STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WESTFIELD EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF WESTFIELD, Respondent.	Case 12 No. 49232 MP-2730 Decision No. 27742-A

Appearances:
Ms. Chris Galinat and Ms. Melissa A. Cherney, Staff Attorneys, appearing on behalf of Mr. David Friedman, Friedman Law Firm, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Westfield Education Association, hereinafter referred to as Complainant or the Association, having on April 30, 1993, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the School District of Westfield, hereinafter referred to as Respondent or the District, violated Section 111.70(3)(a)1 and 4 by engaging in individual bargaining and by unilaterally changing the status quo as defined in the parties' expired collective bargaining agreement when it refused to reimburse employes for credits earned as required by the expired collective bargaining agreement. The Commission, having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusion of Law and Order in this matter as provided in Sec. 111.07(5), Stats.; hearing on said matter being held on October 1, 1993, in Westfield, Wisconsin; a stenographic transcript of said hearing being received on October 19, 1993; and the parties having completed their post-hearing briefing schedule on December 1, 1993; and this Examiner having considered the evidence and arguments of the parties, and having been fully advised in their premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The District is and has been a municipal employer within the meaning of Sec. 111.70 (1)(j), Stats. engaged in the operation of a public school system whose principal place of business is Post Office Box 356, Charles Street,

Westfield, Wisconsin 53964. At all times material herein, Larry Shay has occupied the position of District Administrator and has served as a representative and agent of the Respondent District.

2. The Association is and has been at all times material a labor organization within the meaning of Sec. 111.70(1)(h), Stats. whose business address is South Central United Educators, 2900 Red Fox Run, Post Office Box 192, Portage, Wisconsin 53901. At all times material, the Association has served as the exclusive bargaining agent for professional employes in the District.

3. The District and the Association have been parties to a series of collective bargaining agreements which have governed the wages, hours, and working conditions of the employes in the bargaining unit. During the pertinent time periods, two collective bargaining agreements were in effect. The first extended from July 1, 1991 through June 30, 1992. The parties commenced bargaining for a successor agreement in the spring of 1992 and reached agreement on a successor contract in March of 1993. The Association ratified the successor agreement on March 19, 1993, while the District subsequently ratified on March 22, 1993. The 1992-1993 agreement provided that all economic items be made retroactive.

4. The parties' 1991-92 collective bargaining agreement contains the following pertinent provisions:

> E. Fringe Benefits Pay Schedule
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> Professional Advancement: The district will reimburse teachers for completing courses offering graduate credit at the rate of $100/credit. Such reimbursement is payable as of the first regular monthly meeting of the Board after the teacher has resumed his/her teaching duties with the local school district (fall or winter semester). Graduate credits shall only be approved for courses completed which were specifically related to the teacher's certification, classroom methodology, or extra-curricular programs or courses approved by the School Board. Teachers need not be enrolled in any master's program in order to earn graduate credits. Teachers may advance to the MA lane after completing their master's degree. An earned Master's degree must be completed in the area of a teacher's expertise or accepted and approved by the School Board (exceptions) outside the teacher's present teaching assignment.
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> The Board requires the MA degree in order to move on the MA lanes. Only credits received after 1985 - 1986 will be allowed for advancement to the MA + 18 or above lanes. The Board believes that classroom instruction is the primary purpose of teaching. In order to perform positively (as a teacher) a limit of 3 graduate credits of coursework may be approved during each semester of the teaching year.
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> Continuing Education Requirement: All teachers must earn a minimum of 6 credits every five years of teaching in the school district. The requirement for 3 credits had been in effect since the 1976-77 school year. Beginning in the 1991-92 school year, failure of

a teacher to earn 6 credits shall result in the teacher being frozen at his/her present salary until such time as the credits (or CEUs equivalency) have been earned. A teacher who has been frozen at salary will advance upon earning credits to the location the teacher would have been at if the teacher had not been frozen. The teacher will need to earn the required credits (or CEUs) within five years of the date originally frozen or will be frozen at salary again. Credits (or CEUs (equivalencies) shall be approved only if they are DPI approved or related to the teacher's expertise or approved by the School Board. All equivalencies (CEUs), inservice credits, undergraduate or graduate credits will be based on DPI guidelines; i.e., 1 credit = 3 CEUs = approximately 30 clock hours. All approved CEUs will be reimbursed on an actual cost basis not to exceed $45/credit. All approved CEUs will be reimbursed on an actual cost not to exceed $20/CEU.

