STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1947-B, AFSCME, AFL-CIO, Complainant, vs. TOMAH AREA SCHOOL DISTRICT, Respondent.	Case 53 No. 44369 MP-2380 Decision No. 26708-B

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, appearing on behalf of Local 1947-B, AFSCME, AFL-CIO.

Lathrop & Clark, Attorneys at Law, by Mr. Michael J. Julka, and Ms. Jill Weber Dean, 122 West Washington Avenue, Suite 1000, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Tomah Area School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 1947-B, AFSCME, AFL-CIO having, on July 31, 1990, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Tomah Area School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on December 10, 1990, 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 hearing on said complaint having been held in Tomah, Wisconsin on January 9, 1991 at which time the Complainant amended said complaint to allege a violation of Sec. 111.70(3)(a)4 instead of Sec. 111.70(3)(a)5, Stats.; and the parties having filed post-hearing briefs which were exchanged on April 19, 1991; and the Examiner having considered the evidence and arguments of counsel makes and issues the following Findings of Fact, Conclusion2 of Law and Order.

FINDINGS OF FACT

1. That Local 1947-B, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive bargaining representative of employes in a bargaining unit consisting of all regular full-time and regular part-time custodial employes, bus drivers, clerical employes, school lunch program employes, teacher's aides and school bus maintenance employes of the Tomah Area School District excluding supervisory, confidential, temporary and teaching personnel; and that its offices are located at 5 Odana Court, Madison, Wisconsin 54656.

2. That Tomah Area School District, 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 its principal offices are located at 901 Lincoln Avenue, Tomah, Wisconsin 54660.

3. That the Union and the District have been parties to a series of collective bargaining agreements including an agreement covering the time period July 1, 1986 through June 30, 1989; and that said agreement contains the following provisions:

> ARTICLE 8 - SENIORITY
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> Section 1. It is understood and agreed that the rules of seniority shall prevail. In the event of a reduction in the work force, the last person employed in the job category shall be laid-off, providing that the remaining employes are qualified to perform the available work. An employe laid-off may elect to displace the least senior employe in another job category, provided he/she is qualified. In rehiring, the last person laid-off shall be the first person rehired, provided he/she is qualified. No new employe shall be hired until all regular employes laid off who wish employment and are available have been called back to work. For purposes of this Article, job categories are defined as:
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> Teacher Aides
> Clerk I

Clerk II
Technical Assistant
Maintenance Men
Vehicle Maintenance Men
Custodians
Cook/Cook Servers
Food Service Assistant
Bus Drivers

. . .

ARTICLE 18 - EMPLOYE DEFINITION, WORK DAY, WORK WEEK AND PREMIUMS

. . .

> Section 6. The employer shall establish and post regular work schedules setting forth daily and weekly hours of work for all employes. As needs change, the regular work schedules may be changed by the employer, provided that employes affected by a change shall be given two (2) weeks notice. Split shifts may be scheduled; however, employes assigned split shifts shall be given thirty (30) days notice. Employes assigned split shifts who have greater seniority may exercise the right to displace employes with lesser seniority in order to maintain a straight shift.;

and that the Union and the District did not reach agreement on a successor agreement to the agreement which expired on June 30, 1989.

4. That sometime in June, 1989, the District overloaded an electrical circuit which resulted in a loss of information on the senior high school guidance computer; that the District decided that to prevent such a loss on the computers in the bookkeeping office it would do some rewriting such that the computers would be on their own circuit, and in addition, an outlet would be added for a microwave oven in the break room; that the District determined, after discussion with the maintenance personnel, that the rewiring would take at most two days to complete; and that the District decided that it should be done after normal working hours so as not to affect the normal work activities.

5. That John Acker has been employed by the District as a maintenance worker since September 1980, and is the most senior maintenance employe and is experienced in electrical and heating maintenance work and has performed such work for the District; that Roy Blashaski has been employed by the District since July, 1988 and is a licensed electrician; that there are two other employes who are maintenance workers but that when employes are paired to work together, Acker and Blashaski work together about 90% of the time; that the District asked Acker and Blashaski if they would work two evenings instead of two days to change the circuits described in Finding of Fact 4; and that John Acker refused to voluntarily adjust his hours.

