STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PRAIRIE DU CHIEN EDUCATION ASSOCIATION, Complainant,

vs.

PRAIRIE DU CHIEN SCHOOL DISTRICT, Respondent.

Case 18
No. 60826
MP-3794

Decision No. 30301-A

Appearances:

Mr. H. Leroy Roberts, Executive Director, South West Education Association, 960 North Washington Street, P.O. Box 722, Platteville, Wisconsin 53818-0722, appearing on behalf of the Complainant Association.

Mr. Mark Herman, Lathrop & Clark, Attorneys at Law, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Respondent District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 28, 2002, the Prairie du Chien Education Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Prairie du Chien School District. The complaint alleged that the District committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., when it refused to process grievances during a contract hiatus period. The complaint further alleged that the District committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 and 1, Stats., when it made unilateral changes in the status quo in various areas. While the complaint did not explicitly identify the various areas involved, the following is a listing of the various areas implicitly referenced in the complaint where the District allegedly made unilateral changes in the status quo: 1) the assignment of duties; 2) combined classes; 3) preparation time; 4) emergency leave; 5) class size; 6) teacher load; 7) mileage reimbursement and 8) substitute

pay. Intertwined in these status quo contentions were eight separate grievances. They were the following: 1) the assignment of duties grievance; 2) the combined classes grievance; 3) the Buehler preparation time grievance; 4) the Yeomans-Petrowitz emergency leave grievance; 5) the Stovey grievance; 6) the Mezera grievance; 7) the mileage grievance; and 8) the Rogers emergency leave grievance. By framing the complaint this way (i.e. characterizing the District's actions in these eight grievances as status quo violations), this part of the complaint essentially sought to have the merits of these eight grievances adjudicated by the WERC.

On March 27, 2002, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On April 29, 2002, the District filed an Answer to the complaint. Hearing on the complaint was held on May 10, June 25 and 26, 2002, in Prairie du Chien, Wisconsin. During the course of the hearing, the parties resolved the portion of the complaint dealing with the District's refusal to process grievances during a contract hiatus period. They also resolved some of the aforementioned grievances, and agreed that just the following four grievances would be litigated herein: 1) the Mezera grievance; 2) the Yeomans-Petrowitz emergency leave grievance; 3) the Rogers emergency leave grievance; and 4) the combined classes grievance. At the hearing, the parties presented their evidence concerning those four grievances. Following the hearing, the parties filed briefs and reply briefs by November 1, 2002. On November 20, 2002, the District made a motion to strike certain language from the Association's reply brief, and a motion to reopen the record in the Mezera grievance for the purpose of admitting certain documents into the record (namely, the IEPs of students assigned to her caseload during the fall of 2001). On November 25, 2002, the Association responded to the two motions. On December 5, 2002, the District supplied the Examiner with the documents referenced in their second motion (i.e. the IEPs of students assigned to Mezera during the fall of 2001). In a letter dated December 12, 2002, the Examiner denied the motion to strike material from the Association's reply brief, and granted the motion to receive the aforementioned documents into the record. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. South West Education Association, hereinafter referred to as the Association, is a labor organization with its offices located at 960 North Washington Street, Platteville, Wisconsin 53818-0722. At all times material herein, Leroy Roberts has been an Executive Director of the Association. One of the bargaining units that he services is the teacher bargaining unit in the Prairie du Chien School District.

2. Prairie du Chien School District, hereinafter referred to as the District, is a municipal employer which operates a public school system in Prairie du Chien, Wisconsin. Its offices are located at 400 South Wacouta Avenue, Prairie du Chien, Wisconsin 53821. At all times material herein, James O'Meara has been the District's Superintendent.

3. The Association is the exclusive collective bargaining representative for the District's regular certified teaching personnel. At all times material herein, Jane Yeomans – Petrowitz, Kathleen Buehler, Doug Rogers and Kayla Mezera were members of the teacher bargaining unit.

4. The Association and the District have been parties to a series of collective bargaining agreements which govern the wages, hours, and working conditions of the employees in the bargaining unit referenced in Finding 3. The parties' most recent collective bargaining agreement was in effect from July 1, 1999 through June 30, 2001. It contained the following pertinent provisions:

ARTICLE II – SCHOOL BOARD FUNCTIONS

A. The Board on its own behalf and on the behalf of the District, hereby retains and reserves to itself all powers, rights and authority, duties and responsibilities conferred up and vested in it by the laws and the constitution of the State of Wisconsin and of the United States except as modified by the specific terms and provisions of this Agreement.

B. The Board's right to operate and manage the school system is recognized, including:

1. The executive management and administrative control of the district and its property and facilities, and the determination and direction of the teaching force.

2. The determination of the management, supervisory or administrative organization of each school or facility in the system and the selection of employees to supervisory, management or administrative positions.

3. The determination of the location of schools and other facilities of the school system, including the right to establish new facilities and to relocate or close old facilities.

4. The determination of the public relations program and the financial policies of the District including the general accounting procedures, inventory or supplies and equipment procedures.

5. The maintenance of discipline and control and use of the school system and facilities.

6. The determination of safety, health and property facilities.

7. The determination of safety, health and property protection measures where legal responsibility of the Board is involved.

8. The enforcement of reasonable rules and regulations now in effect and to establish reasonable new rules and regulations from time to time not in conflict with this Agreement.

9. The direction, arrangement, assignment or workloads, teaching assignment with the areas of Wisconsin Department of Public Instruction (DPI) certification of the teacher, the transfer and allocation of all the working forces in the system, including the hiring of all employees, determination of their qualifications and the conditions for their continued employment, the right to suspend, discipline or discharge for cause.

10. The creation, combination, modification or elimination of any teaching position deemed advisable by the Board.

11. The determination of the size of the working force and the determination of policies affecting the selection of employees.

12. The determination of the layout and the equipment to be used and the right to plan, direct and control school activities.

13. The determination and/or approval of grades and courses of instruction including special programs; the scheduling of classes and assignment of work loads; and to provide for athletic, recreation and social events for students, all as deemed necessary or advisable by the Board.

14. The determination and/or approval of the means and methods of instruction, the approval of textbooks and other teaching materials, and the use of teaching aids of every kind and nature.

15. The maintenance of the effectiveness of the school system.

16. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

17. To take whatever actions is necessary to comply with state or federal law.

C. The foregoing enumerations of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth; the Board retaining all functions and rights to act not specifically nullified by this Agreement.

. . .