The district will reimburse teachers for only 9 credits each budget year regardless of the budget year in which the credits were earned. Any credits over 9 can be carried over into the next budget year.

Procedure to be followed: All teachers anticipating taking any courses, workshops, or seminars during the summer or upcoming Fall or Spring semester will notify the District Administrator prior to the end of the school year in order that these projected costs may be included in the budget before the annual meeting. All specific courses must be approved by the District Administrator prior to being taken.

New Teachers (Teacher Non-renewal and Dismissal) All new teachers will serve a three year probationary period. During this period these teachers will have all rights with regard to non-renewals as is extended by law, but they will not have access to the grievance section of this contract to contest their non-renewal. This probationary period applies to teachers initially hired after July 1, 1987 as well as to teachers who have resigned employment with the District and who are subsequently rehired after July 1, 1989. After completion of the probationary period, the teacher may be non-renewed or dismissed only for just cause, as defined in Appendix D.

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Changed Teaching Assignment: In the event that a teacher is requested by the Board to teach a subject or subjects not in said teacher's major field or preparation, and as result said teacher must earn additional credits, these credits will be reimbursed to said teacher at the rate of $45 per credit for undergraduate credits and $100 per credit for graduate credits.

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ARTICLE VI
GRIEVANCE PROCEDURE

A. Definitions

1. A grievance is a claim based upon an event or condition which affects the wages, hours, and conditions of employment of a teacher or group of teachers and/or the interpretation, meaning, or application of the provisions of this agreement.

2. An aggrieved person is the person or persons making this claim.

3. A party in interest is any person or persons who might be required to take action or against whom action might be taken in order to resolve the claim.

4. Days shall mean face-to-face for all teachers as set forth in the "Narrative Calendar" that has been negotiated by the parties unless otherwise specified to the contrary.

5. It is understood that the time limits set forth in this article shall be considered as substantive, and failure of the grievant to file and process the grievance within the time limits set forth in this article shall be deemed no grievance.

B. General Procedures

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

2. In the event a grievance is filed at such time that it cannot be processed through all the steps in this grievance procedure by the end of the school term, the definition of days in Section A.4. is modified to mean calendar days, once summer vacation has begun; the parties further agree to make a good faith effort to reduce the time limits so that the grievance procedure may be completed prior to the beginning of the next school term.

3. At all levels of a grievance after it has been formally presented, at least one member of the Association's Grievance Committee shall attend any meetings,

hearings, appeals, or other proceedings required to process the grievance.

C. Initiation and Processing

1. Level One: The aggrieved person will within ten (10) school days after being made aware of the event to be grieved, first discuss his/her grievance with his/her principal or immediate supervisor, either directly or through the Association's designated Building Representative, with the objective of resolving the matter informally.

2. Level Two: (a) If the aggrieved person is not satisfied with the disposition of his/her grievance at Level One, or if no decision has been rendered within ten (10) school days after presentation of the grievance, he/she may file the grievance in writing with the Chairman of the Association's Grievance Committee (hereafter referred to as the Grievance Committee) within five (5) school days after the decision at Level One, or fifteen (15) school days after the grievance was presented, whichever is sooner. Within five (5) school days after receiving the written grievance the Grievance Committee will refer it to the District Administrator. (b) Within ten (10) school days after the receipt of the written grievance by the District Administrator, the District Administrator will meet with the aggrieved person and the Association representatives in an effort to resolve it. (c) If the aggrieved person does not file a grievance in writing with the Grievance Committee and the written grievance is not forwarded to the District Administrator within twenty (20) school days after the teacher filed his/her grievance with his/her principal or immediate supervisor, then the grievance will be considered as waived. A dispute as to whether a grievance has been waived under this paragraph will be subject to arbitration pursuant to Level Four.

