

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATIONAL ASSISTANTS
ASSOCIATION,

Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT
and THE BOARD OF EDUCATION OF
THE RACINE UNIFIED SCHOOL DISTRICT,

Respondents.

Case 140
No. 53281 MP-3101
Decision No. 28614-A

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, by Mr. Robert K. Weber, 514 Wisconsin Avenue, Racine, Wisconsin 53403, appearing on behalf of the Racine Educational Assistants Association.

Mr. Frank L. Johnson, Director of Employee Relations, 2220 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Racine Unified School District and the Board of Education of the Racine Unified School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Racine Educational Assistants Association filed a complaint with the Wisconsin Employment Relations Commission on October 17, 1995, alleging that the Racine Unified School District and the Board of Education of the Racine Unified School District had committed prohibited practices in violation of Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally implementing its proposal to increase the pay rates for the classification of Hearing Interpreter during a hiatus period on the basis of necessity which the Association asserts to be untrue and pretextual. On December 19, 1995, the Commission 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. Hearing on the complaint was held on February 20, 1996, in Racine, Wisconsin. The parties filed post-hearing briefs and reply briefs, the last of which were exchanged on April 19, 1996. The Examiner, having considered the evidence and arguments of counsel, makes and issues the

No. 28614-A

following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Racine Educational Assistants Association, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its offices are located at 516 Wisconsin Avenue, Racine, Wisconsin 53403. James Ennis is the Association's Executive Director and has acted on its behalf.

2. The Racine Unified School District, hereinafter referred to as the District, and the Board of Education of the District, hereinafter referred to as the Board, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal office is located at 2220 Northwestern Avenue, Racine, Wisconsin 53404. Keri Paulson is the District's Supervisor of Employee Relations and is the District's bargainer with the Association in the two units represented by the Association.

3. The Association is the certified exclusive collective bargaining representative of two bargaining units, one consisting of all full-time and part-time assistants (unlicensed), excluding supervisors and confidential employees (Unit I) and another consisting of licensed assistants (Unit II). Hearing Interpreters are included in Unit II.

4. The parties have collectively bargained a series of collective bargaining agreements, the last of which expired by its own terms on August 24, 1993. Unit II, at all times material herein, had been engaged in collective bargaining for a successor covering the 1993-95 school years and as of September 20, 1995, had not reached any agreement for 1993-95 nor for 1995-1997.

5. The 1991-93 collective bargaining agreement contained the following provisions:

Article IV

BOARD RIGHTS

The Board retains, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and invested in it by the laws and Constitution of the State of Wisconsin, and/or the United States, including, but without limiting the generality of the foregoing, the sole and exclusive right to hire, assign, transfer, promote, demote, discipline, and discharge all employees, to determine the basis of selection, retention, and promotion, to direct and supervise the performance of any and all work, to judge efficiency and competency in the performance of work assigned, to dismiss or lay off temporarily or permanently, and to subcontract any

and all work. The Board retains the right to determine the jurisdiction of the assistant's work.

...

Article XVI

COMPENSATION

...

2. General & Matron Assistants

...

- c. Effective with the first day that assistants are required to report to work of the 1992-93 school year:

...

Matron Assistant I will receive \$9.47 per hour.

Matron Assistant II will receive \$9.96 per hour.

Matron Assistant III will receive \$10.24 per hour.

Hearing Interpreters at all times material herein before September 20, 1995, were paid according to the Matron Assistant schedule.

6. On December, 1991, the Department of Public Instruction sent an Informational Update to all District Administrators which stated, in part, as follows:

... Effective July 1, 1992, a person hired as an educational interpreter as part of a child's special education program must hold an Educational Interpreter - Hearing Impaired - 884, PK-12 license. Attached is a copy of relevant sections of PI-3 that relate to the 884 license for your review. There are five basic areas within the PI-3 rules relating to the DPI licensing of educational interpreters which we would like to highlight:

- 1. The basic 56 semester credit course requirements for the

license.

2. The "grandparent" provision which allows persons who have been successfully employed by a school district as an educational interpreter at least 50% time for two semesters prior to July 1, 1992, or those who have graduated from a two year educational interpreter training program to receive the regular five year license.
3. A procedure for renewal of the license which, similar to that for teaching staff, requires six semester credits or the equivalent of continuing professional education clock hours or a combination of the two during the five years immediately preceeding (sic) application for renewal, and the manner in which these credits can be obtained.
4. A permit provision which provides a mechanism for districts to hire a person they believe qualified to do the job of an educational interpreter, but is not eligible for a regular license. A district must demonstrate that it was unable to fill the position with a fully-licensed person.
5. A provision is also provided in the code for substitute educational interpreters.

7. On October 15, 1992, Shelley Geiselman Kritek, a learning disability supervisor, sent the following memo to John Klas, the District's Director of Exceptional Education:

On Monday, September 28, 1992, I briefly met with several hearing impaired interpreters regarding their concerns relating to their job description and status as matron assistants. Due to changes in certification at the state level, HI interpreters must obtain 6 hours of credit every five years much like teachers and administrators. The concerns expressed at this meeting related to salary based on an educational assistant's job description. The job of an educational interpreter is quite different from an educational assistant and the interpreters feel that a new job description that more closely matches what they do is appropriate at this time. With a new certification and job description it would most likely follow that a different salary schedule be considered. Racine Unified School District

(Exceptional Education Department) is currently in its second year of a discretionary grant, the prime purpose of which is to delineate the role and responsibilities of an educational interpreter and to develop a working model for the evaluation of interpreters. It would be timely to discuss this issue in light of the new certification requirements and goals of the grant.

