8,500. In addition, all individual salaries will be adjusted monthly to reflect increases in the national cost of living as reported by the U.S. Bureau of Labor Statistics. A reading of the consumer price index will be taken the first day of every month. During the 1976-77 year there will be 12 readings taken. The June 1976 CPI reading will be used as the base. The first CPI reading for salary adjustment purposes will be the month of July 1976. Any increase in the July CPI reading will be reflected on the September 25, 1976 check (or as soon thereafter as checks can be computed). The last CPI reading will be taken for the month of June 1977 and any increase reflected on the August 25, 1977 check. It is agreed a maximum of 12% COLA is the limit set for the 1976-77 portion of the contract. It is also agreed the 1976-77 CPI increase from July 1, 1976 to June 30, 1977, times the base salary will determine the beginning point for negotiation of the base salary for the 1977-78 contract year. An example of the CPI index to a hypothetical teacher's monthly checks is as follows:
>
> <u>September 25 check</u>
>
> July CPI reading increased .3 of one percent over the base reading.
> September salary: $1,000 + $3 or $1,003.
>
> <u>October 25 check</u>
>
> August CPI reading decreased .5 of one percent from July reading. Factor remains .3 of one percent. October salary same as September or $1,003.
>
> <u>November 25 check</u>
>
> September CPI reading increased .5 of one percent from August reading. Factor remains .3 of one percent. November salary same as October salary or $1,003.

December 25 check

October CPI reading increased .5 of one percent from September reading. October factor .5 and July factor .3 equals December adjustment of .8 of one percent.
December salary: $1,000 + $8 = $1,008.

It is the understanding of the school board and the SPEA that all services under contract will come under the cost of living adjustment and that the only exclusion would be jobs paid under an hourly wage;

that said agreement expired by its terms on August 10, 1977; that the parties did not reach an agreement on a successor agreement prior to August 10, 1977 but proceeded to Fact Finding and the Fact Finder issued his recommendations on March 17, 1978; that the District did not make any COLA payments at the start of the 1977-78 school year or during the hiatus until after the Fact Finder's decision.

6. That the parties were unable to reach a voluntary settlement of an agreement for the 1978-1979 school year prior to the expiration of the 1977-78 agreement on August 10, 1978; that the parties proceeded to mediation/arbitration with a decision being issued on July 2, 1979; that the District did not make any COLA payments during the hiatus from August 10, 1978 until the mediator/arbitrator issued his award.

7. That the parties were unable to reach a voluntary settlement of the agreement for the 1979-80 school year prior to the expiration of the 1978-79 agreement on August 10, 1979; that the parties did reach a voluntary agreement a couple of months after the expiration of the 1978-79 agreement; and that the District did not make any COLA payments during the hiatus from August 10, 1979 until the voluntary settlement was reached.

8. That during each of these three hiatus periods, no grievance or complaint was filed on the District's refusal to pay the COLA.

9. That the parties' 1979-81 collective bargaining agreement contained the following provisions:

XXX. COST OF LIVING ADJUSTMENT

The 1979-80 base salary is determined by this agreement to be a base salary of $10,550.

In addition, all individual salaries will be adjusted monthly to reflect increases in the Consumer Price Index, Urban Wage Earners and Clerical Workers as reported by the U.S. Bureau of Labor Statistics. A reading of the consumer price index will be taken the first day of every month. During the 1979-80 year there will be 12 readings taken. The June 1979 CPI reading will be used as the base. The first CPI reading for salary adjustment purposes will be the month of July 1979. Any increase in the July CPI reading will be reflected on the September 25, 1979 check. The last CPI reading will be taken for the month of June 1980 and any increase reflected on the August 25, 1980 check. It is agreed a maximum of 12% COLA is the limit set for the 1979-80 portion of the contract. It is agreed that the actual average wage and cost of living earnings over the first year of the contract on the BA base, Step 0, of the salary schedule shall serve as the beginning base salary for the 1980-81 portion of this master contract agreement, not the last monthly salary earned multiplied by 12.

The maximum amount of the 1980-81 salary and COLA adjustment shall be controlled by the language contained in Article XXXI which supersedes, for the 1980-81 portion of the contract, the 12% maximum set forth above. It is agreed that the actual average wage and cost of living earnings over the 1980-81 term of the contract on the BA base, Step 0, of the salary schedule

shall serve as the basis for negotiations for any successive master contract, not the last monthly salary earned multiplied by 12.

. . .