ARTICLE VII – WORKING CONDITIONS DEFINED

A. Certification and Qualification. Members of the professional staff must meet at least the minimum State certification requirements for their respective teaching assignments. All teachers must have a valid Wisconsin teacher license, certificate or permit on file before entering on duties for which they are employed.

. . .

C. Preparation Time. All teachers shall have scheduled preparation periods. High school teachers and Middle School teachers shall have a minimum of two (2) 45 minute or one (1) 90 minute preparation time(s) per day.

. . .

G. Class Size for Special Education. The Wisconsin Department of Public Instruction, Division for Handicapped Children and Pupil Services (DHCPS) is responsible for the publication of minimum/maximum enrollment ranges on an annual basis. The recommendations regarding class size and pupil-teacher ratios will be followed in the Prairie du Chien School District.

. . .

I. High School Teacher Load. (Under Block Scheduling) In a four period day, the normal loading is three (3) teaching periods and one (1) preparation period. Two (2) teaching periods, one (1) preparation period and one (1) supervisory or other assigned duty period shall also be considered a full-time load. If a fourth (4th) period is assigned, such that an employee is scheduled for no (0) preparation period, the employee shall receive additional compensation at a rate of twenty-five percent (25%) of the employee's regular scheduled salary.

. . .

ARTICLE XII – LEAVES OF ABSENCE

A. Sick Leave. Sick leave of ten (10) days annually shall be granted up to 120 days accumulative, **which may be used for both personal and family illness and for doctor appointments for the same parties.** A new teacher in the system may use up to thirty (30) days his/her first year. Each day of sick leave over twenty (20) will be deducted from his/her 2nd year's sick leave accumulation. If the first year teacher leaves the system after the first year, he/she will be docked one (1) days pay for any sick days over 10 that he/she has used. (Emphasis in original).

B. Emergency Leave. Emergency leave shall be five (5) days per year and will not be accumulative. Emergency leave shall consist of illness or death of the following: spouse, child (step), grandchild, father (step), mother (step), brother (step), sister (step), grandfather or grandmother of teacher or spouse, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, personal friend (funeral only), aunt, uncle, niece or nephew. The emergency leave must be approved by the Superintendent and his/her designee prior to the actual leave.

C. Personal Leave. Each teacher shall be granted two (2) personal days of leave per school year, non-cumulative, provided the teacher gives at least 24 hours notice to the District Administrator. Not more than two (2) teachers shall use such leave at the same time, except in case of emergency. Except in emergency situations, personal leave shall not be used during the first or last week of school, the day before or after vacations or holidays, or on an in-service day. The first day of personal leave shall be deducted from the teacher's accumulated sick leave and the school district shall assume the total cost of the leave. The second personal day, the teacher shall pay the cost of the substitute teacher. In

emergency cases, the 24 hours shall be waived. At the end of each school year each teacher shall be paid $25.00 per day for their unused personal days.

. . .

ARTICLE XIII – COMPENSATION

. . .

M. Combination Classes. Those teachers who are required to teach combination classes shall receive $450.00 per school year in addition to their normal placement on the salary schedule.

. . .

5. The District operates four schools: B.A. Kennedy Elementary School, ECHOES, Bluff View Intermediate School and the High School. The acronym ECHOES stands for Eastman Community Home Organization Elementary School. ECHOES is a charter school. That school was formerly known as Eastman Elementary and is sometimes still called that. The High School currently runs on a four-block (i.e. period) schedule. Each period consists of 93 minutes.

6. This finding, and Findings 7 through 31, relate to the Mezera complaint.

Kayla Mezera is a special education teacher at the High School. She works with students who have cognitive and learning disabilities, are emotionally disturbed and health impaired. She teachers Core Math, Core History/English and Core Science.

7. This finding contains background information regarding the District's special education program. Currently, special education is administered at the Prairie du Chien High School by having students attend special education classes in the subjects where they require assistance due to their disability. This is the opposite of "inclusion," where special education students are placed in regular education classes for subjects in which they require special education assistance. Thus, students presently receive special education services while attending special education classes. This current method of delivering special education services at the high school level is different from the District's prior educational method. Prior to the 2000-01 school year, special education students at the high school received instruction in regular education classrooms, even in subjects where they required the assistance of special education teachers. The transition between these two different approaches to teaching special education students began during the 2000-01 school year, and was completed

during the 2001-02 school year. Thus, in the 2001-02 school year, the District completed its transition away from the inclusion model to delivering special education services to special education students in special education classrooms. Special education is viewed in terms of caseloads. Under the current Department of Public Instruction (DPI) caseload recommendations referenced in Finding 9, this permits special education teachers to handle a 10% greater factor level than if inclusion is the dominant setting (see Item number 6 in Finding 9).

8. Special education students are assigned to the classroom of a special education teacher based upon various factors, including the needs of the students and the expertise of the teachers. Special education students are also assigned to special education classes based upon their level of need for services, and at least some special education students also attend regular education classes. A student's level and areas of need are, in turn, determined by the student's Individualized Education Program (hereafter IEP).

9. In March, 2001, DPI issued recommendations for determining caseloads in special education. That document provides as follows on page 2:

STATEWIDE CASELOAD FORMULA

HOW THE FORMULA WORKS:

Each number on the "Student Factoring Table" assigns a factor to a special education student. A student who does not require special education services has a baseline factor of 1. Factors for all special education students exceed 1. For instance, a student considered to be a 'Level 1 elementary LD' has a factor of 1.6, while a student identified as Level 3 secondary CD carries a factor of 3.3. The sum of student factors for each caseload should not exceed 26 without additional review.

HOW TO USE THE FORMULA:

1. For each student on the caseload, record service level, type of disability, and school level for each student. You may wish to use Table 1, "Service Level Matrix" to assist in determining service levels.

2. Utilize the appropriate column in the "Student Factoring Table" to identify a factor for each student on caseload.

3. Multiply the number of students with identical disabilities and service levels by the factor obtained in Step 2.

4. Add each of these sums together to obtain a total caseload size.

5. Add 10% to total caseload factors if inclusion is the dominant setting.

6. Compare total caseload size with the recommended maximum size of 26.

7. Consider extenuating factors to determine whether additional support is required (See Table 2).

. . .

10. For the last 19 years, the District has employed four special education teachers at the High School. These teachers are assigned to teach special education classes to the special education students. In the spring of 2001, one of the four special education teachers, Tammy Stovey, transferred to the District's Middle School. After her transfer, Stovey continued to do some paperwork at the High School relating to her former students. When Stovey transferred, she had a caseload of 24 students. The record does not identify what Stovey's caseload value was, but whatever it was, it exceeded the DPI recommended factor level of 26 which was referenced in Finding 9, Item number 6.