8. On March 7, 1995, Mary Jane Hernandez, Supervisor of Human Resources, sent the following Memorandum to Douglas Julius, Principal of Mitchell Elementary School with copies to Keri Paulson and Shelly Geiselman Kritek:

This is to confirm the result of the meeting that was held at Mitchell Elementary on Wednesday, March 1, 1995. Present at the meeting, in addition to the Mitchell Elementary School Hearing Impaired Program Staff, were Douglas Julius, Principal at Mitchell Elementary School and me. (It should be noted that neither Susan Henken, nor Susan Kelley were present at the meeting.)

The purpose of the meeting was to determine what hours of interpreting might be reassigned from current elementary interpreting staff to give Susan Kelley at least a three (3) hours interpreting schedule. At the start of the meeting, I was informed that Susan Kelley had accepted another interpreting job offer at a rate of \$25.00 per hour.

I was shocked to learn of Ms. Kelley's decision because, when she spoke to me on Monday, February 27, 1995, Ms. Kelley indicated that she would continue to work for Racine Unified School District if she could be assured that she would be providing actual interpreting services versus quasi clerical functions.

Discussion ensued as to the interpreting needs at Mitchell Elementary. I received a copy of the uncovered interpreting schedule. The teachers recommended that I contact SEWCIL to request interpreting services per the schedule. I told them that I would do so. The teaching staff and Mr. Julius reminded me that Racine Unified School District is not in compliance with meeting the needs of the hearing impaired students in so far (sic) as they are not receiving interpreting services throughout their school day; therefore, they do not have equal access to the same services that hearing students have. Additionally, they questioned the liability factor due

to the lack of services, i.e., no interpreter services on the playground.

Discussion then ensued as to the dissatisfaction of the hourly rate and working conditions of the interpreters at Mitchell Elementary versus those employed elsewhere. I stated that the District is limited in wages adjustments/increases that it can grant and/or negotiate due to the QEO imposed by the Governor's office. I

suggested that, if they wanted more information relevant to the limitations, perhaps Keri Paulson, Supervisor of Employee Relations would be willing to meet with them to explain the same.

The last point of information that was shared with me was that, unless the District is willing to offer our current hearing interpreters a more competitive hourly rate and working conditions, i.e., hourly breaks to rest their wrists, hands and fingers, they will all give their notice of resignation at the end of the 1994-95 school year. They stated that they would do so now; however, they have a concern for the well being of the students with whom they are assigned to work.

9. On March 21, 1995, Mary Jane Hernandez sent Keri Paulson the following memo:

Attached please find the information that I received from Carol Sauder, H.I. Program Teacher at Mitchell Elementary. The District cannot afford to be without these services; therefore, I urge you to approach the Board for the authority to offer comparable wages for our H.I. program interpreters.

Thank you.

On July 25, 1995, Mary Jane Hernandez sent Frank Johnson and Keri Paulson the following memo:

This is to request that you petition the Board of Education to allow the hearing interpreters to be compensated on a new and separate salary schedule for the following reasons:

I have been authorized to fill seven (7) hearing interpreter positions for the 1995-96 school year. In the 1994-95 school year, the District was unable to attract and retain hearing interpreters to fill all of the authorized positions. We limped through the 1994-95 school year with a staff of five (5) hearing interpreters. In doing so, the District was not meeting the educational needs of the hearing impaired students. Douglas Julius did an outstanding job of working with irate parents who were threatening to sue the District due to the lack of services to their hearing impaired children.

Additionally, one of the remaining five (5) hearing interpreters

recently brought me a statement from her physician; wherein, he is restricting her from working as an hearing interpreter because she has developed severe carpal tunnel syndrome due to the overuse of her hands and wrists. I now have a total of four (4) hearing interpreters to cover seven (7) positions. We may loose (sic) the remaining four (4) hearing interpreters to other entities who pay higher wages.

Hearing interpreters unlike other educational assistants, must fulfill post secondary educational requirements and be tested for level of proficiency to renew their certification. They are required to do so at their own cost.

The District currently pays hearing interpreters on the same scale as the matron staff, which starts at \$9.47 per hour. The mid point is \$9.96 per hour, while the upper end is \$10.24 per hour. Keri, please recall I previously wrote to share information relative to what other nearby school districts are paying their hearing interpreters. This information substantiates that we are not competitive. This is further reinforced by the fact that I have interviewed two well qualified hearing interpreters who indicated to me that they would consider working for the District if the wages were at a more competitive rate.

Based on the information presented herein, I strongly urge you to do everything possible to change their pay scale to something which is more in line with other school districts. I have forwarded all such information to Keri under a previous communication. I suggest a starting rate of \$14.00 per hour, mid of \$15.00 per hour, and \$16.00 per hour at the upper end.

I remain available to answer any questions regarding this matter. Thank you for any help you can give in this matter.

10. On August 17, 1995, Shelley Kritek, the Director of Exceptional Education, sent Keri Paulson the following memo:

It has come to my attention today that, once again, we are in desperate need of interpreters for the hearing impaired program. This has been a problem for the District for the past few years but it has reached a critical stage at this point in time and must be

addressed immediately if the Racine Unified School District is to stay in compliance with the federal law and state statutes. It is important for the Board of Education to understand what is at stake if this issue is not resolved.