XXXI. SALARY SCHEDULE 1980-81

The 1980-81 average salary for the bargaining unit will be a guaranteed 10.0% increase over the 1979-80 average salary for the bargaining unit, which includes continuation of present salary increment, lane changes, cost of living adjustment as expressed in Article XXX, and a longevity factor of 5% for those people off the schedule, as defined in Appendix A-1. Other contract benefits will remain as defined by the language for the 1979-80 contract year.

The guaranteed 10.0% average salary increase for the bargaining unit may result in either a ceiling on the cost of living adjustment factor (Article XXX) or an additional payment to be made (salary adjustment on the BA base) at the end of the 1980-81 contract year. Should the cost of living factor and salary schedule application result in a less than 10.0% average increase no further adjustment in the COLA factor will be made, by virtue of the salary adjustment on the BA base, to achieve the 10.0% guaranteed average annual increase.

10. That the parties had not ratified a successor agreement prior to the expiration of the 1979-81 agreement; that the successor agreement was ratified sometime prior to September 16, 1981; and that the District made two COLA payments during this hiatus.

11. That commencing with the 83-84 school year, the District, upon advice of counsel, began to pay the step increment based upon experience during the hiatus period.

12. That the District, by its refusal to make COLA payments after the expiration of the 1983-84 and 84-85 agreements, unilaterally altered the wages and terms of conditions of employes.

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

CONCLUSION OF LAW

1. That the Respondent, Sun Prairie Joint School District No. 2, by its failure to make COLA payments which adjusts the monthly salaries for bargaining unit employes during the contractual hiatus periods following the expiration of the parties' 83-84 and 84-85 collective bargaining agreements, made a unilateral change in the status quo, and thus refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats., and derivatively interfered with employes' exercise of their Sec. 111.70(2) Stats., right to bargain collectively through a representative of their own choosing in violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER 1/

It is ORDERED that the District, its officers and agents shall immediately:

1. Cease and desist from refusing to bargain in good faith with the Association by failing to maintain the status quo by not making COLA payments according to the COLA provision in the expired agreement.

1/ See Footnote 1 on Page 8

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

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

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

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

Dated at Madison, Wisconsin this 18th day of September, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL NOT unilaterally change the wages, hours and conditions of employes in the bargaining unit represented by the Association.

2. WE WILL to the extent we have not already done so, make whole all employes in the bargaining unit represented by the Association for wage losses incurred by the District's failure to make COLA payments after the expiration of the 1983-84 and 1984-85 collective bargaining agreements by payment of interest on said wage losses.

3. WE WILL NOT in any other or related manner interfere with the rights of our employes pursuant to the provisions of the Municipal Employment Relations Act.

By _____
For Sun Prairie Joint School
District No. 2

Dated this _____ day of _____ , 1986.

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

SUN PRAIRIE JOINT SCHOOL DISTRICT NO. 2

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER

In its complaint as amended, the Association alleged that the District refused to bargain in good faith in violation of Secs. 111.70(3)(a)4 and 1, Stats., by its failure to maintain the status quo during the hiatus period between contracts by unilaterally refusing the payment of the COLA as set forth in the expired agreement. The District answered the complaint denying that it had committed any prohibited practice.

ASSOCIATION'S POSITION

The Association contends that unilateral changes in wages during a contract hiatus are per se violations of the duty to bargain in good faith absent a valid defense, such as necessity or waiver or a mutual understanding that hiatus COLA adjustments are not part of the status quo. It submits that the evidence fails to establish the defense of a mutual understanding on the non-payment of COLA during the contractual hiatus. It points out that in neither hiatus period was the District seeking to modify the COLA provision either prospectively or retroactively. The Associaiton asserts that the Commission should redefine its method of determining the status quo and rely solely on the clear and unambiguous contract language and resort to past practice and bargaining history only when the language lacks clarity. It asserts that the language of Article XXXI requires the District to make monthly COLA payments during the hiatus period between contracts. It points out that such payments were required until the maximum increase set forth in the expired contract was reached and it was up to the District to bargain a provision which protected it from overpayment during a hiatus period rather than to entirely withhold the payment of the COLA.

The Association claims that the COLA payment is inextricably intertwined with the salary schedule which the District implements during a hiatus. It submits that it makes no sense to apply part of the plan and not the rest of it.

The Association argues that the evidence of past practice on the non-payment of COLA during the prior hiatus periods should not be considered because of the changing position of the Commission from the static status quo to the dynamic status quo. Additionally, it asserts that past practice is not convincing because the UniServ Dirctor was unaware of the failure to pay the COLA in the past and the past failure to grieve by the rank and file cannot be held to create a binding past practice. It claims that the evidence is not sufficient to establish a mutual understanding as to the status quo on COLA. It further notes that the District paid COLA during a short hiatus at the beginning of the 1981-82 school year, and it submits that the language on longevity contains more restrictive language than the COLA provision, yet the District paid longevity during the hiatus periods.

