STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

SUN PRAIRIE EDUCATION ASSOCIATION,

Petitioner,

v.

Case No. 87-CV-4883

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

Decision No. 22660-B

NOTICE OF ENTRY OF MEMORANDUM DECISION
AND ORDER

TO: Mr. Stephen Pieroni
Wisconsin Education Association Council
101 West Beltline Highway
Post Office Box 8003
Madison WI 53708

Mr. Daniel M. Leep
Mulcahy & Wherry, S.C.
815 East Mason Street
Milwaukee WI 53202-4080

PLEASE TAKE NOTICE that a memorandum decision and order, of which a true and correct copy is hereto attached, was signed by the court on the 13th day of November, 1988, and duly entered in the Circuit Court for Dane County, Wisconsin on the 14th day of November, 1988.

Dated at Madison, Wisconsin this 17th day of November, 1988.

DONALD J. HANAWAY
Attorney General

JOHN D. NIEMISTO
Assistant Attorney General

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison WI 53707-7857
(608) 266-0278

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WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

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MEMORANDUM DECISION AND ORDER

Case No. 87-CV-4883

Decision No. 22660-B

This is a proceeding under the Administrative Procedure Act, ch. 227, Stats., to review a decision of the Wisconsin Employment Relations Commission (commission) dismissing the complaint of the Sun Prairie Education Association (union) against the Sun Prairie School District (district) for alleged violations of the district's duty to bargain collectively under the Municipal Employment Relations Act (MERA), secs. 111.70-111.77, Stats. The issue is whether the district made a unilateral change in the status quo respecting wages and conditions of employment, in violation of secs. 111.73(a)(4) and 111.73.(a)(1), Stats., when it refused to continue making cost of living adjustment (COLA) payments required under successive collective bargaining agreements during hiatus periods between the expiration of one contract and the ratification of its successor.[1]

FACTS

The facts are not in dispute. The union and the district have been parties to successive collective bargaining agreements for several years. These agreements have contained a COLA provi-

sion since at least the 1974-75 school year. Each of these provisions has required a monthly adjustment of individual employee's salaries to reflect increases in the national cost of living based on monthly readings of the Consumer Price Index (CPI). Although the precise language of these provisions has varied over the years, each has also specified that the cost of living increases received under the current contract, together with the "base salary" for the current year, would constitute either the beginning base salary or the "basis for negotiation" of the successive year's contract. The COLA provisions thus had what the union describes as a "ripple effect" on subsequent wages.

When the parties were unable to reach agreement on the terms of a successor contract by the expiration date of any current collective bargaining agreement, a "hiatus" period ensued during which no contract was in effect. There was a seven month hiatus following the August 10, 1977 expiration of the 1975-77 contract; a ten month hiatus following the August 10, 1978 expiration of the 1977-78 contract; and a two month hiatus following the August 10, 1979 expiration of the 1978-79 contract. The district did not make COLA payments to its employees during any portion of these hiatus periods. The union did not file any grievance or complaint as the result of the district's refusal to make such payments.

The examiner found that the short period between the expiration of the 1979-81 agreement and the union's ratification of the 1981-83 agreement in mid-September, 1981 was not a "true" hiatus because the district had apparently ratified the agreement before the union. He therefore discounted evidence suggesting that the

district had made two payments of COLA during that period as probative of a change in past practice. Neither party has challenged the examiner's interpretation of this evidence.

The evidence does not clearly establish the length of the hiatus following the expiration of the 1981-83 agreement in August, 1983. Neither party challenges the commission's finding of fact, which modified the examiner's findings, that the district made no COLA payments during that period but that it did make payments of other forms of increase to base salary set forth in the expired contract, each of which was based on the individual employee's attainment of additional experience and/or education credits. It made these payments on the advice of its attorney. That advice, in turn, was based upon its attorney's judgment and predictions with respect to the protracted litigation following the commission's decision and order in Menasha Joint School District, Dec. No. 16589-B (9/81). In that case, a majority of the commission had applied a "static" view of the status quo and held that a school district was not required to pay wage increases during a hiatus when those increases reflected "experience increments" earned during the term of the expired contract. That holding was reversed by the circuit court in Menasha Teachers Union v. WERC, Winnebago County Circuit Court Case No. 81-CV-1007 (8/83). In September, 1983, the commission publically announced its decision not to appeal the circuit court ruling.

The 1983-84 agreement expired on August 10, 1984. The district again made no COLA payments during the ensuing hiatus, but again made the experience/education-based payments. The

ance, filed in September, 1984, on grounds that there was no existing contract. The union filed its complaint with the commission in the instant case on March 19, 1985. The matter was held in abeyance pending the parties' further bargaining on a new contract.