3. Level Three: (a) If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Two, or if no decision has been rendered within the ten (10) school days after he/she has first met with the District Administrator, he/she may file a grievance in writing with the Grievance Committee within five (5) school days after the decision by the

District Administrator, or within fifteen (15) school days after he/she has first met with the District Administrator, whichever is sooner. Within five (5) school days after receiving the written grievance, the Grievance Committee may refer it to the Board if it determines that the grievance is meritorious and that appealing it is in the best interest of the school system. Within ten (10) school days after receiving the written grievance, the Board will meet with the aggrieved person and Association Representative for the purpose of resolving the grievance.

4. Level Four: (a) If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Three, or if no decision has been rendered within ten (10) school days after he/she has first met with the Board, he/she may, within five (5) school days after a decision by the Board or fifteen (15) school days after he/she has first met with the Board, whichever is sooner, request in writing that the Chairman of the Grievance Committee submit his/her grievance to arbitration. If the Grievance Committee determines that the grievance is meritorious and that submitting it to arbitration is in the best interests of the school system, it may submit the grievance to arbitration within fifteen (15) school days after receipt of a request by the aggrieved person.

(b) Within ten (10) school days after such written notice of submission to arbitration, the Board and the Grievance Committee will agree to contact the WERC for a panel of five (5) arbitrators' names. Once the names have been received, the Board and the Association shall choose one to arbitrate the grievance. A coin toss shall determine whether the Board or the Association shall strike one (1) name first. Once the order is established, the Board and the Association shall alternate the striking process. The name left shall be the arbitrator.

(c) The arbitrator so selected will confer with the representatives of the Board and the Grievance Committee and hold hearings promptly and will issue his/her decision on a timely basis. The arbitrator's decision will be in writing and will set forth his/her findings of fact, reasoning, and conclusions of the issues submitted. The decision of the

arbitrator shall be final and binding on the parties.
(d) In the event there is a charge for the services of an arbitrator, including per diem expenses, if any, and/or actual and necessary travel and subsistence expenses, or for a transcript of the proceeding, the parties shall share the expenses equally.

5. Initiation of Group Grievances: (a) If, in the judgement of the Committee, a grievance affects a group or class of teachers, the Grievance Committee may submit such grievance in writing to the District Administrator directly and the processing of such grievance will be commenced at Level Two. The Grievance Committee may process such a grievance through all levels of the grievance procedure even though the aggrieved persons do not wish to do so.

D. Rights of Teachers to Representation

1. No reprisals of any kind will be taken by the Board of any member of the administration against any party in interest, any building representative, any member of the Grievance Committee, or any other participant in the grievance procedure by reason of such participation.

2. Any party in interest may be represented by himself/herself, or at his/her option, by a representative selected by the Association, when a teacher is not present to state his/her views at all stages of the grievance procedure.

E. Miscellaneous

1. Decisions rendered at Level One, Two, and Three of the grievance procedure will be in writing setting forth the decision and the reasons therefore and will be transmitted promptly to all parties in interest and to the Grievance Committee. Decisions rendered at Level Four will be in accordance with the procedures set forth in Section C., Paragraph 4 (c).

2. All documents, communications, and records dealing with the processing of a grievance will be filed separately from the personnel files of the participants.

3. The Board agrees to make available to the aggrieved person and his/her representative, all pertinent information

not privileged under law, in its possession or control and which is relevant to the issues raised by the grievance.

4. When it is necessary at Level Two, Three or Four for a representative, or not more than three (3) representatives, designated by the Association to attend a meeting or a hearing called by the District Administrator, or his/her designee, during the school day, the District Administrator's office shall so notify the principals of such Association representatives, and they shall be released without loss of pay for such time as their attendance is required at such meeting or hearing.

ARTICLE VII
DURATION

Savings Clause: If any Article or Section of this Master Contract or an Addendum thereto should be held invalid by operation of law or by any tribunal or competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal, the remainder of this contract and Addendum thereto shall not be affected thereby; and the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement of such (invalid) Article or Section.