6. That the District sent letters on July 19, 1989 to Acker and Blashaski indicating that as per Article 18, Section 6, their regular work schedules would be changed effective August 3, 1989 to 3:00 p.m. to 11:30 p.m.; and that Acker and Blashaski worked these hours on August 3 and 4, 1989 and then returned to their normal shift having completed the wiring work described in Finding of Fact 4.

7. That on August 9, 1989, the Union on behalf of Acker filed a grievance alleging that the District violated the parties' collective bargaining agreement by changing his work schedule on August 3 and 4, 1989; that the grievance asserted a violation of Article 8, Section 1 in that Acker was the most senior maintenance man and less senior employes should have been assigned to the late shift; that additionally the grievance stated that the job filled by Acker was posted as day shift; and that the grievance alleged the work should have been assigned as overtime rather than a change of hours.

8. That the grievance was denied on the merits by the District at each step of the grievance procedure; that the Union filed a request for grievance arbitration and the District refused to proceed to arbitration as the collective bargaining agreement had expired on June 30, 1989 and the parties had not entered into a successor agreement so no agreement was in effect when the grievance arose and there was no agreement to arbitrate said grievance.

9. That on July 31, 1990, the Union filed the instant complaint alleging a violation of the contract by assigning Acker to work the late hours when less senior employes were available; and that the Union amended the complaint at the hearing to allege a violation of Section 111.70(3)(a)4, Stats. by failing to maintain the status quo when it adjusted Acker's work schedule.

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

CONCLUSION OF LAW

That the District by changing Acker's hours of work on August 3 and 4, 1989 during the contractual hiatus following the expiration of the parties' 1986-1989 collective bargaining agreement did not unilaterally alter the status quo and has not unlawfully refused to bargain in violation of Sec. 111.70(3)(a)4 or any other section of the Municipal Employment Relations Act.

On 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 complaint as amended be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of May, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

(See Footnote 1/ on Page 4)

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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

In its complaint as amended, the Union alleged that the District violated Sec. 111.70(3)(a)4, Stats. by assigning different work hours to John Acker when less senior employes were qualified and available. The District denied that it had committed any prohibited practices in the assignment of different work hours to John Acker.

UNION'S POSITION

The Union contends that the agreement must be read as a whole and that the seniority of employes must be taken into account when adjusting work schedules. It relies on Article 8, Section 1 as requiring the assignment of work hours on the basis of seniority. It submits that Acker was not the only maintenance man qualified to do the work as the evidence established that less senior men were qualified to perform the work. The Union asserts than when Acker was hired he was informed that he would have a regular a.m. shift and work performed outside this shift would be overtime. The Union also notes that this is the first time that maintenance workers worked outside their regular hours on a non-voluntary basis without receiving overtime.

The Union argues that the issue related to the Union's decision to file the grievance and the composition of the Union Grievance Committee is the sole concern of the Union and the District has no business attempting to involve itself in the internal operations of the Union. It maintains that the Union as a whole voted to proceed on this grievance at a regular union meeting. That is all that is needed to know that the Union's officers are acting upon the desires of the members.

The Union takes the position that the District adjusted the terms of the agreement when it changed Acker's work schedule instead of that of less senior qualified employes. It asks that appropriate remedial orders be issued as well as any other relief deemed appropriate by the Commission.

DISTRICT'S POSITION

The District contends that the Union has the burden of proving by a clear and satisfactory preponderance of the evidence that the District failed to maintain the status quo by making a unilateral change in the status quo involving a mandatory subject of bargaining during the hiatus period. It submits that the Union must show what the status quo was with respect to work assignments, that the District unilaterally modified this and the modification involved a mandatory subject of bargaining. The District points out that the Commission, in determining what the status quo is, examines the expired agreement, past practice and bargaining history. It alleges that the Union has failed to meet its burden of proof. It notes that the Union offered three theories to support its complaint, which are: 1. The grievant's job was posted as a day shift and the District could not change it to a night shift; or 2. The work should have been assigned as overtime; or 3. The District had to follow seniority to change the work schedule and the grievant being the most senior should not have been assigned the work. The District claims that the evidence offered demonstrates that the Union's allegations are legally and factually frivolous and were advanced with reckless disregard for accuracy and brought for reasons unrelated to MERA's legitimate purposes, thereby entitling the District to an award of costs and attorneys fees.