Historically, the District has employed interpreters as educational assistants and placed them on the assistant salary schedule. Approximately three years ago the Wisconsin Department of Public Instruction required all interpreters to be certified and licensed (License 884--Educational interpreter (sic)). Interpreters with experience in the field could apply for the license based on their experience. Those interpreters new to the field have to enroll in a program at a training institution in order to be certified for interpreting in the educational setting. All interpreters must complete six credits of continuing education in the field every five years (much as teachers do) to renew their licensure. As you can see, the requirements for educational interpreters are much different than those required of an educational assistant. As such, the interpreters are in high demand and the rate of pay around the state reflects the level of expertise required. The information regarding rate of pay from districts surrounding Racine Unified (sic) has been compiled and provided to you by Mary Jane Hernandez. To put it briefly, Racine Unified (sic) is currently paying \$10.24 per hour to interpreters who have been in the District for as many as sixteen years. Surrounding districts are offering as much as \$15.00 per hour for beginning interpreters. At this rate, there is little doubt about why the District is in the position it finds itself now. **We should have at least seven Interpreters on staff to meet the needs of all our students with hearing impairments. We are faced with opening a school year with two Interpreters.**

The District operates its exceptional education programs under the Individuals with Disabilities Act (IDEA), a federal act which requires any district receiving federal dollars to operate its programs in compliance with the law. The essence of IDEA is to provide a free appropriate public education for all students identified with handicapping conditions. The law mandates that an appropriate education be provided in the least restrictive environment to meet the student's needs. The placement is based on the student's Individual Education Program (IEP) which establishes the goals and objectives for the student and the environment necessary to meet the student's needs. All of the students that have an identified handicapping

condition in the area of hearing impaired and receive services through the exceptional education department has an IEP. Current IEPs on students in the hearing impaired program have indicated that these students receive all or part of their instruction within the regular education classroom. In order for this to happen, the student must be able to communicate with the teacher and the other students in that classroom. The interpreter allows this portion of the student's IEP to be carried out. Because the IEP specifically describes the program for the student, the district would be in violation of IDEA and in noncompliance with the state statutes if the recommended program were not provided.

The impact of noncompliance could be felt by the district in several ways. By not providing a free appropriate public education for these students the District could be faced with a complaint filed at the state level. Parents also have the right to initiate a hearing whenever the District proposes to change the child's free appropriate public education. This could have a financial impact on the District, not only with the possibility of a loss of funding but could also include legal fees to be provided at District expense. At risk also is the possibility of a civil suit being filed against the District and District personnel in relation to Section 504 of the Rehabilitation Act of 1973, a civil rights act that protects those identified with handicapping conditions against discrimination. Settlement in a civil suit can be monetary.

As you can tell, the District is in a very precarious position in facing a shortage of interpreters who have already been identified as necessary to carry out the IEPs of students in the hearing impaired program. I believe if the District was able to offer salaries comparable to other districts in the area, we would not be faced with such a critical shortage. As a matter of fact, the District just completed a three year grant on the appropriate use of educational interpreters (in which District interpreters played a major part) which has become a model across the state (see attached). It does seem somewhat ironic that the District has set standards for use of interpreters, yet we are unable (sic) provide this service to our own students.

The bottom line is that the student's educational experiences will be compromised without the availability of interpreters to allow these students an opportunity to engage in communication in the regular

education environment in their schools. Interpreters do not take the place of teachers, but rather provide the vehicle for learning to occur for these children. I cannot stress enough the seriousness of this situation and the necessity to settle an issue immediately that has been at a crucial stage for quite some time.

If you need any additional information or input from this department, please do not hesitate to call on us. Thank you for attention to this matter and I anticipate hearing from you soon regarding the status of this situation.

11. Also on August 17, 1995, Mary Jane Hernandez sent Keri Paulson the following memo:

I'm heartsick at the extremely precarious situation that Racine Unified School District faces as we attempt to educate hearing impaired students without the ability to communicate with them. When last I wrote you, it was to express concern over the District's inability to attract and retain hearing interpreters.

The reality of the loss of these staff members due to our inability to compensate these highly valued employees for their marketable skills makes me ill!! Following are the startling facts on our hearing interpreter staff:

	<u>Employment Date</u>	<u>Hourly Rate</u>	<u>Status</u>
* Sue Henken	9/4/79	\$10.24	Contemplating Resignation
* Peggy Dietrich*	8/28/85	\$10.24	Resigned 8/17/95
* Lisa Miller*	1/18/88	\$10.24	Transferred 8/10/95 (out of HI)
* Sue Kelley*	10/10/94	\$10.24	Resigned 3/16/95
* Maria Schrubbe	10/01/90	\$10.24	Trained to interpret on the college level. (We may soon loose (sic) her!)

*Vacancies unable to be filled for the start of the 1995-96 school year.

As of this writing, we have two individuals to cover for seven (7) positions. This is absolutely ludicrous. Please do whatever you can to communicate the desperateness of this matter to the Board of

Education.

We need a minimum wage scale as follows:

- * \$14.00 per hour -- Starting Rate
- * \$15.00 per hour -- After Two (2) Years
- * \$16.00 per hour -- After Four (4) Years

Please remember, I gave you a note indicating that one of our hearing interpreter candidates received a job offer with the Waukesha School District starting at approximately \$15.85 per hour, plus an attractive benefit package.

We must be competitive if we are to educate our hearing impaired students. I remain available should you have need for further clarification regarding this matter.