The provisions of this agreement will be effective as of the first day of July, 1991, and shall continue and remain in full force and effect as binding on the parties until the thirtieth day of June, 1992.

This agreement shall not be extended orally and it is expressly understood that it shall expire on the date indicated.

5. The 1992-1993 successor agreement contains identical provisions with respect to the applicable contractual provisions set forth in Finding of Fact 4.

6. During the summer and late fall of the 1992-1993 school year, the District hired three teachers, Larry Manzetti, David Hauser, and Beth Hauser to teach in its special education program. None of the three were permanently certified to teach special education at the time. During their hiring interviews the District informed all three that they would need to earn credits to obtain temporary certification from the State Department of Public Instruction in order to teach and ultimately earn additional credits for permanent certification from the same agency. The three were also informed at that time that the District would not reimburse them for the credits necessary to obtain temporary certification. This condition was confirmed in the hiring letters of Manzetti and D. Hauser.

7. Manzetti was hired in mid-June of 1992 during the term of the 1991-

1992 agreement. Manzetti's letter of June 12, 1992, states as follows: "There are several factors that you need to be aware off as the contract is being drawn up. These include the stipulations that you will were certified (temporarily) by this fall, and that the District will not reimburse you for obtaining this certification..." Thereafter, the District sent Manzetti another letter dated September 18, 1992 which states as follows:

> This letter is intended to clear up any confusion as a result of the letter of June 12, 1992. In the second sentence of the second paragraph, I indicated that the conditions for employment were that you had to be certified and that the District was not going to reimburse you for attaining that certification. In that same sentence I had inserted the word (temporarily) which referred only to the certification for this year. It did not nor does it now imply that the balance of the certification is reimbursable.
>
> Both the Board of Education and myself have the same understanding and that is that you are responsible for becoming certified, which means that you are responsible for the payment of the credits earned this past summer as well as those for next summer, assuming you will complete the other 15 hours in the summer of 1993.
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> Delores has indicated that you will be moved to the BA + 12 column immediately since we have now received your grades for this summer.

8. D. Hauser was hired in late August - early September during a contractual hiatus. D. Hauser's letter dated September 10, 1992, indicates the following: "Since you do not have a degree as required for this position, you will be obligated to get that degree without reimbursement from the District..." B. Hauser testified that she was orally informed on or around October 7, 1992, at the time of her interview, that she was obligated to get a temporary license and that credits would not be reimbursed.

9. All three employes took classes relating to their certification and earned graduate level credits. All three submitted "Application for Approval of Credit" forms reflecting the course work completed. These forms are also used for lane advancement on the salary schedule and for the collective bargaining agreement's requirement that teachers earn six credits during a five-year period to request and approve credit reimbursement by the District. District Administrator Shay advised them that the credits would count for lane advancement on the salary schedule and towards the collective bargaining agreement's requirement that they earn six credits during a five-year period. On all of the forms submitted by the three employes, the District checked that these employes would not be reimbursed. Manzetti turned in his Application for Approval of Credit forms on or around March 16, 1993 and received notice that he would not be reimbursed on or around that date. D. Hauser submitted the form on or around April 28, 1993, and was advised around that date that his request for reimbursement was to be denied. Beth Hauser submitted her forms on April 23, 1993, May 6, 1993, and August 25, 1993. She was advised shortly after those dates that she was being denied reimbursement.

10. The denials of all requests for reimbursement with the exception of the August 25, 1993, request fell within the contract term of the 1992-1993 collective bargaining agreement and were subject to the provisions of that contract's final and binding grievance arbitration procedure.

11. The record does not reflect exactly when the Association became aware of the District's discussions with the new teachers or the reimbursement denials. None of the three employes or the Association grieved the denial of reimbursement for the credits.

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

CONCLUSIONS OF LAW

1. Because the parties' collective bargaining agreement which was ratified on March 22, 1993, contains a grievance procedure culminating in final and binding arbitration; because the two Section 111.70(3)(a)(4) allegations contained in the instant complaint are premised upon language contained in the 1992-1993 collective bargaining agreement, resolution of which should also resolve the statutory disputes; and because the Respondent has not objected to the filing and processing of a grievance with respect to the instant allegations, 2/ the Examiner will not assert jurisdiction but defer the instant dispute to the parties' agreed-upon procedure for resolution of such disputes.