11. After Stovey transferred to the Middle School, the District began a search for another high school special education teacher. The search for a replacement was long and difficult. One reason for this was because of a lack of applicants who were certified in special education. The District ultimately posted the position five times seeking applicants. One of the applicants who was interviewed and considered in the summer of 2001 was opposed by Mezera and others. That applicant was not offered the position. In November, 2001, an applicant was offered the position and accepted it, but he subsequently backed out.

12. In the summer of 2001, Principal Bark notified all three high school special education teachers that the vacant special education position at the high school would not be filled by the time school started.

13. The 2001-02 school year started with just three special education teachers at the High School: Kayla Mezera, Lisa White and Kerry Peterson. The position formerly filled by Stovey was still vacant.

14. At the start of the 2001-02 school year, Principal Bark met with the three special education teachers and offered them (i.e. the three special education teachers) the opportunity to teach a fourth class, entitled "core work experience" during their preparation period, and to receive additional pay for doing so in accordance with the High School Teacher Load clause. All three special education teachers refused the offer to teach an additional class during their

preparation period for pay. After all three special education teachers refused the opportunity to teach the class, Bark secured a teacher, Kopp, who had previously taught the class in another district. Thus, Kopp was hired to teach the "core work experience" special education class. He was paid overload pay for teaching that class.

15. Also at the start of the 2001-02 school year, Principal Bark told all three special education teachers how preparation periods were to be handled during the year. Specifically, he told them not to use their preparation period to provide additional assistance to students. Bark also told the special education teachers that if students came to them (i.e. the special education teachers) for assistance during their (i.e. the teachers') preparation periods, they were to direct the students to the learning lab for assistance.

16. The District assigned the three special education teachers the following caseloads for the 2001-02 school year: Mezera was assigned a caseload of 22 students, White was assigned a caseload of 23 students and Peterson was assigned a caseload of 23 students. The students in Mezera's caseload had the following disabilities: 17 were cognitively disabled, two were learning disabled, two were emotionally disturbed and one was health impaired. The record does not contain the breakdown for White's and Peterson's caseload (i.e. it does not indicate what disabilities their students had).

All three of the High School special education teachers were assigned caseload values that exceeded the recommended maximum size of 26. (See Finding 9, Item number 6).

17. Mezera's caseload value was the highest of the three special education teachers. Her caseload of 22 students yielded a caseload value that would be calculated as being 39 under the DPI's recommendations. This figure of 39 was determined thus: her 17 cognitively disabled students were multiplied by a "student factor" of 1.7 to yield a "pretotal" of 28.9; her two learning disabled students were multiplied by a "student factor" of 1.3 to yield a "pretotal" of 2.6; her two emotionally disturbed students were multiplied by a "student factor" of 1.6 to yield a "pretotal" of 3.2, and her one health impaired student was multiplied by a "student factor" of 2.6 to yield a "pretotal" of 2.6. When these four "pretotal" numbers are added together, they total 37.3. The figure of 37.3 is based on the students all being categorized at "Level 1". If a higher level is involved, then the calculation invariably rises. In this instance, two of Mezera's students were not at "Level 1" but rather at "Level 2". When they were counted at "Level 2", the caseload value increased from 37.3 to 39.

18. The District also assigned and scheduled Mezera one preparation period per day for the 2001-02 school year. Mezera was under no legal or contractual obligation to service students during her preparation period. The students on Mezera's caseload were assigned to other teachers and staff members for instruction and/or assistance during her preparation period. Mezera did not follow the instructions Principal Bark gave her about preparation time

usage. On her own volition, she provided services to special education students during her preparation period for much of the first semester. She also provided services to special education students who were not part of her caseload during her preparation period. Specifically, she provided assistance to Kopp and his students. The District did not ask her to do so or require her to do so. Thus, she chose to use her preparation period to assist students, including students who were not part of her caseload.

19. Mezera was frustrated with her caseload and felt she had been assigned an overload without being paid for it. In this district, teaching an extra class is commonly referred to as teaching an overload. That term (i.e. "overload") is not contained in the collective bargaining agreement.

20. On December 6, 2001, Mezera filed two grievances concerning her caseload for the 2001-02 school year. One grievance alleged that the District "violated the contract when it failed to assign Ms. Mezera students in accord with the DPI standards" for the 2001-02 school year. The other grievance alleged that the District had "failed to pay Ms. Mezera for the additional work assigned during her preparation time." When District officials responded to the grievances, they indicated that they would not "accept" them (i.e. the grievances) "due to a non-settled contract."

21. On December 18, 2001, Principal Bark met with Association President Dave Antoniewicz to discuss the workload of the three special education teachers. One of the options that they discussed was that beginning with the second semester, the three special education teachers would be paid an additional 6.25% of their salary to compensate them for their (alleged) lost preparation time. The record does not indicate what other options were discussed.

22. Principal Bark's discussion with Association President Antoniewicz referenced in Finding 21 did not constitute individual bargaining.

23. Later that same day, Principal Bark met with Dan Wall, who at the time was a student teacher in the High School in the math department. Bark asked Wall to be a long-term substitute for the second semester and teach math to special education students. Wall agreed to do so. Wall was/is not certified in special education.

24. The next day, December 19, 2001, Bark had a meeting with the three special education teachers wherein he addressed the matter of their caseload. In that meeting, he informed them that Wall had been hired as a long-term substitute. He also told them that given Wall's employment, the option that he had discussed with Antoniewicz whereby the special education teachers would be paid 6.25% of their salary to pay them for their (alleged) lost preparation time was withdrawn.

25. That same day (December 19, 2001), Association Representative Leroy Roberts sent the following letter to Principal Bark:

> In accord with our phone conversation today, it is understood that there should have been four special education teachers at the high-school level for the school year 2001-2002 to accommodate the number of special education students and that the three current special education teachers assumed the overload of students during their normal class day and that some of them have even used their preparation time and lunch periods to service those added students. However, the administration has now directed the three special education teachers to **not** (emphasis added) take special students during either the preparation time or during the lunch period. Similarly the teachers are to **not** (emphasis added) accept additional students during their regular class periods either for special or added service, regardless of the requirements of law or the expectation contained in the IEP's for special students.
>
> It is my understanding, from your comments, that the Union will have to process the demands of overloads for the first semester through the grievances for the special education employees. This would include the time the employees lost by using their prep time and for the added students in excess of the DPI recommendations.
>
> Further, it is understood that the District will employ a person in some capacity to assume all overload for these three special education teachers, and this will occur not later than the start of the second semester. This will insure that the current special education staff will not have an overload of students and will not use either their preparation time, lunch period, or regular class periods for added services beyond those of the regular classes.