With respect to the Union's first theory, the District maintains that nothing in the agreement supports this theory and, in fact, the language of Article 18, Section 6 clearly grants the District the right to change schedules.
The District asserts that it complied with Sec. 6 by giving the proper notice in writing to Acker. It takes the position that there is no bargaining history or past practice to support the Union's position, rather the bargaining history and past practice established that there is no guaranteed permanent schedule.

With respect to the second theory, the District argues that there is no support for the argument that work that must be performed outside normal hours must be assigned as overtime. It refers to Article 18 which contains overtime provisions in Sec. 3 and work schedule change provisions in Sec. 6 noting that neither references the other and there is no indication that either takes precedence over the other. It concludes that nothing in the agreement requires the assignment of overtime to the exclusion of a change in work schedule. The District insists that bargaining history buttresses its position and past practice does not support the Union's position rather the evidence presented teems with examples of work schedule changes as an alternative to overtime. It contends that the record establishes that schedule changes as an alternative to overtime is a mutually recognized part of the status quo.

With respect to the third theory, that work schedule changes must be made

on the basis of seniority, the District asserts that the Union has failed to prove its contention. The District states that the Union has plucked one sentence from Article 8, Sec. 1 of the expired agreement and argued that the broad seniority provision applies to work schedule modifications. The District maintains that this one sentence does not apply to the entire contract but only in the context of layoff and recall as other articles reference the application of seniority and this would not be necessary if the "rule of seniority" applied to all provisions. It refers to Article 24 and Article 18, Sec. 3 as examples where language is unnecessary or required if the general rule applied. It argues that where the parties intended seniority to apply, they stated so and defined what seniority meant in each context. The District claims that bargaining history and past practice do not support the Union's position but a review of the changes in contract language over succeeding contracts indicates an increase in the importance of qualifications over pure seniority and the evidence of routine overtime assignments and work schedule changes indicates these were done on the basis of qualifications and not seniority. It submits that Acker and Blashaski were the best qualified to do the work on August 3, and 4, 1989, the District had a legitimate business purpose for the work being done at night and it maintained the status quo in assigning the work at that time to these employes.

The District maintains that due to the extra ordinary circumstances present in this case, that it should be awarded costs and attorneys fees. It submits that the Union has lodged a frivolous claim and it was pursued in bad faith because Acker had failed to obtain the position of maintenance supervisor. The District asserts that none of the theories presented by the Union was investigated and its conduct in pursuing the complaint absent investigation constitutes reckless conduct and could serve the basis for a prohibited practice complaint for violating Sec. 111.70(3)(b)3, Stats. The District requests the complaint be dismissed and it be awarded costs and attorneys fees as well as an order to the Union to cease and desist from bringing grievances or complaints without conducting the contractually required investigation.

DISCUSSION

The amended complaint alleges that the District violated Sec. 111.70(3)(a)4, Stats. by changing Acker's work schedule on August 3 and 4, 1991. Section 111.70(3)(a)4, Stats. provides that it is a prohibited practice for a municipal employer "to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit." The Commission has held that, absent a valid defense, the District is obligated as part of its obligation to bargain collectively to maintain the status quo in wages, hours and conditions of employment during a hiatus period after the expiration of an agreement and agreement upon a successor agreement. 2/ With respect to determining the status quo the Commission has adopted the concept of the dynamic status quo. 3/ Application of the dynamic status quo requires an examination, on a case by case basis, of the parties' collective bargaining contract language, past practice and bargaining history. 4/ Therefore, in order to determine what the status quo is in the instant case, it is necessary to review the contract language, the bargaining history and past practice.

Article 18, Sec. 6 of the parties' agreement provides, in pertinent part, as follows:

> As needs change, the regular work schedules may be changed by the employer, provided that employes affected by a change shall be given two (2) weeks notice.