On March 22, 1985, the commission issued its decision in School District of Wisconsin Rapids, which disavowed the majority decision in Menasha and adopted the "dynamic" status quo doctrine. In that case a unanimous commission held that the school district had committed prohibited practices under MERA by failing to make status advancements and to observe contractual salary and vacation schedules during a contract hiatus. On March 5, 1986, the commission issued its decision in Kenosha County, Dec. No. 22167-B (3/86), concluding that "there is no persuasive basis for exempting COLA clauses from application of the dynamic status quo doctrine contained in our Wisconsin Rapids decision." Id., at 7. Although the commission's holding that the employer had violated MERA by failing to make COLA payments during a contract hiatus was reversed after rehearing by a plurality of the commission, Dec. No. 22167-D (7/24/87), the commission did not disavow its earlier conclusion that COLA provisions in expired contracts were subject to the same principles as other forms of wage increments in ascertaining status quo.[2]

The hearing in this case took place on March 18, 1986, about two weeks after the initial decision in Kenosha. At hearing the union amended the complaint to include the district's failure to make COLA payments during another hiatus following the expiration of the 1984-85 wage agreement.[3] The examiner determined that the language of the contracts, which was substantially identical with

respect to the COLA provisions, did not expressly limit COLA payments to the terms of the contracts, and that these payments were "part and parcel" of a total compensation plan which "must be applied" in an all-or-nothing fashion during hiatus periods. The examiner held that the district, having chosen to depart from its past practice by paying other salary increments based on experience and education, was thereby obligated to include the COLA payments in its new practice because there was "no logical reason for the COLA to be excluded from this change in past practice."

The commission affirmed most of the examiner's findings of fact, modified two findings, and reversed his conclusions of law and order. It rejected the examiner's "all or nothing" approach to the compensation plan, and held that each component part of the plan must be viewed separately to determine whether it is a part of the status quo which must be maintained pending bargaining for a new contract, or a contractual benefit of the bargain which expires when the contract expires. It concluded that the language of the contract contemplated a term-limited obligation, and that this construction was consistent with the past practices of the parties in applying similar COLA provisions of former contracts. It therefore dismissed the union's complaint.

STANDARD OF REVIEW

The commission points out in its brief to this court that the scope of judicial review of an agency's conclusions of law within its field of expertise, including its interpretation of contracts, is limited by the requirement of due deference.[4] The union contends that the deference otherwise due is diluted by the commission's relatively new adoption of the dynamic status

quo doctrine,[5] changes in the composition of the three-member commission since that time, and the difficulty the subsequently-constituted panel has had in determining how to apply that doctrine to a variety of fact situations.[6] "Deference to the Commission," the union contends, "cannot be allowed to slip into judicial inertia which permits irrational results" or which render the reviewing court "hidebound and incapable of reviewing [a] case objectively, rationally and independently as contemplated by Section 227.57(5), Stats."

It is unnecessary in this case to determine the precise degree of deference due to the commission's decision under these circumstances. This court's review of the record in light of the applicable law convinces it that, even if no deference were due as a matter of law, the commission properly dismissed the union's complaint.

APPLICABLE LAW

It is well-established under MERA, as well as under the federal NLRB and other-state counterparts to the Wisconsin act, that an employer's unilateral change in the status quo of wages, hours, or conditions of employment during a hiatus period between contracts is a per se violation of the duty to bargain. As the commission noted in Wisconsin Rapids, supra, p. 14:

> Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, an employer's unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining. [Citations omitted.]

It is not always easy to determine, however, what parts of a

collective bargaining contract constitute the "status quo," which must be maintained pending bargaining for a new contract, and which parts are mere and temporal benefits of the bargain which expire when the contract expires. Administrative agencies and courts in other jurisdictions have gone off in a variety of directions, under a variety of banners--including "static" and "dynamic" approaches to status quo--in attempting to discern or set the boundaries of an employer's simultaneous right and duty to confer specific types of benefits to preserve the status quo in the absence of a current contract.[7] One appellate court has held that, because COLA is related to wages, any COLA provision which "establishes a practice or policy of making regular COLA adjustments to wages" is itself a mandatory subject of bargaining which must be maintained pending bargaining of a new contract. Ass'n Firefighters v. Portage, 134 Mich App. 466, 474 (1982).