26. On December 20, 2001, Principal Bark sent the following memo to the three special education teachers:

> To: Kayla Mezera, Lisa White, Kerry Peterson
> From: Duane Bark
> Re: Term 3 and 4 Information
> Date: Dec. 20, 2001
> This memo is to follow-up in writing what we talked about during our meeting on Dec. 19, 2001 at 3:25 pm in my office.

I will be hiring a long-term substitute teacher to take the 4th position in the Spec. Ed. Department. This person will teach 3 classes and be given a case load of kids that they will be responsible for. I will help that person with some of the details of the position.

There will be no assignments for the prep periods that all 4 teachers are scheduled for. If you want to work with kids during your prep that will be your decision as individuals.

All 4 teachers have been given teacher/student ratios that meet the DPI recommended numbers. Copies of case loads were handed to you at the meeting on Dec. 19, 2001.

If students come in during the time you are scheduled to teach class and ask for help. It will be your decisions as individuals to either help them or not.

The addition of the 4th teacher will take place on Jan. 3rd, 2002.

A reminder that all concerns and problems relating to the high school should go through me as your building administrator.

CC: Mr. O'Meara
Mr. Roberts

27. Wall began working as a long-term substitute in the High School on January 3, 2002. After he started, Bark changed and rearranged the students' and teachers' schedules so that the special education class sizes were smaller in the second semester than they were in the first semester. Walls' hiring did not change the length of class periods or the number of students on the teachers' caseload. Instead, there were simply fewer students present in the classes they taught. Mezera acknowledged that in the second semester, she was able to take her preparation period most days, although she still gave up her preparation period on occasion to work with students during that time.

28. This finding contains information regarding the parties' bargaining history concerning the Class Size for Special Education clause. The Class Size for Special Education clause was first placed in the 1987-89 collective bargaining agreement. That clause is substantially the same now as it was when it was created.

29. This finding contains information regarding how the High School Teacher Load clause and the Class Size for Special Education clause have historically been applied. There is no past practice in the District of making payments under the High School Teacher Load clause

to special education teachers under any circumstances or conditions. Additionally, there is no past practice in the District that compensation is paid under the High School Teacher Load clause for "lost" preparation time. The additional pay referenced in the High School Teacher Load clause has only been paid to teachers who undertake an additional period of instruction.

30. When the Association filed the instant prohibited practice complaint against the District, it included in paragraph 19 of the complaint the DPI standards grievance as a violation of the status quo, but not the preparation time grievance. Thus, the Association did not advance the grievance which alleged that the District had "failed to pay Ms. Mezera for the additional work assigned during her preparation time" as a violation of the status quo in either paragraph 19 of the complaint or anywhere else.

31. The status quo relative here is that when the District assigns special education teachers a high caseload, even a caseload that violates the Class Size clause, they are not paid the 25% salary add-on referenced in the High School Teacher Load clause unless they undertake an additional period of instruction so that they have no preparation period. In the 2001-02 school year, the District did not assign Mezera a fourth period of instruction, or assign her to service students during her preparation period. The District's refusal to pay Mezera the 25% salary add-on referenced in the High School Teacher Load clause for her caseload in the 2001-02 school year was consistent with the status quo and thus did not violate same.

32. This finding, and Findings 33 through 43, relate to the two emergency leave complaints.

Bargaining unit employees have a number of ways to get paid time off from work. Article XII of the collective bargaining agreement specifies that they can get paid time off via sick leave, emergency leave and personal leave. When an employee wants to use one of these types of leave, they complete a District leave of absence form and mark the appropriate box (i.e. "sick day", "emergency" or "personal"). Other categories are also listed on this form, but they need not be listed here. When an employee wants to use paid leave to cover a planned absence, they can request any of the three forms of paid leave just referenced (i.e. sick leave, emergency leave or personal leave). Emergency leave requires approval in advance by the District Administrator. Personal leave, in contrast, does not require advance approval. The Personal Leave clause merely requires an employee to provide 24 hours notice to the District Administrator. The Sick Leave clause does not say anything about approval; it is silent on same. To summarize then, of the three types of paid leave, only emergency leave requires approval in advance by the District Administrator. Approval by the District Administrator is not automatic; the District Administrator can either grant or deny the requested emergency leave.

33. The following facts relate to the contractual sick leave language. In the last round of bargaining, the parties changed the contractual sick leave language. The change which was agreed upon is summarized thus. The District proposed new language that said that employees could use sick leave for doctors' appointments. The Association agreed to this language. The new language which was added to the sick leave clause was this: "which may be used for both personal and family illness and for doctor appointments for the same parties." When this new language was agreed on, the Association did not view it (i.e. the new language) as being a substantive change; instead, the Association viewed it (i.e. the new language) as simply codifying an existing practice of allowing employees to use sick leave for doctors' appointments. The District does not dispute the existence of such a practice.

34. The following facts relate to the contractual emergency leave language. The parties' collective bargaining agreements have included emergency leave provisions for at least the last 20 years. The language which specified that the emergency leave "must be approved by the Superintendent prior to the actual leave" was included in the parties' 1982-1984 collective bargaining agreement. The language which specified that the emergency leave could be used for "illness or death" of a specific group of relatives was included in the parties' 1984-85 collective bargaining agreement. In the last round of bargaining, the District tried to modify the emergency leave language. Specifically, the District tried to get the word "serious" added as a qualifier to the word "illness", so that the clause would read "emergency leave shall consist of serious illness or death of the following: . . ." The District's proposal was discussed during bargaining. During the course of that discussion, Association representative Leroy Roberts indicated that since the word "emergency" was not contractually defined, it was left to the discretion of the District Administrator to define it. The District subsequently dropped its proposal to include the word "serious" in the Emergency Leave clause. Since the District's bargaining proposal was not agreed on, the Emergency Leave clause remained unchanged in the parties' 1999-2001 collective bargaining agreement. Prior to the complaint involved here, the Emergency Leave clause has never been the subject of litigation between the parties.

35. After the parties had negotiated their 1999-2001 collective bargaining agreement, and it had been ratified by both sides, the District's Director of Business Services, Michael Coughlin, sent the following memo to Association representatives Nancy Trautsch and Brian White concerning sick leave and emergency leave:

PDC BUSINESS OFFICE MEMO

TO: NANCY TRAUTSCH AND BRIAN WHITE

FROM: MICHAEL L. COUGHLIN

SUBJECT: QUESTION ON LEAVES

DATE: 04/05/00

During the negotiation process for the current Master Contract, Article XII: Leaves of Absence, was discussed. The district brought to the table for discussion a change in A. Sick Leave language and B. Emergency Leave language.