2. Because the Examiner has deferred the instant dispute to grievance arbitration, she will not assert the Commission's jurisdiction to determine whether by its conduct the District unilaterally changed the status quo and/or individually bargained with the new teachers by denying them credit reimbursement for credits taken to receive the requisite temporary or permanent certification in violation of Sec. 111.70(3)(a)1 and 4, Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

That the complaint is deferred to the parties' 1992-93 grievance arbitration procedure. Further Commission action with respect to these claims is hereby held in abeyance. The Examiner will dismiss said complaint upon motion of the Association or the District upon a showing that the subject matter of the claimed Sec. 111.70(3)(a)(4) violations has been resolved in a manner not clearly repugnant to the merits of the Municipal Employment Relations Act. The Examiner will proceed to the merits of these allegations on the motion of the Association or District showing that said claims have not and will not be resolved in a fair and reasonably timely fashion with a determination on the merits through contractual grievance arbitration.

Dated at Madison, Wisconsin this 20th day of December, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Mary Jo Schiavoni, Examiner

1/ See District's brief, pp. 12 and 14.

WESTFIELD SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

BACKGROUND

The facts in this case are essentially undisputed. Prior to and during the 1992-1993 school year, the District hired three teachers for its special education program who did not possess the requisite certification. The District conditioned its hiring of these three individuals upon their earning sufficient credits to obtain temporary and eventually permanent certification from the Department of Public Instruction in Special Education. It stressed at the time of their hire that it would not reimburse them for the credits necessary to receive their temporary certification. By letter dated September 18, 1992, to one of the individuals, Larry Manzetti, the District made it clear that it would not reimburse him for any credits earned in attaining temporary or permanent certification. All three new teachers earned certain graduate credits towards their temporary or permanent certification which the District applied towards salary lane placement and towards fulfilling other contractual requirements, but the District denied the teacher's requests for reimbursement for these credits. The actual denials were made a short time after March 16, 1993, with respect to Manzetti, and after April 23, May 6, and August 25 with respect to B. Hauser, and after April 28 with respect to D. Hauser.

None of the affected individuals or the Association filed a grievance with respect to this matter. The Association did, however, file a prohibited practice complaint on April 30, 1993.

POSITIONS OF THE PARTIES:

Association

The Association makes three substantive arguments. First, it argues that the District was required to maintain the status quo during the contract hiatus with respect to mandatory subjects of bargaining, and that reimbursement is a mandatory subject of bargaining. Second, it contends that by advising employes at the time of their hire that they would not have rights guaranteed to them under the District's obligation to maintain the status quo, the District unilaterally changed the status quo and engaged in unlawful individual bargaining. Finally the Association argues that the District position that the employes were required to exhaust the grievance procedure is without merit.

With respect to the first argument, the Association points to the contract language, specifically Article IV, E. Fringe Benefits Pay Schedule on pp. 7, 8 entitled Professional Advancement. It asserts that the status quo, as established by this language, provided that the teachers would receive reimbursement for graduate level credits taken related to their certification. It had the obligation to maintain this status quo during the hiatus following the expiration of the 1991-92 collective bargaining agreement.

The Association further maintains that tuition reimbursement is primarily related to wages, hours, and conditions of employment and, therefore is a mandatory subject of bargaining. The District's action in advising the three new employes that they would not be reimbursed for graduate level credits, although these credits were related to their certification contravened the provisions of the expired collective bargaining agreement, and unilaterally changed the status quo. Citing testimony by District Administrator Shay that the only reason that the three were not reimbursed was because they were told during their interviews that they would not be reimbursed, the Association

stresses that an individual bargain is not a valid reason for failing to maintain the status quo.

According to the Association, although the District was free to select whomever it desired for employment, once hired the conditions of employment were already determined by the status quo in existence at the expiration of the agreement, which the District was required to maintain. Stressing that an employer could not decide arbitrarily to pay a new employe a wage rate other than that provided in the expired salary agreement because of his/her certification status, the Association argues that the instant situation is no different. Once hired as a bargaining unit member, the new employes' wages, hours, and working conditions are governed by the expired collective bargaining agreement.