12. The District and the Union had informal discussions about the wage rate for Hearing Interpreters throughout 1995. On August 3, 1995, Paulson and Ennis had a discussion about Hearing Interpreters' compensation and Ennis told Paulson to make a reasonable proposal on the subject to him. On August 24, 1995, Paulson sent Ennis the following proposal:

As you know from previous conversations, the District is experiencing a serious problem in attracting and holding qualified hearing interpreters. The reasons that we are having this difficulty is simply the law of supply and demand as well as the fact that these people are paid on the educational assistants' pay scale. The educational assistants' pay scale is able to attract a sufficient supply of educational assistants, however, it is not able to attract the necessary number of hearing interpreters. The District has many students that are in need of these vital services. In fact, there are seven (7) hearing interpreters and the District is only able to fill two (2). The outlook for immediate change is, quite frankly, bleak. A review of comparable wages for similar employees shows us that the hearing interpreter pay scale is too low. Therefore, to correct this situation, the District proposes that we remove the hearing interpreters from the pay scales in the current collective bargaining agreement and establish a special 4 step pay scale for these employees. The proposed 1995-96 schedule would be as follows:

1st year:	\$12.50 per hour
2nd year:	\$13.50 per hour
3rd year:	\$14.50 per hour
4th year:	\$15.50 per hour

Please give this your immediate consideration because, with the start of the new school year, this problem will be at a crisis stage.

It would be appreciated if you would give me the Association's response within the next five (5) working days.

Thank you for your anticipated cooperation.

13. On August 25, 1995, Ennis responded as follows:

As you are aware from previous conversations **assistants are experiencing serious problems from your refusal to grant steps and levels or a reasonable salary increase.**

Your statement at the REAA/RUSD negotiations session was that "steps and levels would not be granted by the Board to put pressure on the assistants to settle for a lower salary."

Hearing Interpreters are part of the assistants unit and have had the wage freeze that everyone else has had since 1993. Hearing Interpreters and all assistants will settle together and there is no justification for the board to act for one group of assistants and not all.

We remind you that we have requested that the WERC supply mediators and that they have complied by the appointment of mediators and they are in the process of scheduling mediation sessions.

REAA will be more than willing to discuss your proposal for Hearing Interpreters at the first session of mediation.

REAA reminds you that there is a pay scale for Hearing Interpreters as there is for all assistants and that your problem is the same problem for the assistants--both parties need a contract and neither party can act unilaterally.

14. On August 28, 1995, Paulson sent Ennis the following by fax:

This is in response to your August 25, 1995 letter.

You stated that *"assistants are experiencing serious problems from your refusal to grant steps and levels or a reasonable salary increase."* I find this pronouncement perplexing since you only met to bargain for less than thirty (30) minutes and only made two (2) proposals, one of them being your initial proposal. This short period of bargaining and refusal to make counter proposals prior to you breaking off negotiations certainly did not give the parties a positive climate in which to resolve the contract. Additionally, your quotation of my statement relative to step and level increases was totally inaccurate.

As you know from my letter, hiring hearing interpreters has, out of necessity, become a priority issue with the District. The District has not had success in filling these critical positions mainly because of the prevailing wage rate for this type of employment.

In your letter you state that this issue should become a topic of discussion at our first mediation session. I agree. However, our first mediation session will most likely be held on October 9, 1995, which, in my opinion, would be too late to help the students that need these services every day.

For the good of Racine education, please reconsider the District's proposal. Do not hold hearing impaired students hostage for the purpose of attempting to obtain concessions somewhere else in the collective bargaining agreement.

On August 29, 1995, Paulson sent Ennis the following by fax:

This is a request for an emergency bargaining session this afternoon to discuss hearing intepreter (sic) wages. As you know, the District has been unable to hire hearing intepreters (sic) in the quantity necessary to fulfill its obligation to its students.

The District has determined that our inability to attract and retain qualified hearing intepreters (sic) is directly related to the wage that the District is currently paying this category of employee. Other comparable employers are offering a wage significantly higher.

Please confirm as soon as possible that you will be available for such negotiations this afternoon.

Ennis responded on August 29, 1995, as follows:

There is no emergency when hearing Interpreters can be hired and receive their salary increase along with all assistants. We would note that you have hired over 100 assistants since the wages, steps and levels have been frozen by the Board.

In our letter of August 25, 1995 we agreed to meet at our next meeting. In fact, per your letter of August 25, 1995 you have available Monday October 9, 1995 or Thursday November 9, 1995 (letter attached). **We continue to be willing to deal with your emergency at your next available negotiations date of October 9, 1995.**

I am authorized to discuss with you the data you refer to in your letter - "Other comparable employers are offering a wage significantly higher." if you will supply hard copy data backing up these statements. **In fact I would be willing to meet as early as 3:30 PM today - again informally - to review your data.**

If your data is as you state - **we may be willing to reach a rapid and joint solution to your problem.**

We would remind you that an issue similar to this was determined on February 20, 1987 in favor of the Association (attached). This case did in part deal with the issue of "necessity" and the Association takes the position that the Racine Board of Education is required to follow the principles of this decision in all of their labor relations.

If you are willing to meet as offered above, please make rapid contact.

The parties met on August 29, 1995, but reached no agreement on the wage rate for Hearing Interpreters.

15. On August 30, 1995, Paulson sent Ennis the following memo via fax:

During the meeting yesterday, you indicated a willingness to consider bargaining a wage schedule for hearing interpreters separate from wage schedules for other educational assistants. You seemed to recognize that the District's pay scale was the main factor in the District not being able to fill hearing interpreter vacancies.

However, you qualified your willingness to do this by stating that you needed written confirmation of hearing interpreter wage rates in other school districts and proposed contract language which would show how a hearing interpreter would be placed and advanced on the pay scale.