The district's intent of the discussion was to make the reasons for leaves consistent throughout the district for all employees. Emergency Leave language was not changed but for Sick Leave the following underlined statement was added:

> Sick leave of ten (10) days annually shall be granted up to 120 days accumulative, which may be used for both personal and family illness and for doctor appointments for the same parties.

At the time of tentative agreement the PEA stated that these leaves would be left to the interpretation of the District to do their best to make decisions in a consistent manner. Since the date of ratification of the Master Contract the district has attempted to interpret these two leaves as follows:

Sick leave is used for personal illness, illness of a family member (example: a sick child at home), maternity leave, a doctor appointment or hospital stay for the same (self or family member).

Emergency leave is for unplanned and unforeseen events due to accident, unavoidable circumstances, a life threatening condition of a family member, or death.

This is a change from how it was done in the past because emergency leave was used liberally and was not always prior approved as the contract states. The district's intent is to use emergency leave for true emergencies. I don't believe that any leaves have been denied due to this change, but now sick leave accommodates the majority of the requests.

If there are further questions, please contact me. Thank you.

CC: Dr. Rossetti
Supervisors

36. The District granted emergency leave to the following employees for the following events. On March 2, 1995, Nancy Trautsch was granted one day to attend an uncle's funeral. On April 1, 1996, Nancy Trautsch was granted one day to attend the "emergency oral surgery" of her daughter. On November 7, 2000, Karen Schilling was granted four hours to pick up her son because the "babysitter's father [was] dying." On November 13, 2000, Karen Schilling was granted one hour to attend a funeral. On February 15, 2001, Karen Schilling was granted five days because her father was "critically ill". On April 23, 2001, Christina Mezera was granted one day for her daughter's surgery. On April 23, 2001, Nancy Wachter was granted three days because her father was having surgery. On April 25, 2001, Paul Porvaznik was granted two days because of "flooding problems at home". On May 9, 2001, Dale Hansen was granted one day because of his son's surgery. On May 21, 2001, Dale Hansen was granted two hours because of his son's oral surgery. On November 12, 2001, Karen Schilling was granted two days because her mother was "having heart trouble" and was "undergoing a shock treatment". On February 27, 2002, Karen Schilling was granted six hours because her son was ill.

37. In addition to the foregoing, the District also granted emergency leave to Jane Yeomans-Petrowitz for April 7, 2000. In that instance, she requested a day of emergency leave to accompany her mother to a doctor's appointment in Iowa City, Iowa. The then-superintendent, Dr. Victor Rossetti, initially denied the request. She subsequently used sick leave for the day and grieved the denial of emergency leave. Both sides considered the grievance resolved when Rossetti sent the following letter to Association representative Scott Gordon:

April 18, 2000

Mr. Scott Gordon
PEA Representative
Bluff View Intermediate School
Prairie du Chien, WI 53821

Dear Scott:

This letter is in reply to the Association's grievance on behalf of Ms. Yeomans-Petrowitz disagreement regarding her sick leave. Although we have several misunderstandings relating to the interpretation of Emergency vs. Sick Leave, in this case I will credit Ms. Yeomans-Petrowitz accumulated sick leave and deduct the days from emergency leave. Further, I will guarantee that your contract relating to leave days will be followed. All decisions regarding

leave days will be made in the Superintendent's Office. If in the future misunderstandings occur regarding leave days, the individual requesting the leave and the Superintendent of Schools will resolve any and/or all discrepancies regarding interpretation.

I hope this letter resolves the misunderstanding.

Sincerely,

Vic /s/
Victor L. Rossetti, Ed.D.
Superintendent of Schools

VLR: tvl
c: Board of Education
Jane Yeomans-Petrowitz
Nancy Trautsch

Gordon subsequently responded to Rossetti with the following memo:

DATE: May 8, 2000

TO: Dr. Rossetti

FROM: S. Gordon S. Gordon /s/

RE: Response to grievance concerning interpretation of emergency days.

Based on your written response to the formal grievance filed concerning interpretation of leave language in the master agreement, I understand that:

1. The District will credit Ms. Jane Yeomans-Petrowitz with sick leave days in question and deduct the same from emergency leave.

2. The District will follow the contract and state law with respect to future decisions concerning leave.

Thank you for your assistance in this matter.

This grievance settlement occurred several months after the parties had settled their 1999-2001 collective bargaining agreement.

38. On August 31, 2001, Jane Yeomans-Petrowitz filed a request to use a day of emergency leave on October 19, 2001. This request was made nearly two months prior to the date she sought to use the emergency leave. When she completed the District's leave form, she indicated on the form that the reason she needed emergency leave for that day was "parent illness – family situation." When Petrowitz wrote "parent illness – family situation" on the form, what she was referring to was this: she planned to accompany her mother to a doctor's appointment that day. Her principal, Mike Healy, initially approved the request for emergency leave. Several days later though, Healy told Petrowitz that he had been directed by the District Administrator, James O'Meara, to deny her request for emergency leave, and thus he was doing so. He directed her to use sick leave for the date, which she subsequently did. Petrowitz was absent from work on October 19, 2001 because she accompanied her mother to a doctor's appointment that day. Her mother did not undergo surgery that day. Petrowitz was paid for the day, but she had to use sick leave rather than emergency leave.

39. Petrowitz grieved the denial of her request for emergency leave. District officials denied the grievance. In doing so, they indicated that the leave request could be covered by sick leave. When the Association appealed the grievance to arbitration, the District indicated it would not proceed to arbitration on it because the collective bargaining agreement had terminated.

40. In September, 2001, while Petrowitz's emergency leave grievance was being processed, O'Meara sent out the following undated e-mail concerning emergency leave:

> I've been asked by the Grievance Committee Chairman to e-mail everyone to clarify what *Emergency Leave* is, as interpreted by this District Administrator.
>
> The word *emergency* in my *Webster's New World Dictionary* is defined as "a sudden occurrence demanding quick action". Therefore, by its very definition, some urgency must exist to use the leave for illness. The leave **must** be approved by the Superintendent and this approval must be received **prior** to the actual leave. I have instructed all principals and supervisors not to approve any Emergency Leave requests for illness. All requests are approved or denied **only** by me to keep consistency in the approvals.
>
> Emergency Leave for the death of a relative or friend can be approved by your principal or supervisor.