The third argument addresses the District's contention that deferral to the grievance arbitration procedure is appropriate. In the Union's view, no collective bargaining agreement was in place. Because the predecessor had expired and the successor had not been ratified, it maintains that there is nothing to which the dispute can be deferred. The Association disputes the relevance of that fact that the parties later reached agreement on a successor agreement. Once the District had committed a prohibited practice, a statutory cause of action accrues. The issue is the District's duty to bargain, rather than its duty under the collective agreement. In the Association's opinion, a prohibited practice cause of action does not abate or become mooted due to an agreement on a successor contract. Rather the issue is a statutory one and deferral is not appropriate.

In its reply brief, the Association reiterates its position that deferral is not appropriate. Claiming that the parties have had an agreement for only a few months, it argues that although some of the individual forms were submitted during the brief period in which a contract was in effect, this occurred in only very limited instances. Furthermore, according to the Association, the District's denial with respect to a particular reimbursement request is not what is being challenged in this case, but rather the unilateral decision in the summer and fall of 1992 that reimbursement would not occur with respect to the new employes. The decision itself and notification to the Association both occurred during the contractual hiatus. The Association submits that it has appropriately raised this in the context of a status quo violation rather than as several separate grievances.

In response to an ancillary argument by the District that one of the three new teachers, David Hauser, who was not present at the hearing, should be dismissed from the case, the Association maintains that the District's argument is specious. Noting that there is no requirement that the elements of the case be proved through particular witnesses, it asserts that all of the facts alleged about D. Hauser were established through the District's own witness, which is appropriate under the circumstances.

The Association does not dispute the District's right to set minimum qualifications for applicants and it agrees that it is not illegal for an employer to "bargain" with applicants over matters not covered by the collective bargaining agreement. Here, however, it claims that an employer attempted to require the new employes to waive rights to which they were clearly entitled under an expired agreement as a pre-condition to hiring. In this case, the Association stresses, the District did more than just establish minimum qualifications, it required as a conditions of employment that prospective employees waive rights to which they were entitled by virtue of the status quo, a violation because this constitutes individual bargaining.

The Association requests that the three new teachers be made whole for

the District's violations.

District

The District makes numerous arguments to support its position that it did not violate MERA. It argues that the affected individuals, Manzetti, D. Hauser and B. Hauser were not employees within the meaning of the statute when they interviewed with Administrator Shay and were not employed by the District. Because they were applicants and not employes, the District claims that they are not covered by MERA.

The District, arguing in the alternative, also maintains that assuming the applicants are employes, establishing qualifications for the position is not a mandatory subject of bargaining. It contends that the District was merely establishing the selection criteria and minimum qualifications for the position among applicants who were not employes of the District. According to the District, because determining a job description and establishing minimum qualifications are permissive subjects of bargaining, it is not individual bargaining to require applicants to possess the minimum qualifications necessary for the job nor it is a violation of the law to require the applicants to obtain the necessary credits at their own expense.

With respect to the Association's status quo allegation, the District asserts that it did not violate the status quo because (a) the status quo does not apply to job applicants; and (b) the new teacher's requests were formally denied during the term of a collective bargaining agreement. Because the applicants are not municipal employes, the status quo doctrine does not apply. With respect to the merits of the alleged status quo violation, the District insists that it is the Association's duty to prove exactly what the status quo was and that it was changed. In this vein, it notes that the record is devoid of evidence that the District deviated from its established practice of approving credits and that this practice ever applied to job applicants.

A secondary argument exists with respect to the timing of the denial of the approval for credits. Pointing out that all of the denials with one single exception took place shortly after the forms for approval were submitted, the District asserts that the denials took place during the term of the 1992-1993 collective bargaining agreement 3/ which contains a binding arbitration provision. Pointing to its affirmative defense that the Association should have processed a grievance over this issue and not filed a prohibited practice complaint, the District stresses that it was incumbent upon the Association to exhaust the grievance procedure first.