Attached is a listing of the comparables and the proposed language. Please let me know as soon as possible when you are ready to meet on this issue. Time is of the essence in resolving this matter because each school day that passes potentially deprives a hearing impaired child of his/her educational opportunities.

May I suggest tomorrow afternoon, following our scheduled arbitration.

Attached to the memo was the following proposal:

Add the following language to Article XVI:

Section 1. [re-number remaining subsections]

- e. Hearing interpreters who have been employed by the District for at least one school year, will receive one step advancement on the date that the interpreters are first required to report to work at the beginning of each school year. This will not apply to any interpreter who is at the top step.
 - 1. Hearing Interpreters new to the District will be paid at the rate set out in step one for all regular hours worked.

2. Hearing Interpreters that are District employees as of the date this section of the agreement becomes effective will be placed at the appropriate step depending on their work experience with the District.

Section 3. Hearing Interpreters

- a. Effective with the first day that the hearing interpreters are required to report to work of the 1995-96 school year:

Step I	\$12.50 per hour
Step II	\$13.50 per hour
Step III	\$14.50 per hour
Step IV	\$15.50 per hour

16. On September 5, 1995, Ennis responded to Paulson as follows:

The following is the REAA's counter proposal to yours of August 30, 1995.

- A. Effective retroactive to August 26, 1993 Hearing Interpreters will have the following salary schedule.

Step I	\$13.00 per hour
Step II	\$14.00 per hour
Step III	\$15.00 per hour
Step IV	\$16.00 per hour

- B. Hearing Interpreters new to the District will be paid at the rate based upon previous experience as a Hearing Interpreter in the public schools of the State of Wisconsin.
- C. The Board agrees to pay retroactivity no later than the next pay period after the signing of this agreement.
- D. Until there is settlement of the REAA Bargaining Unit II (Licensed Assistants) all other language of the current agreement shall remain in force.

- E. At the time of settlement of REAA Unit II the salary schedule and language above shall become a part of the agreement.
- F. This agreement waives no other rights and shall be the salary agreement for Hearing Interpreters through June 30, 1997.

Based upon the needs of the Board, the REAA makes this proposal with the understanding that upon date of agreement that new Hearing Interpreters will be employed under this schedule.

That same day, Paulson responded to Ennis as follows:

Thank you for you (sic) counter proposal dated and received today. The attached documents are the District's response to your proposal. As you will see, the District attempted to address each of the concerns as outlined in your counter proposal.

I would appreciate it if you would consider and respond to the District's proposal within the next twenty-four (24) hours. As you know, time is of the essence.

Thank you for your anticipated cooperation.

The attached documents were:

MEMORANDUM OF UNDERSTANDING Hearing Interpreters

1. Hearing interpreters that are District employees as of the date this section of the agreement becomes effective will be placed at the appropriate step depending on their work experience with the District.
2. The Board agrees to pay retroactivity to the educational assistant hearing interpreter(s) in the following manner:

- a. 1993-94 and 1994-95 retroactivity, if any, will be calculated based upon the hourly rate paid during these years and increased by the same percentage as agreed to for other bargaining unit members. This retroactivity will be paid at the same time as other bargaining unit members.
 - b. 1995-96 retroactivity will be figured according to the 1995-96 salary schedule and paid no later than September 29, 1995.
3. Until the time that a successor agreement is reached with REAA Bargaining Unit II (Licensed Assistants) all other language of the current agreement shall remain in force except for those provisions that state that they sunset at the end of the agreement.
4. At the time of contract settlement of REAA Unit II, the salary schedule(s) and language attached hereto shall be incorporated into the successor agreement.
5. This agreement waves (sic) no other rights and shall be the salary agreement for hearing interpreters through June 30, 1997.

RACINE EDUCATION ASSOCIATION

RACINE UNIFIED SCHOOL DISTRICT

JAMES J. ENNIS
Executive Director

KERI A. PAULSON
Employee Relations Supervisor

Date

Date

Attachment 1

LANGUAGE TO BE INCLUDED IN THE SUCCESSOR LABOR AGREEMENT

Add the following language to Article XVI

Section 1. [re-number remaining subsections]

- e. Hearing interpreters who have been employed by the District for at least one school year, will receive one step advancement on the date that the interpreters are first required to report to work at the beginning of each school year. This will not apply to any interpreter who is at the top step.

- 1. Hearing interpreters new to the District will be paid at the rate set out in step one for all regular hours worked.

Section 3. Hearing Interpreters

- a. Effective with the first day that the hearing interpreters are required to report to work of the 1995-96 school year:

Step one	\$12.50 per hour
Step two	\$13.50 per hour
Step three	\$14.50 per hour
Step four	\$15.50 per hour

- b. Effective with the first day that the hearing interpreters are required to report to work of the 1996-97 school year:

Step one	\$13.00 per hour
Step two	\$14.00 per hour
Step three	\$15.00 per hour
Step four	\$16.00 per hour

17. On September 5, 1995, Mary Jane Hernandez sent the following memo to the District's Superintendent:

This is to give you an updated report on the Hearing Interpreters which as you know has been in a critical state, due to our inability to attract and retain qualified Hearing Interpreters.

* I have interviewed a total of seven (7) Hearing Interpreter

candidates, all of whom are aware of the proposed hourly rates.

- * I referred the candidates to the Hearing Interpreter staff so that they could assess the candidates (sic) interpreting skills.
- * A meeting has been scheduled for 3:00 p.m. on Wednesday, September 6, 1995 to review which candidate is the best fit for the vacancies.
- * Until such time as the Interpreters are hired, the vacancies will be filled by SEWCIL Interpreters at \$30.00 per hour.