If you have any questions regarding this, please make an appointment with me.

Sincerely,

Jim O'Meara

41. On December 17, 2001, Doug Rogers filed a request to use a day of sick leave on January 16, 2002. This request was made about a month prior to the date he sought to use the leave. When he completed the District's leave form, he indicated on the form that the reason he needed sick leave for that day was "doctor appointment for family member." When Rogers wrote "doctor appointment for family member" on the form, what he was referring to was this: he planned to accompany his mother to a doctor's appointment that day. Two days later on December 19, 2001, Rogers filled out a second leave form requesting leave for January 16, 2002 (i.e. the same day covered by his previous request). This time, he requested emergency leave for that day – not sick leave. The stated reason for emergency leave was identical to what he wrote on the sick leave form: "doctor appointment for family member." While this second form was dated December 19, 2001, it was not submitted to management until after the District's Christmas vacation was over. Rogers indicated that the reason he delayed submitting the second request until then was because he was waiting to hear back from management about the sick leave day. On January 3, 2002, Rogers sent the following memo to District Administrator O'Meara:

> I am submitting this emergency leave form in replacement of the sick leave form for January 16, 2002. My mother is ill and will be seeing a physician at Mayo Clinic on this day. And after reviewing the memorandum sent out on September 5, 2001 I feel this should fall under an emergency leave day. Therefore I am submitting this emergency leave request form for approval for the date of January 16, 2002.

O'Meara subsequently approved Rogers' request for sick leave for January 16, 2002, and denied his request for emergency leave for that day. Rogers was absent from work on January 16, 2002 because he accompanied his mother to the doctor that day. His mother did not undergo surgery that day. Rogers was paid for the day, but he had to use sick leave rather than emergency leave.

42. Rogers grieved the denial of his request for emergency leave. When District officials responded to the grievance, they indicated that they would not "accept" the grievance "because of a non-settled contract."

43. The status quo with regard to the granting of doctors' appointments is that they are generally handled under sick leave – not emergency leave, and that the District

Administrator has the discretion to determine whether or not to grant emergency leave. The District's refusal to grant Petrowitz's and Rogers' requests for emergency leave for them to accompany their mothers to doctors' appointments was consistent with the status quo and did not violate same.

44. This finding, and Findings 45 through 56, relate to the Combined Classes complaint.

"Regular" elementary education teachers have, in essence, one class each day. They teach the same group of students, all day, every day, except during lunch, recess and "specials" classes. (Note: the term just used, "specials", will be defined later in this paragraph). "Regular" elementary education teachers teach core subjects such as reading and math. "Specials" teachers teach music, physical education and art. "Specials" teachers travel to different elementary school buildings. The two teachers involved in the complaint are both "specials" teachers in the District. Doug Rogers is an elementary physical education teacher and Kathleen Buehler is a music teacher.

45. For many years, the District has had classes at some of its elementary schools known as "combination classes." As will be noted in more detail in Findings 46 and 47, that term refers to multi-grade classes. Said another way, the term "combination classes" refers to classes which consist of students from more than one elementary grade level (such as students from kindergarten and first grade being in the same classroom). All of the classes at ECHOES are multi-grade classes: the kindergarten and first grade students are together, the second and third grade students are together, and the fourth and fifth grade students are together. The elementary classes at B.A. Kennedy are not multi-grade classes, so they are not "combination classes". The term "combination classes" does not refer to classes composed of students who are from two different classrooms, but of the same grade level (such as students from two different first-grade classes). The teachers who teach "combination classes" receive extra compensation for doing so. The circumstances under which the combination classes stipend has, and has not, been paid are identified in Finding 47.

46. This finding contains information regarding the parties' bargaining history concerning the Combination Classes clause. The Combination Classes clause has been in existence since 1976. When this clause was agreed upon, the parties decided that teachers who taught what was characterized as "combination classes" would receive additional compensation (i.e. a stipend) for doing so. The amount that was agreed upon was $450 per year. John Mulrooney, who was the district's administrator when this language was incorporated into the parties' 1976 collective bargaining agreement, indicated that the combination classes stipend was to provide additional compensation to regular elementary teachers who taught classes consisting of two grade levels (i.e. students of more than one grade level), and that the extra pay was compensation for the additional work they had to perform to prepare classes for

students of two separate grade levels. Mulrooney also indicated that the Combination Classes clause did not apply to "specials" teachers (i.e. physical education, music and art teachers). The Combination Classes clause has not changed since Mulrooney was the District's administrator.

47. This finding contains information regarding how the Combination Classes clause has historically been applied. In the past, the combination classes stipend has been paid under the following circumstances. It has been paid when regular elementary education teachers taught the same class, all day, every day, except during lunch, recess and "specials" classes, to students of two different grade levels. Thus, the teachers who received it (i.e. the combination classes stipend) taught multi-grade classes (i.e. classes consisting of students of two grade levels such as kindergarten and first grade, second and third grade, etc.). The combination classes stipend has long been paid to the teachers at ECHOES/Eastman, because they taught multi-grade classes. The District's Business Manager, Coughlin, indicated it has been done this way this since at least 1991 and there is no evidence to the contrary. In the past, the combination classes stipend has not been paid under the following circumstances. First, it has not been paid when students from two classrooms of the same grade level (such as two first-grade classes) are sent to a physical education or music class at the same time. While in that particular instance the two classes have been combined in one sense of the word for one period, the District has not paid the combination classes stipend in that situation. Second, the combination classes stipend has not been paid to a "specials" teacher (i.e. art, music or physical education). Third, the combination classes stipend has not been paid to a non-elementary teacher.

48. In the mid-1990's, Rogers taught multi-grade "specials" classes at Eastman (the school now called ECHOES). When he did, he did not receive the combination classes stipend, even though the regular elementary education teachers at Eastman did. At one point in that time frame, Rogers asked his then-principal at B.A. Kennedy, Merle Frommelt, why he was not being paid the combination classes stipend. Frommelt responded that in order to get the combination classes stipend, the teacher had to teach combination classes every day. At the time, Rogers was not teaching multi-grade classes every day of the week. Rogers did not grieve the District's failure to pay him the combination classes stipend.

49. Some elementary classes are smaller than others because the District receives SAGE funding for them. The SAGE program was designed to limit elementary math and reading class size to no more than 15 students. Some of the elementary classes at B.A. Kennedy are in the SAGE program, while the classes at Bluff View are not. As a result of the SAGE program, elementary class sizes at B.A. Kennedy are smaller than they are at Bluff View. When students in two SAGE classes go to a "specials" class at the same time for instruction in art, music or physical education, the class size essentially doubles. When Rogers taught such physical education classes at B.A. Kennedy, there were about 28 to 32 students in the class.