In the District's view, the allegation of a change in the status quo is an effort to subvert the agreed-upon resolution process. This is especially the case where there is no showing by the Association that it would have been futile to utilize the grievance procedure. Moreover, there is no evidence that the District was unwilling to process a grievance nor that District raised objection(s) that might have indicated it was futile to pursue a grievance. Additionally, there is nothing in the collective bargaining agreement or the

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2/ The District maintains that any allegations with respect to changing the status quo with respect to the August 25, 1993, application for credit reimbursement fall outside of the pleading of the complaint and are beyond the scope of the Commission's authority.

parties' bargaining history which excludes this issue from arbitration. Should the Commission not find that exhaustion precludes consideration, the District believes that the case should be deferred to arbitration.

The District points out that the law in Wisconsin on deferral is well established and consistent with both federal substantive law and Wisconsin Supreme Court decisions. Noting that it has never raised technical objections to proceeding to arbitration nor is it raising such objections now, the District stresses that any objection which it has goes to the substance or merits of the matter.

Finally, the District submits that there is no separate violation of Section 111.70(3)(a)1. The denial of the credit reimbursement was based upon the firm and solid belief that job applicants are not entitled to be paid for credits necessary to secure basic licensure. The action taken by the district has nothing to do with protected concerted activity. Approval for lane change which was granted to two of the new teachers demonstrates the lack of anti-union animus. If there is any violation of Sec. 111.70(3)(a)1., it is a derivative violation.

The District claims that even though the Association is the nominal complainant in this matter, the real complainants are the three new teachers involved. According to the District, fairness, due process and the interest of justice require that a complaining party be present to testify how Respondent's action has harmed, injured or violated the law as applied to him. The failure of D. Hauser to appear at hearing deprived Respondent District of its opportunity to ask question of him. It therefore moves to exclude any testimony with regard to D. Hauser and to dismiss the portion of the complaint that are applicable to him.

In sum, the District maintains that the Association is attempting to establish that it has the right to represent job applicants who are not even minimally qualified to meet the requirements of the job. The District's willingness to hire them on a provisional certification, but only if they obtained the necessary credits and paid for them at their own expense, does not constitute a violation of the law. Because all three could have and should have filed a grievance regarding the District's actions, they were obligated to utilize the agreed-upon contractual dispute resolution procedure before filing the instant complaint. Alleging a change in the status quo is nothing more than an attempt to circumvent the agreed upon dispute resolution process and should be rejected.

The District requests that the complaint be dismissed in its entirety, or in the alternative, deferred to the parties' grievance-arbitration procedure.

DISCUSSION:

Before any discussion of the merits can take place, it is necessary to address the District's arguments that the dispute is subject to the grievance arbitration procedure of the parties' 1992-1993 collective bargaining agreement (with the single exception of the August 25, 1993 request for credit reimbursement which was made after the agreement expired.) The Association has argued that the dispute really arose during the contract hiatus which occurred from June 30, 1992 to mid-March of 1993 when the applicants were hired. It maintains that the District's action and initial announcement of said action occurred during the hiatus and that the District's action is a statutory rather than a contractual issue.

The facts, however, do not support the Association's contentions. On or around the first occasion that the District actually denied any of the new

teachers their request for reimbursement, and for all subsequent denials, with the exception of B. Hauser's last August 25, 1993 request, the most recent collective bargaining agreement was in effect. Accordingly, this Examiner concludes that a collective bargaining agreement was in effect at all times relevant except for the August 25 denial. When Manzetti received the first denial notification of his forms sometime on or after March 16, 1993. He could have timely filed a grievance upon ratification of the agreement because the grievance procedure contained a 10 school-day time period for filing a grievance. The record reflects that it was ratified by both parties to apply retroactively with respect to economic items on or around March 22, 1993. It is undisputed that none of the affected new teachers or the Association ever filed a grievance with respect to the credit reimbursement issue at any time.