The District is now in a better position of filling its Hearing Interpreter vacancies than ever before. The candidates have been told that we are in the process of negotiating the proposed hourly rates. I shudder to think where the District might be if I were not able to discuss a proposed wage with our candidates.

Please extend my appreciation to the Board of Education for their willingness to address this matter at such a crucial time. I remain available should you require further information regarding this matter.

18. Sometime after September 5, 1995, Paulson met Ennis by chance and Ennis stated he received the September 5 proposal and he was not going to be threatened or respond and was not moving off his previous proposal.

19. On September 15, 1995, Paulson sent the following memo to Ennis by fax:

As you are aware, we have been negotiating hourly pay raises for Hearing Interpreters. This special consideration was necessitated because of the extreme difficulty the District has had recruiting Hearing Interpreters. On September 5, 1995, I sent you a letter with the District's counter proposal. I indicated to you that time was of the essence. As of today, you have not responded to that letter. Therefore, I consider that our negotiations are at an impasse and that because of necessity, the District is putting you on notice that it will implement our last proposal concerning Hearing Interpreters as of September 20, 1995.

It is understood that we will continue to bargain pay for the Hearing Interpreters and in the event we reach agreement different from our implemented proposal, we will adjust such accordingly.

It is unfortunate that this action had to be taken, but as you know, the first priority of this school district is to provide the necessary education to all of the District's students.

After September 20, 1995, the District implemented its last proposal.

20. On October 10, 1995, Ennis sent Paulson the following letter:

This is to notify you that the Association does not believe a "necessity" exists (sic) -- contrary to your assertion of September 15, 1995 -- for unilaterally implementing your proposal of September 5, 1995. Certainly, there is no impasse.

As you know, the Association has bargained in good faith over the issue of Hearing Interpreters' current wage schedule -- even though the District and the Association have no contract for even the 1993-95 period, and despite the fact that during the 1993-95 contract period, the District failed to alert the Association of any recruiting difficulties.

The Association and the District have a mediation session scheduled for November 9, 1995 for Unit II employees. The Association would be willing -- if we cannot reach an agreement prior to that time on this issue -- to take the Hearing Interpreters up as the first item of business. In the interim, the Association remains willing to bargaining (sic) over the wage schedule and its retroactivity.

On the other hand, the Association does not intend to play into your contrived and pretextual emergency. From the Association's perspective, it was your poor planning, failure to timely notify the Association or address the issue, and the unwillingness to reach any agreement that has resulted in the current situation, (sic)

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

CONCLUSION OF LAW

1. The District by unilaterally implementing a wage schedule and increase for Hearing Interpreters violated the status quo and has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats.

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

ORDER 1/

IT IS ORDERED that the Racine Unified School District and the Board of Education of the Racine Unified School District, its officers and agents, shall immediately:

1. Cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by changing the status quo during the hiatus period between the expiration of a collective bargaining agreement and a successor contract by unilaterally implementing a wage schedule and increase for bargaining unit employees.

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

2. Take the following affirmative action which the Examiner finds will effectuate the policies and purposes of the Municipal Employment Relations Act.
 - a. Immediately restore the status quo ante and bargain collectively with the Racine Educational Assistants Association regarding wage schedules and increases.
 - b. Notify all of its employees by posting, in conspicuous places on its premises where employees are employed, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by an official of the District and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.
 - c. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 18th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

1. WE WILL NOT commit unlawful unilateral changes in the wage schedule and wage rates for employees in the bargaining unit represented by the Racine Educational Assistants Association.
2. WE WILL immediately restore the status quo ante and, upon request, will bargain with the Racine Educational Assistants Association regarding wage schedules and wage rates.
3. WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by the Municipal Employment Relations Act.

By _____
For the School District of Racine

Date _____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF

AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

RACINE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating this proceeding, the Association alleged that the District violated Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally implementing a pay schedule and pay increase for Hearing Interpreters in violation of the status quo. The District answered the complaint denying that it had committed any prohibited practices and affirmatively asserted that implementation was a necessity and the Association waived its right to bargain because it would not reject or respond to the District's last offer and time was of the essence.

UNION'S POSITION

The Union contends that the District violated MERA by engaging in bad faith bargaining and by unilaterally implementing a salary increase in the absence of necessity. It submits that the District intended to implement a wage increase for Hearing Interpreters whether or not it was able to reach an agreement with the Association. It claims that the testimony established that prior to any proposals made to the Association, the District had contacted area colleges to offer graduates \$12.50 per hour, and even before the Association had made any counterproposal, a job applicant had been offered a job at \$12.50 per hour. It observes that the conclusion is compelled that the decision to implement had been made before "negotiations" had begun. It argues that the District engaged in surface bargaining, imposed timelines, refused to compromise on retroactivity and insisted on piecemeal bargaining for a period of time the parties had not even commenced negotiations.