A plain reading of this language allows the District to change regular work schedules to meet changed needs by giving two weeks notice to the employes. It is undisputed that the District had a reasonable basis for changing regular schedules and gave the proper amount of notice. 5/ The Union has argued that Article 8, Sec. 1 limits the District's right to change schedules as provided in Article 18, Sec. 6. Article 8, Sec. 1 provides in part as follows: "It is understood that the rules of seniority shall prevail." The Union submits that applying this sentence to Article 18, Sec. 6 requires the District to limit its schedule changes by seniority such that the least senior qualified employes' schedules must be changed before more senior employes' schedules are changed. When the above quoted sentence is read by itself, it appears that strict

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2/ Manitowoc Public School District, Dec. No. 24205-B (WERC, 3/88), aff'd Manitowoc CirCt., (1/89); School District of Plum City, Dec. No. 22264-B, Pierce County CirCt. (4/88).

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

4/ School District of Manitowoc, Dec. No. 24205-B (WERC, 3/88).

5/ Tr-115, Exs. 2 and 3.

seniority must be applied without regard to any other factors. However, a reading of Article 8 in its entirety suggests that the parties did not intend the application of strict seniority. Seniority applies to layoffs, bumping and recall provided the more senior employe is qualified to perform the work. For promotions, a more senior employe in a job category is given preference if qualified within a job category before a more senior qualified employe from a different job category. Thus, it must be concluded that the language of the first sentence when read and interpreted in light of the entire Article is limited. Additionally, a reading of the agreement as a whole indicates the application of this sentence to other provisions is further limited. Article 24 states that preference on vacation days shall be given on a seniority basis. If Article 8, Sec. 1 applied, this language would be redundant. Article 18, Sec. 3 provides for the distribution of overtime equally. If strict seniority applied, there would be a conflict as to the distribution of overtime. Article 18, Sec. 2 allows a more senior employe whose hours have been reduced to displace a less senior employe in the job category whose hours have not been reduced provided the senior employe is qualified. Again, the provision would be redundant if strict seniority applied because the senior would have had his hours reduced. Article 18, Sec. 6 allows the District to schedule split shifts and allows more senior employes assigned a split shift to displace a junior employe on a straight shift. Again, if Article 8 applied, this language would be redundant. Furthermore, as the parties put this language in on split shift schedules but not on a change in schedules, it must be concluded that they did not intend seniority to be a factor on a schedule change, otherwise they could have easily stated so just like they did on the split shift.

In summary, it is concluded that the first sentence of Article 8, Sec. 1 cannot be taken out of context and applied to Article 18, Sec. 6 because when the agreement is read as a whole, the application of seniority is restricted and only applies where specifically so stated. Inasmuch as the agreement is silent in Article 18, Sec. 6 on a shift schedule change while clear on a split shift, it is concluded that seniority does not apply to a shift schedule change.

A review of the negotiating history does not contradict this conclusion. This first sentence of Article 8, Sec. 1 is identical to that contained in the parties' 1968-69 agreement. 6/ The 1968-69 agreement contained no provision similar to Article 18, Sec. 6. 7/ Article 18, Sec. 6 appeared for the first time in the 1978-80 collective bargaining agreement. 8/ Article 18, Sec. 6 referenced seniority on split shifts but not schedule changes. If Article 8, Sec. 1 applied, there would have been no need to discuss seniority at all but the reference to split shift meant it applied there but not to shift schedule changes. Had Article 18, Sec. 6 preceded the negotiation of Article 8, Sec. 1, then arguably seniority might apply to Article 18, Sec. 6, shift schedule changes because the application of seniority through a later provision would overcome the inference that seniority had to be specifically referenced. Thus, the negotiating history does not contradict the plain language interpretation discussed above.

With respect to past practice, the record establishes that there have been many changes in the employes' work schedules. 9/ The record also reflects that each of these were mutually agreed to by the parties and no grievances were filed. The assignments were made or agreed to without respect to seniority. 10/ The present case is the first instance where an employe refused to voluntarily change his/her hours. 11/ Therefore, there is nothing in the record that the District has in the past used the provision in Article 18, Sec. 6 to change schedules because prior to this case, employes always agreed to change schedules. On the other hand, there is no past practice established that on changing schedules voluntarily, the District always obtained a mutual agreement with the least senior employes to change schedules. On the contrary, the more experienced employes changed schedules. 12/ Thus, the evidence fails to show any past practice with respect to Article 18, Sec. 6 that it must be applied in accordance with Article 8, Sec. 1.