In Wisconsin Rapids, supra, the commission made it clear that the question of status quo pending the bargaining of a collective bargaining contract was an individualized question which must be answered on a case-by-case basis by analysing the terms of any expired contract, the history of the bargaining between the parties, and the history of the parties' administration of the language of the contract by their past practices. Id., p. 17. It quoted, at p. 14, Professor Gorman's summarization of NLRA law on the subject[8] as follows:

> ..."conditions of employment are to be viewed dynamically, over a period of time, and the status quo against which the employer's [alleged] "change" is considered must take account of any regular and consistent past pattern of changes in employee status. Employer modifications consistent with such a pattern are not a "change" in working conditions at all. Indeed, if the employer, without bargaining with the

> union, departs from that pattern by withholding benefits otherwise reasonably expected, this is a refusal to bargain in violation of [the applicable provisions of the NLRA]. [Italic deleted; italics added.]

Because there was no prior collective bargaining agreement in Wisconsin Rapids, supra, the union having been newly certified as bargaining agent, the commission analysed the language of the employee manual in effect at the time of certification in order to ascertain prevailing conditions of employment. It found that both the language of the manual and the district's past practices in granting experience-based wage increases "make it clear that [such] increases are to be anticipated apart from possible annual adjustment of the contents of the [salary] schedule [in the manual] itself." Id., p. 18; italics supplied. It is apparent from the commission's opinion that it held these increases to be a part of the status quo which the district was required to maintain pending bargaining with the union because the parties "reasonably expected" them to be continued, as reflected by the language of the document embodying the prevailing conditions of employment, and by past practices upon which both parties had come to rely.

The commission employed the same approach in School District of Webster, Dec. No. 21312-B (9/85), where the issue was maintainance during contract hiatus of merit increases based on an expired agreement which "required the District to conduct an evaluation of performance during the term of the...agreement which could only have its effect on...increases 'for the following school term.'" Although the increases involved the exercise of employer discretion in making performance evaluations, both the amounts of the merit increases and the

eligibility requirements for those increases were specified in the written contract. Because the language of the contract, taken as a whole, set up an ongoing system of increases which gave the district "no choice but to pay" the specified amount if the specified eligiblity criteria had been met, the commission held that the ongoing system was a part of the status quo which must be maintained during hiatus, despite language limiting the term of the contract to the school year. Past practice did not enter into the analysis of the parties' reasonable expectations because there had been no prior hiatus during which the contractual language could have been applied.

In Kenosha, supra, the expired contract provided that the initial COLA payments would be made on a certain date and that: "Thereafter, there shall be quarterly adjustments." The commission found that this open-ended language supported the union's position that the parties had intended the payments to continue indefinitely past the expiration date of the contract. Additional support was found in the bargaining history of the provision, which established that the union had successfully opposed the district's attempt to specify exact dates upon which each COLA adjustment would be due, and thus raised the implication that the parties intended no limitation on these payments. In light of these implications, the commission overruled the examiner's conclusion that the union's failure to grieve a single non-payment of COLA after the expiration of the contract "reflected a Union understanding that hiatus-COLA adjustments were not a part of the status quo." Dec. No. 22167-B (3/86), p. 8. It found that this single instance of non-payment occurred in unusual circumstances suggesting that the parties had made a "trade-off"

between wage and COLA freezes and major job security provisions during the hiatus. Under such circumstances, the commission said, "it is by no means clear that the...nonpayment represented a mutual understanding that hiatus COLA adjustments were not ordinarily due as a part of the status quo." Id., p. 8, and the examiner's conclusion that the union had not met its burden of proving that COLA adjustments were part of the status quo was not warranted.

The evidence at rehearing in Kenosha established that there had been no "trade-off" which would explain the union's failure to grieve non-payment of the COLA payments it asserted were part of the status quo. A majority of the commission thus reversed its earlier determination and found that the union had not met its burden of proving that the district had unilaterally departed from status quo by failing to make the payments, in violation of MERA. Both majority commissioners emphasized that the actual conduct of the parties during the hiatus was the best evidence of their understanding of the contractual language.[9]

The commission's separate opinions following rehearing in Kenosha were issued on July 24, 1987. Its unanimous opinion in this case was issued on July 28, 1987.

DISCUSSION

The COLA provisions at issue in the 1983-84 contract are identical, except for specified dates, to the provisions at issue in the 1984-86 contract. Both are contained in Article XXXI of the contracts. Because these interrelated provisions are lengthy, a copy of the salient portion of the 1983-84 contract, which was in effect from August 11, 1983 until August 10, 1984, is appended to this opinion. The central paragraph of the provi-

sions at issue is paragraph C of Article XXXI, which provides:

> Computation of Increase in the CPI
>
> A reading of the CPI [Consumer Price Index] 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 <u>any contract year</u> shall be controlled pursuant to paragraph D. below. [Italic supplied.]