The Association submits that there was no necessity for implementation. It takes the position that the District's assertion of "impasse" is irrelevant because it is not applicable to interest arbitration situations. The Association insists that the District did not prove necessity and this defense is pretextual. It states that any problems in recruiting Hearing Interpreters were easily foreseeable and preventable and were of the District's own making. It points out that the District was aware of the problem for years and in October, 1992, Shelly Geiselman Kritek had put the District on notice that changes in Wisconsin licensing would require a different salary schedule. It claims that it is surprising that the District never made a proposal regarding a salary increase for Hearing Interpreters despite the fact the parties were negotiating for a successor bargaining agreement to that which expired in August, 1993. It observes that in March, 1995, and again in July, 1995, Mary Jane Hernandez urged the District's negotiator to approach the Board to offer competitive rates for Hearing Interpreters. Also, it refers to Ms. Kritek's advice to the negotiator that there was a desperate need of interpreters. It submits that it is clear that this was an ongoing problem for some time which the District refused to address or remedy. It argues that the District

can hardly maintain that its failure to make an initial proposal until the imminent start of the school year somehow gave rise to a right to implement its proposal. The Association maintains it was not dilatory as it made a counterproposal less than two weeks after the district's initial proposal. The Association maintains that the difference in offers was insignificant and not grave enough to allow the District to implement its own offer. It alleges that the District's actions were not a necessity and its implementation was willful and avoidable. It submits that the District's conduct constituted bad faith and represented a per se violation of Secs. 111.70(3)(a)1 and 4, Stats. It asks for a finding that the District committed a prohibited practice and appropriate remedial relief be ordered.

DISTRICT'S POSITION

The District contends that the Association waived its right to bargain over implementation. It claims that waiver is a recognized defense and the record demonstrates that the Association had no desire to reach an agreement on wage schedule for Hearing Interpreters. It argues that the Association merely wanted to take advantage of the pressure the District experienced in not securing Hearing Interpreters. It submits that the District's negotiator, Keri Paulson, testified that as early as August 3, 1995, the Association recognized the problem of recruiting Hearing Interpreters because of low wages. It notes that Paulson testified that at one time both parties were agreeing that August, 1995, would be the appropriate starting time of the Hearing Interpreter wage increase. It points out that Paulson sent a formal proposal dated August 24, 1995, emphasizing the need for immediate consideration but the Association's response was to suggest a raise in the wages of all educational assistants. It alleges that the Association took further advantage by suggesting the matter be taken up in mediation scheduled for October, 1995, and to turn the screw even more, the Association warned the District not to act unilaterally. It insists that the Association did not care to solve the problem but to pressure the District into a more favorable resolution of the educational assistants contract. It observes that the District then responded and pleaded with the Association not to hold the hearing impaired students as hostages but the Association reiterated its previous position and requested information on comparables which the District supplied. It contends that the Association's counterproposal on September 5, 1995, seeking retroactive pay to September, 1993, was one the Association knew the District could not accept because the District would have to give up its ability to implement a QEO. The District claims that by making such a proposal, the Association demonstrated that it had no intent to bargain a solution to the District's problem and, in effect, waived its right to bargain. The District points out that it made a further proposal and Ennis told Paulson that he wasn't going to respond and that he was not going to move from the Association's last proposal. It notes that the Association did not request another meeting nor respond to the District's letter stating that September 20, 1995, would be the implementation date. It urges that the totality of this conduct constitutes waiver by the Association.

The District contends that there was a necessity to implement its proposal. It asserts that the District has a legal obligation to provide appropriate education to all students and this need had reached a crises stage as it had seven positions and only two filled just prior to the start of the

1995-96 school year. It alleges that the District attempted to recruit from every source including temporary people from SEWCIL at \$28.50 per hour, but none were available and new recruits were not interested at \$9.47 per hour. The District argues that after it exhausted all means to retain new employees, it embarked on an aggressive negotiation campaign with the Association but the Association's response was perfunctory and opportunistic and made a "Catch 22" proposal which it knew the District would not accept because it would have to give up its QEO rights. It claims the Association gave the District a "take it or leave it" proposal and the District reasonably concluded the parties were at impasse and did the only thing it could do, i.e., implement its proposal. It concludes that the Association waived its right to bargain and the District out of necessity had no choice but to implement the wage scale it did.

ASSOCIATION'S REPLY

The Association contends that the record demonstrates the District's bad faith bargaining, not a waiver by the Association. It submits that there is a high burden of proof relative to a waiver defense and the District failed in its burden. It argues that the District failed to make a proposal until the eleventh hour then used the beginning of school as a pretextual necessity to unilateral implement its proposal. The Association insists that the District illegally bargained with the individual Hearing Interpreters and after negotiations with the Association began, the District's offers were regressive and confusing. As to the QEO arguments, it maintains the District's arguments on QEO waiver are simply assertions and not the law, and the District chose to implement a QEO although it was not required to do so.

As to the necessity defense, the Association observes that the District is asserting a self-serving, self-created emergency. It submits that the District was aware of the problem for years and chose to ignore it, at least at the bargaining table, and its characterization of last minute demands preceding implementation of already promised rates to new hires, as an "aggressive negotiation campaign," is disingenuous. It asks for a finding and order consistent with the relief prayed for in its complaint.

DISTRICT'S REPLY

The District denies that it is totally to blame for the Hearing Interpreter recruiting problems and points out that it has been able to cope with this during the 1994-95 school year. It asserts that it wasn't until the end of the 1994-95 school year that recruitment based on the old rate proved fruitless. It contends that Paulson and Ennis had discussed the problem months before the matter reached a crisis stage but the evidence fails to support a conclusion that the parties would have reached any agreement had they exchanged proposals a year earlier. It further states that the evidence fails to show that the District was dilatory.

The District asserts that the cause of the problem does not eliminate the fact that it needed Hearing Interpreters at the beginning of the 1995-96 school year to fulfill its legal obligation to the District's deaf children. It submits that the only viable solution was to increase wages to the \$12.00 to \$13.00 range. The District observes that the parties differed on how to provide the wage increase. It claims that as 1993-95 had passed, no need for a higher salary was required those years and the Association's proposal on retroactivity made no sense. It submits that it would lose its right to impose a QEO for 1993-95 and the Association's submitting a proposal it knew the District would not accept and by refusing to bargain further constituted a waiver of its right to bargain.