50. Sometime during the 2000-01 school year, Rogers complained to the then-District Curriculum Coordinator, Ms. Coley, about one of the classes he was teaching that year at B.A. Kennedy. The class he complained about consisted of students from two different classrooms that were in the same grade level (specifically, two different first grade classes). Rogers viewed that class as a "combined class". According to Rogers, Coley replied to him as follows: give it a try and by the end of the year, we'll make our decision on what is best for the kids. Rogers inferred from Coley's statement that she was promising him compensation if he taught "combined classes" in the next school year. Rogers was not paid the combination classes stipend in the 2000-01 school year. He did not grieve it.

51. Coley's comments to Rogers referenced in Finding 50 did not constitute individual bargaining.

52. At the start of the 2001-02 school year, Buehler complained to the principal at B.A. Kennedy, Kathryn Roe, about the overall size of her music classes at B.A. Kennedy. In Buehler's view, they were too large. Roe then spoke to District Administrator O'Meara about what could be done to reduce the size of the music classes at B.A. Kennedy. Among the options which were considered were hiring an additional aide or moving an existing aide away from a core-subject area to assist with the music and physical education classes. O'Meara ultimately rejected both options (i.e. hiring more aides or moving an existing aide away from a core-subject area to the music/physical education area).

53. As part of their teaching assignment for the 2001-02 school year, Rogers and Buehler were assigned to teach physical education and music, respectively, at B.A. Kennedy and ECHOES. Rogers was also assigned to teach third, fourth and fifth grade physical education classes at Bluff View. Some of the classes that Rogers and Buehler taught at B.A. Kennedy contained students from two different regular elementary classrooms. These classrooms are known as homerooms. These students were sent to a physical education or a music class at the same time. For example, Rogers and Buehler had students from two different kindergarten teachers at the same time, students from two different first grade teachers at the same time, etc. As was noted in Finding 49, when this happened there were about 28 to 32 students in the class. The classes that Rogers and Buehler taught at B.A. Kennedy were not multi-grade classes. That same year, Rogers and Buehler were also assigned to teach "specials" classes at ECHOES. The classes that Rogers taught on Tuesdays at ECHOES were multi-grade classes. On that day, he taught multi-grade classes for three periods. The class periods at ECHOES are 55 minutes long. Buehler also taught multi-grade classes at ECHOES, but the record does not indicate how many, or how often.

54. The classes which Rogers and Buehler taught in the 2001-02 school year at ECHOES were not identical to the classes taught by teachers who were paid the combination classes stipend. The teachers at ECHOES who were paid the combination classes stipend are

regular classroom teachers who taught multi-grade classes all day, every day. Rogers and Buehler did not teach multi-grade classes all day, every day.

55. On August 23, 2001, Rogers and Buehler grieved the District's failure to pay them the combination classes stipend for the 2001-02 school year. District officials denied the grievance. When the District Administrator denied the grievance, he indicated that the Board had the right, under the contractual management rights clause, to set assignments and workloads. He also indicated that he believed Article XIII, Section M, was inapplicable here.

56. The status quo with regard to the payment of the combination classes stipend is to pay it only to regular elementary education teachers who teach multi-grade classes all day, every day. In the 2001-02 school year, Rogers and Buehler did not teach any multi-grade classes at B.A. Kennedy. While they did teach some multi-grade classes at ECHOES, they did not do so all day, every day. Additionally, the status quo is not to pay the combination classes stipend when students from two different classrooms of the same grade level are sent to a "specials" class, because that is not considered a "combination class." The District's refusal to pay Rogers and Buehler the combination classes stipend in the 2001-02 school year was consistent with the status quo and did not violate same.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The District did not change or violate the status quo as to the wages, hours or working conditions of the employees in the bargaining unit represented by the Association when it did not pay Mezera overload pay in the 2001-02 school year during the hiatus following the expiration of the parties' 1999-2001 collective bargaining agreement. Therefore, by this conduct, the District did not refuse to bargain with the Association within the meaning of Sec. 111.70(3)(a)4, Stats., and did not interfere with the rights of its employees under Sec. 111.70(2), Stats., within the meaning of Sec. 111.70(3)(a)1, Stats.

2. The District did not engage in individual bargaining by the acts referenced in Finding 21, and therefore the District did not violate Sec. 111.70(3)(a)4, Stats., by its conduct here.

3. The District did not change or violate the status quo as to the wages, hours or working conditions of the employees in the bargaining unit represented by the Association when it did not grant Petrowitz's and Rogers' requests for emergency leave in the 2001-02 school year to accompany their mothers to doctors' appointments. Therefore, by this conduct,

the District did not refuse to bargain with the Association within the meaning of Sec. 111.70(3)(a)4, Stats., and did not interfere with the rights of its employees under Sec. 111.70(2), Stats., within the meaning of Sec. 111.70(3)(a)1, Stats.

4. The District did not change or violate the status quo as to the wages, hours or working conditions of the employees in the bargaining unit represented by the Association when it did not pay the combination classes stipend to Rogers and Buehler in the 2001-02 school year during the hiatus following the expiration of the parties' 1999-2001 collective bargaining agreement. Therefore, by this conduct, the District did not refuse to bargain with the Association within the meaning of Sec. 111.70(3)(a)4, Stats., and did not interfere with the rights of its employees under Sec. 111.70(2), Stats., within the meaning of Sec. 111.70(3)(a)1, Stats.

5. The District did not engage in individual bargaining by the acts referenced in Finding 50, and therefore the District did not violate Sec. 111.70(3)(a)4, Stats, by its conduct here.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint of prohibited practices filed in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of April, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

PRAIRIE DU CHIEN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

As noted in this decision's prefatory paragraph, this complaint originally had two parts. The first part alleged that the District violated Secs. 111.70(3)(a)4 and 1, Stats., when it refused to process grievances during a contract hiatus period. This part of the complaint was resolved during the course of the hearing. The second part of the complaint alleged that the District violated Secs. 111.70(3)(a)4 and 1, Stats., when it unilaterally changed the status quo in various areas. While the complaint did not explicitly identify the various areas involved, it did so implicitly. The eight areas which were implicitly referenced were identified in this decision's prefatory paragraph and need not be repeated here. Intertwined in these status quo contentions were eight separate grievances. The traditional mechanism for resolving grievances and enforcing the collective bargaining agreement is via grievance arbitration. The parties' collective bargaining agreement provides for arbitration of unresolved grievances. This mechanism (i.e arbitration) is only available though when a contract is in place. In this case, the District would not agree to arbitrate any of the grievances since there was a contract hiatus. The Association then included all eight grievances in the instant complaint and characterized them all as status quo violations. By framing the complaint this way (i.e. as a status quo case), this part of the complaint essentially sought to have the WERC adjudicate the merits of the eight grievances. During the course of the hearing, the parties resolved some of the grievances, and agreed that just the following four grievances would be litigated herein: 1) the Mezera grievance; 2) the Yeomans-Petrowitz emergency leave grievance; 3) the Rogers emergency leave grievance; and 4) the combined classes grievance. Hereinafter, these four grievances will be referred to as complaints rather than grievances. The rationale for this change is found in the Introduction section of the **DISCUSSION**.