Therefore, the plain language of Article 18, Sec. 6 is interpreted as allowing the District to make shift changes with the proper notice to employes

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6/ Ex-7.

7/ Id.

8/ Ex-14.

9/ Tr-72, 73, 78, 79, 85, 87, 93, 98, 102, 107, 124, 125.

10/ Tr-88, 96, 126.

11/ Tr-78-79, 85-86, 99.

12/ Tr-95-97, 127.

without regard to seniority, particularly Article 8, Sec. 1, sentence 1. Bargaining history and past practice do not contradict this interpretation but support it.

The Union raised two additional arguments. The first was that when Acker was hired his hours were established forever as the normal hours. This argument is not persuasive as it is not supported in the record. When Acker was interviewed for the job, he was told what his normal hours would be and if he worked beyond that he would be paid overtime. 13/ This is nothing more than briefly informing Acker what the contract provides which is that regular work schedules are posted per Article 18, Sec. 6 and overtime is provided per Article 18, Sec. 2. This synopsis of the agreement did not mean that the other terms of the agreement did not apply or that this discussion somehow restricted the District's rights under the contract. The evidence related to this discussion establishes that the description of regular hours and overtime was merely informational and did not constitute any guarantee or some type of individual bargain separate from the contract. Therefore, this argument fails for lack of proof.

The second argument is that the work performed on August 3 and 4, 1989 should have been overtime rather than a change in schedule. It is undisputed that the District has the right to require overtime and it has the right to change work schedules under Article 18, Sec. 6. The District can choose which of its rights it wishes to exercise. Although it might be argued that as the District never changed Acker's schedule in the past and always assigned work beyond his normal hours as overtime, that a past practice was created preventing the change in Acker's work schedule. However, not all past practices are binding on the District. A binding past practice must be the result of an agreement or mutual understanding. A non-binding past practice is merely the unilateral decision by the District to exercise its rights in a certain way over a long period of time but this is always subject to unilateral change by the District. This principle was stated quite succinctly by Umpire Shulman in Ford Motor Co. 14/ as follows:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. . . . A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
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> But there are other practices which are not the result of joint determination at all. They may be . . . choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things . . . Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.

The mere failure of the District in the past to exercise its rights under Article 18, Sec. 6. with respect to Acker's schedule and to assign him overtime instead did not constitute a waiver or a loss of its right to change his work schedule. In other words, non-use of the right to change Acker's schedule did not create a binding past practice that the District could not exercise this right in the future. Therefore, the District can change schedules or require overtime at its option and its choice to change schedules in this case did not violate past practice or the contract.

The status quo in the instant matter is determined by the contractual language give the sparsity of evidence with respect to bargaining history and past practice. The plain meaning of the language of Article 18, Sec. 6 must be given effect, and thus, the status quo was not unilaterally changed when the District changed Acker's work schedule on August 3 and 4, 1989 in accordance with the terms of Article 18, Sec. 6. Therefore, the Union has failed to prove that the District violated Sec. 111.70(3)(a)4, Stats. and the complaint has been dismissed in its entirety.

13/ Tr-18, 22, 83-84.

14/ 19 LA 237, 241 (1952).

The District has asserted that it should be granted costs and attorneys fees in this matter. The Commission has a strict test for awarding attorneys fees and has indicated that it will do so only in "exceptional" cases where warranted. 15/ The Commission has considered defenses and indicated that where they are "debatable" as opposed to "frivolous", attorneys fees would not be warranted. Parallel reasoning would yield the conclusion that where complaint allegations are "frivolous", attorneys fees would be warranted and where "debatable" they would not be warranted. A review of the allegations in the complaint, particularly the application of seniority to the change in work schedules is "debatable" rather than "frivolous". Thus, it is concluded that the instant case is not one that can be described as "exceptional" where the "extraordinary remedy" of costs and attorneys fees should be awarded and the District's request for same are denied.

Dated at Madison, Wisconsin this 29th day of May, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

15/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-D (WERC, 5/81).