The District claims that had it not raised its rates, it may have had only one Hearing Interpreter for 1995-96. It argues that the Association was not bargaining in good faith but was engaging in extortion of the worst kind. It insists that it had no reasonable choice but to implement. The District states that it retained the right to assert the waiver defense and it requests that the defenses of waiver and/or necessity were applicable in the current situation.

DISCUSSION

It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 2/ In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 3/

The wage increase for Hearing Interpreters is clearly a unilateral change in the status quo wages and it occurred in a contractual hiatus and is a per se violation absent a valid defense. The District has asserted two defenses: waiver and necessity.

As to the waiver defense, the District asserts that after the District made its last proposal the Association said it wasn't going to respond and did not respond. In a hiatus period, such conduct does not constitute waiver. The Commission has held that the status quo doctrine entitles the parties to retain those rights and privileges in existence when the old contract expired which are primarily related to wages, hours and conditions of employment while they bargain over what rights

2/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) at 12; Green County, Dec. No. 20308-B (WERC, 11/84) at 18-19; and School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85) at 14.

3/ School District of Wisconsin Rapids, supra, at 14.

they will have under the next contract. 4/ In short, the parties could bargain

4/ Village of Saukville, Dec. No. 28032-B (WERC, 3/96).

over wages to be included in a successor contract but they can't be implemented until agreement is reached or an interest arbitration award is received. The Commission, relying on its holding in St. Croix Falls School District, 5/ stated the following:

. . . , the employer is entitled to force the union to bargain over new provisions in a successor agreement which retroactively change the employer's rights and obligations as to mandatory subjects of bargaining. But **during** any such employer effort, the union **is not** obligated to bargain over loss of existing status quo protections during the contract hiatus. There is only one bite at the apple. 6/

Here, the Union was entitled to retain its existing status quo position until a successor agreement was reached and thus there was no waiver defense to the District's unilateral implementation of the wage rate for Hearing Interpreters.

The second defense is necessity. The Commission has recognized that "necessity" is a valid defense to a modification of the status quo during a contract hiatus. 7/ The District claims that its inability to recruit Hearing Interpreters and the imminent start of the school year constituted sufficient necessity to implement a wage increase for Hearing Interpreters. The cases cited by the District to support its necessity defense have both been set aside by the Commission and the respective complaints dismissed. 8/ Arguably, these two cases involved permissive subjects which are not applicable to the instant case. The District has asserted that it bargained and reached impasse, however, the Commission has held that impasse is not a basis on which implementation can occur except during the term of a contract and not during a hiatus which is the situation in the instant case. 9/ The Commission has recognized necessity in a case involving a student evaluation program which had to be implemented before the start of school. 10/ School calendar has to be implemented if school starts before the parties reach agreement on a successor contract. On the

5/ Dec. No. 27215-D (WERC, 7/93), aff'd 180 Wis.2d 671 (1994).

6/ Village of Saukville, Dec. No. 28032-B (WERC, 3/96).

7/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

8/ City of Eau Claire, Dec. No. 22795-E (WERC, 3/89); County of Dane, Dec. No. 22681-B (WERC, 1/88).

9/ Green County, Dec. No. 20308-B (WERC, 11/94).

10/ Board of School Directors of Milwaukee, Dec. No. 15829-D,C (1980).

other hand, the Commission has held that economic savings does not constitute "necessity." In Racine Unified School District, Dec. No. 23904-B (WERC, 9/87), the Commission held that implementation of a wage increase to receive state aids was not a necessity. In Wisconsin Dells School District, Dec. No. 25997-B (Shaw, 4/90) aff'd Dec. No. 25997-C (WERC, 8/90), it was held that the discontinuance of hot lunches did not constitute business necessity. In St. Croix Falls School District, Dec. No. 27215-B (Burns, 1/93) aff'd Dec. No. 27215-D (WERC, 7/93) aff'd 186 Wis.2d 671 (1994), change in sick leave policy did not constitute necessity. In Village of Saukville, Dec. No. 28032-B (WERC, 3/96), the Commission held that savings realized by subcontracting could not be equated with necessity.

In the instant case, the District has the right to subcontract any and all work. 11/ The District could have subcontracted with SEWCIL, later named Independence First, for Hearing Interpreters. 12/ Contrary to the District's assurances, there apparently were Hearing Interpreters available from SEWCIL as the record fails to establish that they were not and Mary Jane Hernandez in her September 5, 1995 letter to the Superintendent states that until such times as Interpreters are hired, the vacancies will be filled by SEWCIL Interpreters at \$30.00 per hour. 13/ The District could have continued to use SEWCIL Interpreters until it reached agreement with the Union but implementation would obviously result in some savings. These savings do not however equate with necessity. 14/ Thus, the defense of necessity has not been shown by the District and it is concluded that the unilateral implementation of the Hearing Interpreters' wage schedule is a per se violation of its duty to bargain. The District has been ordered to cease and desist its unilaterally changing the status quo and has been directed to restore the status quo ante as well as the standard posting and notification requirements.

Dated at Madison, Wisconsin, this 18th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

11/ Ex. 1.

12/ Ex. 25.

13/ Ex. 27, Tr. 61.

14/ See Racine Unified School District, Dec. No. 23904-B (WERC, 9/87) where the Commission held that a very good business decision does not establish necessity.