The union contends that the underscored words in the final sentence of the paragraph, when read with paragraph D, could not more plainly reveal the parties' intention to require that COLA payments continue during any hiatus following the expiration of the contract.

Paragraph D provides for a guaranteed average salary increase to the bargaining unit of 6.03 percent for the 1983-84 contract year. This total increase is comprised of schedule-based increases linked to experience ("salary increments") and education credits ("lane changes"), a "longevity factor" for employees off the salary schedule, and COLA payments. A "ceiling" on COLA applies if the cost of implementing all of the components of the guaranteed increase exceed 6.03 percent, and a salary adjustment which the parties have dubbed in their testimony as a "kicker" (set forth in the final two sentences of paragraph D) applies to make up the difference if the various forms of increase result in less than a total 6.03 percent increase.

It is no plainer to this court than it was to the commission that these two paragraphs, either separately or together, express

the parties' intention to require continuing COLA payments following the expiration of the contract. To the contrary, both paragraphs are firmly tied to "the 1983-84 contract year" referenced in those and in other paragraphs of Article XXXI.

Paragraph A sets an agreed "base salary" for the contract year, which governs the application of the salary schedule, and provides that "actual salary for 1983-84" will be the amount resulting from that application plus "the twenty-six (26) applications of COLA." (Italics added.) The figure 26 refers to the total number of bi-weekly payments during the contract year.

Paragraph C specifies that "[d]uring the contract year there will be twelve (12)" monthly CPI readings, the last of which will be "for the month of June, 1984," with "any increase" to be "reflected on the August, 1984 checks." The "hypothetical example" of COLA applications to base salary shown in paragraph A specifically designates August 3 and 17, 1984, as the last two payroll periods "for 1983-84." Although the example of the "ceiling on COLA in the event average salary increase exceeds 6.03%" shown in paragraph D lists only the "Payroll Month[s] Applied," and not the year, the footnote to this column of the example states "Actual application of this example would be computed on per period salary (26 periods) rather than monthly." Nothing in the language of any of these provisions specifies or contemplates an "application" of COLA beyond the 26 periods specified in Paragraphs A and D, or monthly "readings" of CPI beyond June, 1984, as specified in Paragraph C.

The application of the "kicker" provision in Paragraph D requires a date certain--which could only be the expiration date of the contract--for the computation of the amount of the "ad-

justment" which must "be made to accomplish the required guaranteed 6.03% increase" in average annual salary in the event the periodic payments of experience, education, and COLA-based increases do not accomplish that guarantee. The existence of this provision, which has historically been interpreted by the parties to require payment of a lump sum "kicker payment" at the beginning of the school year following expiration of a contract,[10] is inconsistent with a supposed obligation to continue COLA payments past that date until the 6.03 percent increase has been met. Paragraph E, governing the parties rights and duties in the event of a change in the CPI, is expressly limited to "the term of this agreement."

The sole ambiguity in the contractual language of these provisions arises out of the use of the word "any" in the phrase "any contract year" in the last sentence of Paragraph C. Since the only "contract year" to which all other provisions of these paragraphs appear to apply is the 1983-84 contract year, it is not clear from the face of the contract why this sentence refers to "any" rather than "the" contract year. The commission's opinion did not address this ambiguity.

The ambiguity is relieved, if not wholly resolved, by the observation in the commission's brief to this court that the sentence first appeared in the parties' 1981-83 contract, which applied to two contract years, each with a separate "base salary."[11] Paragraph D of Article XXXI of that contract provided for an average base salary increase of ten percent in "each" of the two years governed by the contract. While it is not clear why the contract uses the precise term "each" in Paragraph D, and the less precise term "any" in Paragraph C, it is more reasonable

to believe that these terms were each intended to apply to both of the contract years covered by the 1981-83 agreement, and that the language of Paragraph C was inadvertently carried over into the 1983-84 one-year contract, than it is to believe, as the union contends, that the parties intended by this language to require the district "to make monthly COLA payments up to the 1983-84 guaranteed average salary increase of 6.03%" in "any year subsequent to the 1983-84 school year or until a successor collective bargaining agreement could be negotiated." The use of the term "contract year," which appears on its face to mean the one-year period of time during which the contract is in effect, is inconsistent with a supposed obligation to continue these payments past the end of the contract, which would render the "kicker" provisions meaningless.

This court fully agrees with the commission's conclusion that nothing in the contract language supports the union's contention that COLA payments were a part of the status quo which the district was obligated to continue following expiration of the contract. The union's contention is rendered even more unlikely in light of the bargaining history of these provisions, and the past practices of the parties with respect to them.