Central to the Association's view of the case is its argument that the Commission is required to assert jurisdiction to consider the Section 111.70(3)(a)4 statutory allegations. It submits that it is improper for the Commission to dismiss or defer its complaints of the District violating its duty to bargain by finding the allegations to be contractual rather than statutory issues. While this Examiner understands the Association's position, the Commission has held that it will refuse to assert jurisdiction with respect to the merits of certain duty to bargain allegations under some circumstances where the Respondent objects to the assertion of said jurisdiction during the proceeding and offers to utilize the parties' contractual grievance arbitration machinery to resolve the dispute.

The Association does not allege that the District's actions with respect to credit reimbursement constitute a violation of Section 111.70(3)(a)5 and 1, Stats., largely because its theory of the case is that the District's actions occurred during the hiatus when no contract was in effect. It does, however, allege two violations of Section 111.70(3)(a)4 and 1, Stats., namely unlawful change in the status quo and individual bargaining. Both of these Section 111.70(3)(a)4 allegations are premised upon the language in the parties' agreement(s) as it applies to credit reimbursement. The Association relies exclusively upon that language to establish the status quo, and the District's alleged departure from the status quo. The individual bargaining allegation also requires an interpretation as to whether the District offered the new teachers something other than what the expired contract required with respect to credit reimbursement without bargaining with the Association. It is evident that interpretation of the applicable contract provision will be necessary in determining whether a violation occurred in both instances.

The District argues that because the Association did not file a grievance or grievances over the reimbursement issue and because there has been no showing that failure to do so may be futile, the allegations should be dismissed because the Association failed to exhaust its internal remedies, namely the grievance-arbitration machinery. While it is clear that the Commission will not assert jurisdiction with respect to Section 111.70(3)(a)5 allegations when this is the case 4/, the Commission has never abdicated its statutory responsibilities by either dismissing the complaint entirely or refusing to assert jurisdiction so that there is no forum to hear the merits where a Section 111.70(3)(a)4 claim was alleged. It has, however, held that Sec. 111.70(3)(a)4 refusal to bargain allegations will be deferred to the contract grievance arbitration forum in appropriate cases in which Respondent

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3/ Marathon County, Dec. No. 25757-B, C (Honeyman, 12/89), (WERC, 3/91); Wood County, Dec. No. 24799-A (Engmann, 7/88); in contrast, Grant County, Dec. No. 24154-B (Engmann, 10/88); City of Whitewater, Dec. No. 25768-A (McLaughlin, 3/89).

objects to Commission exercise of jurisdiction in the matter. 5/ Generally speaking, the Commission will defer where (1) the Respondent is willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator; (2) the collective bargaining agreement clearly addresses itself to the dispute; and (3) there is no important issue of law or policy involved. 6/

In the instant case, Respondent District in its brief states that it is willing to arbitrate and waive any technical objections to the filing of grievances which would prevent a decision on the merits from an arbitrator. Both allegations of statutory violations are firmly grounded in the credit reimbursement language of the 1992-1993 collective bargaining agreement and its predecessor. This dispute is not of such importance as to warrant Commission consideration under the circumstances. Accordingly deferral is warranted with respect to all of the applications for credit reimbursement with the exception of B. Hauser's August 25, 1993 credit reimbursement application.

With respect to B. Hauser's August 25, 1993 reimbursement application,

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4/ Brown County, Dec. No. 19314-B (WERC, 6/83); see also, Cedar Grove-Belgium Area School District, Dec. No. 25849-A (Burns, 12/89); and School District of Sheboygan, Dec. No. 26098-B (McGilligan, 1/90).

5/ Brown County, supra.; also City of Beloit (Fire Department), Dec. No. 25917-B (Crowley, 8/89).

Respondent is correct in its assertion that said evidence falls outside of the scope of the pleadings before this Examiner. The complaint was filed on April 30, 1993. Said reimbursement denial did not occur until four months after the filing of the complaint. The Association did not move to amend said complaint to include this additional allegation or to conform the pleadings to the evidence. It is, therefore, inappropriate for the Commission to consider it under the circumstances. 7/

Dated at Madison, Wisconsin this 20th day of December, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Mary Jo Schiavoni, Examiner

6/ Racine Unified School District, Dec. No. 20941-B (WERC, 1/85).