With respect to bargaining history, the Association notes that over the years the parties have modified the language on COLA and have removed references to specific years, indicating an ongoing duty to make COLA payments. It states that the District proposed a fixed ceiling on COLA which was accepted by the Association and this establishes the continuous nature of the COLA provision. The Association asserts that the failure to make the COLA payments violated the District's duty to maintain the status quo after expiration of the agreement and it asks that the District be found to have committed prohibited practices and that appropriate remedial orders be issued.

DISTRICT'S POSITION

The District contends that the complaint is without merit and must be dismissed. It submits that based on a review of the Commission's decisions establishing the principles of the dynamic status quo, the facts of the instant case are distinguishable from these and do not require COLA payments as part of the status quo. It notes that COLA payments are not conditioned upon the attainment of a certain length of service. It claims that the specific language of Article XXXI contains a clear reference to contract years and specifies the month and year of the last payment, thus expressly providing no

carryover of the COLA into the hiatus period. It maintains that bargaining history supports its interpretation because in the past the District has only sought to remove the entire COLA provision, which the Association rejected, and no evidence was presented that the District had sought to limit COLA to the contractual dates but had failed in that regard. The District claims that past practice supports its position as the evidence established three hiatus periods of 7, 10 and 2 months respectively, where no COLA payments were made and the Association failed to file a grievance and/or a prohibited practice complaint.

The District submits that upon an examination of the language of the agreement, past practice and bargaining history with respect to the COLA clause, it must be concluded that the complaint is totally without merit and it urges the Examiner to dismiss it.

DISCUSSION

The general rule is that, absent a valid defense, a unilateral change in the status quo in wages, hours and conditions of employment during a hiatus after a previous contract has expired is a per se violation of the MERA duty to bargain. 3/ In determining the status quo, the Commission has adopted the dynamic view of the status quo. 4/ Application of the dynamic view of the status quo requires on a case by case basis an examination of the language of the parties' agreement, bargaining history and past practice as to the manner in which employes have been compensated in order to determine whether the status quo requires employer continuation of a compensation plan during a hiatus or prohibits the continuation of the plan. 5/ The Commission has held that the term "compensation plan" is generic in nature and is not intended to exclude certain methods of compensation including COLA provisions. 6/ It is therefore necessary to apply the above principles to the facts of the instant case to determine the status quo.

Referring to the contractual language, Article XXXI, Section A.2., provides for the determination of the beginning BA base salary for subsequent negotiations and Section C provides as follows:

> "A reading of the CPI shall be taken the first day of every month. During the contract year, there will be twelve (12) readings taken. The June, 1983 CPI reading shall be used as the base for the 1983-84 contract. The first CPI reading for a salary adjustment shall be the month of July. Any increase in the July CPI reading will be reflected on the September checks. The last CPI reading for the 1983-84 contract year will be taken for the month of June, 1984, and any increase reflected on the August, 1984 checks. The exact level of the cost of living earnings in any contract year shall be controlled pursuant to paragraph D. below."

While the third sentence specifies that the CPI base for 1983-84 will be the June, 1983 CPI reading, and the sixth sentence provides that the last CPI reading for the 1983-84 contract year will be taken in June, 1984, all the other sentences in Section C are more general and could be applied without limitation to the specific contract year. In Webster, 7/ the Commission held that where an evaluation system was written broadly and without limitation to a particular year, such an arrangement suggested that the parties were establishing a compensation system that was on-going, even though an "Example" dealt specifically with the 1982-83 school year. Here, while the language of Article XXXI contains specific references to the 1983-84 contract year, it would appear that the more general language establishes an on-going system of compensation. In Appendix A-1, the

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3/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

4/ Id.

5/ Id.; School District of Webster, Dec. No. 21317-B (WERC, 9/85).

6/ Id.; Kenosha County, Dec. No. 22167-B (WERC, 3/86).

7/ School District of Webster, Dec. No. 21317-B (WERC, 9/85) at p. 13.

provision on longevity provides as follows: "The following contract provision on longevity will be effective only for the 1983-84 Master Contract Agreement;..." It was stipulated that the District paid longevity payments to eligible employes during the hiatus of the 1983-84 school year. It appears that the language on longevity is more narrowly drawn with respect to the specific year than the language of Article XXXI, yet the longevity payment was made as part of the status quo. Interpreting the agreement as a whole, it is deemed appropriate to conclude that the reference to the specific year in Subsection C does not limit COLA payments to that and only that year.