Contrary to the union's suggestion that continued COLA following expiration was a "quid pro quo" for a ceiling on COLA during the contract term, the record is devoid of any indication that the parties ever discussed hiatus-payments, much less that they made the suggested trade-off. Since it is undisputed that the district had never made such payments in the past, the absence of such evidence, together with the absence of express language in the contract requiring such payments, strongly sup-

ports the conclusion that the parties did not agree to change past practice.

The union's failure to grieve nonpayment of COLA during past hiatus periods, especially those which followed the changes in the language of the contract upon which the union relies as expressing an intent to require such payments, is inconsistent with the union's claim and is not satisfactorily explained by the record. The commission correctly concluded that the union failed to meet its burden of proof that it had a reasonable expection of continued COLA payments during the hiatus periods in question, and that such payments were a part of the status quo which the district was required to maintain during those periods. Its order must therefore be affirmed.

Dated this 13th day of November, 1988.

BY THE COURT:

Martha J. Bablitch
Reserve Judge for
Dane County Circuit Court
Branch 6

APPENDIX

(1) Because each successor agreement was retroactive to the beginning date of the hiatus period, and COLA payments were made accordingly following ratification of each new agreement, the only amount of money at issue is the interest allegedly due to employees who did not receive the payments in question on the periodic basis contemplated by the contracts during each hiatus.

(2) In its brief to this court, the union cited Dec. No. 22167-C (4/23/86), in which the commission granted a rehearing in Kenosha, neither party cited the commission's decision reversing its earlier holding in Dec. No. 22167-D (7/24/87).

(3) The parties' 1984-86 contract provided for a "wage reopener" for the 1985-86 portion of its two-year term. No agreement was reached on wages prior to the commencement of the 1985-86 school year, and the district again refused to make COLA payments during the hiatus.

(4) Board of Ed., Brown Deer Schools v. WERC, 86 Wis.2d 201, 210, 271 N.W.2d 662, 666 (1978), quoting Tecumseh Products Co. v. Wisconsin Employment Relations Board, 23 Wis.2d 118, 129-30, 126 N.W.2d 520, 525 (1964) and citing Milwaukee Transformer Co. v. Industrial Comm. 22 Wis.2d 502, 126 N.W.2d 6 (1964). (If agency's construction of collective bargaining contract is reasonable, reviewing court will sustain although alternative view may be equally reasonable.)

(5) Beloit Education Asso. v. WERC, 73 Wis.2d 43, 67-68, 242 N.W.2d 231, 242-43 (1976). (Rule requiring affirmance of agency's conclusion of law if there is any rational basis to sustain it does not apply unless administrative practice is long-continued, substantially uniform, and unchallenged; if question is new, agency's determination is give "great bearing" or "due weight."); cf., Blackhawk Teachers' Federal v. WERC, 109 Wis.2d 415, 423-24, 326 N.W.2d 247, 252 (1982).

(6) See, eg.,Plum City School District, Dec. No. 22264-B (6/87), rev'd, West Central Education Association v. WERC, Pierce County Circuit Court Case No. 87-CV-257 (4/27/88) in which the three members of the commission issued three separate opinions, the majority holding that a school district was not obligated to continue payments according to the salary schedule in an expired contract when past practice indicated a contrary understanding between the parties.

(7) See, e.g., cases cited at footnotes 9 and 11 of School District of Wisconin Rapids, Dec. No. 19084-C (3/22/85).

(8) Gorman, Basic Text On Labor Law: Unionization and Collective Bargaining, at 450 (1976).

(9) Commissioner Gordon stated:

> There being no satisfactory explanation for the Union's conduct in not protesting the nonpayment during the hiatus upon expiration of the [earlier] agreement, I now find it more reasonable to conclude that hiatus COLA adjustments were not part of the status quo. In these circumstances I find the evidence of what actually occurred during any previous hiatus to be determinative of what is to occur during any subsequent hiatus [despite the open-ended language in the contract]. Dec. No. 22167-D, p. 7.

Commissioner Schoenfeld stated:

> Inasmuch as the Union...acquiesced to the County's refusal to make said COLA payments...I believe that the mutual action of the parties at that time better reflected their understanding over whether said payments were mandated under this language. Id., p. 8.

(10) See Arbitration Award of Arbitrator Richard B. McLaughlin, issued October 25, 1984, which was introduced into evidence by the union as Exhibit 17 of this record.

(11) A copy of the relevant portions of the 1981-83 contract is appended to this opinion.