The District argued that subsection D. of Article XXXI established a guaranteed average salary rate of 6.03% which could not be extended beyond the contract year 1983-84. The Association contends that this merely sets the limit in the hiatus period. The undersigned finds that the District's position is correct as to the guarantee for that year but this does not alter the continuing nature of the COLA provision. There may be a different guarantee every year but the negotiations can apply that retroactively such that if there is an overpayment, the District will recoup it and if there is an underpayment, the kicker will apply. Furthermore, the parties can negotiate for any limitation they wish to apply to limit the COLA upon expiration of the agreement. Thus, a close reading of the language of the agreement does not establish that it provides an express limitation on COLA to the specific contract year with its cessation upon expiration of the agreement.

Turning to bargaining history, the evidence established that in prior negotiations, the District had sought to eliminate the COLA provision in its entirety from the contract but that during the two hiatus periods referenced in the amended complaint, there was no demand made to eliminate Article XXXI from the agreement. The 1979-81 agreement provided a cap of 12% on the cost the first year and a guaranteed average salary including the COLA of 10% the second year. Since then the COLA has basically remained the same except that the dates have been changed and the amount of the guarantee has varied. It is concluded that bargaining history supports neither the District's or Association's position.

With respect to past practice, the record clearly establishes three hiatus periods during which no COLA was paid, namely the start of the 1977-78, 78-79, and 79-80 school years. The Association points out that the District paid COLA prior to ratification of the contract in 1981. The evidence does not reveal when the parties reached agreement in 1981 but it appears that the District ratified the agreement prior to the Association, and therefore, it is concluded that 1981 did not have the markings of a true hiatus period, so the undersigned has discounted the 1981 payments as not being a change in past practice. Thus, the evidence clearly establishes a past practice before 1981 supporting the District's non-payment of the COLA during a hiatus period. Such evidence would normally give rise to the conclusion that the status quo did not include COLA payments. 8/ The Association argues that the evidence of past practice should not be applied in this case because the UniServ Director was unaware that COLA payments were not being made. The undersigned does not find this evidence to be persuasive. The mere lack of knowledge of the prior past practice on the part of the UniServ Director would not vitiate the past practice. The Association has made one argument which the undersigned does find persuasive. The evidence established that prior to the start of the 1983-84 school year, the District did not pay COLA nor the increments. In other words, the past practice for the three hiatus periods prior to the 1983-84 school year included all phases of the compensation plan. Thereafter, apparently in response to the Commission's decisions on the status quo, the District began payment of increments, lane changes and longevity during a hiatus but not the COLA. Essentially this was a change in the prior practice. It must be noted that these prior Commission decisions involved increments and longevity but not COLA. 9/ Thereafter, the Commission has held that COLA payments were not exempt from the status quo. 10/ The undersigned finds that the District's compensation plan includes increments, lane changes, longevity

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8/ School District of Plum City, Dec. No. 22264-A (McLaughlin, 10/85).

9/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85); School District of Webster, Dec. No. 21317-B (WERC, 9/85).

10/ Kenosha County, Dec. No. 22167-B (WERC, 3/86).

and the COLA. The COLA is part and parcel of the compensation plan. It is like one single system and there is no logical reason to separate the COLA part of the plan from the others. The compensation plan must be applied in whole or none of it should be applied, absent some express provision indicating it should not be so applied. 11/ As discussed above, the language on longevity appears quite specific as to its application in a certain school year, whereas the COLA provision is more general, yet the longevity is paid and the COLA is not. The past practice supports a conclusion that none of the compensation plan should be paid, yet that past practice was changed in 1983-84 with respect to all of the plan but COLA. As there is no logical reason for the COLA to be excluded from this change in past practice, the undersigned concludes that with respect to the compensation plan, past practice is also no longer applicable to the COLA provision and the new "practice" with respect to increments, etc. should also apply to the COLA provision.

Therefore, upon consideration of the contractual language, bargaining history and past practice, taken as a whole, the undersigned concludes that the doctrine of dynamic status quo required the District to continue COLA payments in the 1984-85 and 1985-86 hiatus periods. The District failed to prove any valid defenses for its failure to make such payments. Thus, the undersigned has found that the District violated Sec. 111.70(3)(a)4 and 1, Stats. by unilaterally changing the status quo during the hiatus periods.

Inasmuch as the COLA payments have been paid retroactively, the remedy is limited to the payment of interest at the statutory rate, along with the standard remedial orders.

Dated at Madison, Wisconsin, this 18th day of September, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

11/ School District of Tomorrow River, Dec. No. 21329-A (Crowley, 6/84) aff'd by operation of law, Dec. No. 21329-C (WERC, 8/84).