POSITIONS OF THE PARTIES

Association

Association's Initial Brief

The Association begins with the following overview. It notes at the outset that the District has a legal obligation to maintain the dynamic status quo during a contract hiatus with regard to wages, hours and conditions of employment under the terms of the predecessor contract. It asserts that it is well established that an employer who does not do so commits a prohibited practice. The Association avers that what happened here is that the District changed

the status quo in the areas of caseload, emergency leave and combined classes. It contends that each of these matters are mandatory subjects of bargaining. Building on that underlying premise, the Association argues that the District failed to maintain the status quo in those three areas and thus committed prohibited practices which need to be remedied.

. . .

The Association makes the following arguments in the Mezera complaint.

In its view, the issue in that case can be framed thus: "Did the Employer commit a prohibited practice by failing to maintain the dynamic status quo when they unilaterally assigned students not in accord with the DPI regulations as required by the contract language, and, as a result, Ms. Mezera lost her preparation time?" The Association answers that question in the affirmative. In its view, the District failed to maintain the status quo pertaining to caseload during the hiatus period. It elaborates on that contention as follows.

The Association avers at the outset that four special education teachers were needed at the high school to meet DPI requirements and service the students properly. When one of them left, this left just three teachers to do the work of four. Since this happened four months before the start of the school year, the Association believes the District had sufficient time to find a replacement. However, as the Association sees it, what the District did was to drag its feet in filling that vacant position, plus turn a deaf ear to assisting the remaining three special education teachers once school started. The Association puts it this way in their brief: "It wasn't necessary to make a change in the teaching assignments so long as the employees could survive." The Association maintains that at the start of the school year, management assigned Mezera a caseload of 39 students. The Association alleges that this caseload was an overload which violated the second sentence of Article VII, Sec. G (the "Class Size for Special Education" provision). That provision provides thus: "The [DPI] recommendations regarding class size and pupil-teacher ratios will be followed in the Prairie du Chien School District." According to the Association, this provision clearly and unambiguously specifies that employees are to be assigned a caseload in accordance with DPI recommendations; if they are not, then anything over the recommendations is an overload. Thus, the Association reads this language to say that an overload is any students over the maximum recommended by the DPI. In the Association's view, the District's failure to follow this language here "goes to the heart of this issue."

The Association believes it is apparent that Mezera was assigned an overload. Building on that underlying premise, the Association next characterizes Mezera's overload as excessive. Their contention that Mezera had an excessive overload is based on the premise that the DPI recommendation for special needs students is 26 maximum students, and her caseload exceeded that number. The Association avers that the District stipulated that Mezera's caseload was 39

students. Since 39 is 13 students or 50% over the DPI recommendation of 26, the Association's position is that Mezera had a caseload that was 50% greater than that allowed by DPI (i.e. a maximum of 26 students). The Association then asks rhetorically: "How could Ms. Mezera not use her preparation time to fulfill the obligations mandated by the Federal Statute, PL 94-142 and the DPI rules governing special education?" The Association answers that question by saying that "any rational person must come to the immediate conclusion that one preparation period a day would not be enough added time to service the number of extra students" (i.e. 13 students). The Association characterizes the District's arguments to the contrary as simply "an effort to muddy the water" and an attempt "by the District to circumvent the bargained language."

Next, the Association addresses how Mezera responded to the overload she was given. The Association notes that what Mezera did was to give up her scheduled preparation time period to teach and instruct the students. The Association believes that was perfectly understandable under the circumstances. As the Association sees it, Mezera could not reasonably have been expected to serve her students without losing all her preparation time. It notes in this regard that each student's Individual Education Plan (IEP) has to be followed and fulfilled. According to the Association, if the IEP is not followed or fulfilled, or the teacher and District fail to provide the required services, then they are liable for not adhering to the DPI regulations and instructional requirements.

Next, the Association avers that District officials knew that Mezera had an overload and was responding to same by using her preparation time to service the special needs students, yet it did nothing about it. According to the Association, it is management's responsibility to see that employees get a planning period, and that it is used for the purpose it was intended. As the Association sees it, the District made no effort to provide instructional aides or temporary teachers to lessen the work requirements placed on Mezera and the other special education instructors. Instead, management simply took advantage of Mezera, knowing that she was dealing with her overload by working during her preparation period.

The Association responds as follows to the District's argument that it could not find a fourth special education teacher. First, the Association calls this argument "an effort to avoid the language in the bargained contract and muddy the waters with an extraneous argument." In the Association's view, management had adequate time to look for, and find, a fourth special education teacher, but it failed to do so. Second, the Association contends that the District's suggestion that Mezera had something to do with one of the applicants being rejected misses the mark because Mezera is not responsible for hiring, nor was she even on the interview team. Third, the Association maintains that even after a fourth special education teacher was secured, it was still necessary for the other three special education teachers to continue the duties required of special education certification. According to the Association, those regulations require a properly-certified special education teacher to develop the learning

plans for students, and the teacher who was employed did not hold the necessary special education certification to perform all of the duties relating to special needs students. In other words, the Association asserts that the (fourth) teacher who was secured was not certified for special needs students, so the other three special education teachers still needed to assist with the Individual Education Plans (IEPs) so they and the District would comply with state and federal statutes and DPI regulations. The Association avers that doing this work deprived all of the special education teachers of the requisite preparation time which they were entitled to by the clear contract language. Fourth, the Association acknowledges that Mezera admitted that after the fourth special education teacher was secured, her classes for the second semester were smaller, and she was sometimes able to have a preparation period. In any event, the Association asserts that Mezera did not receive a preparation period every day of the year (as she was contractually entitled).

As a remedy, the Association asks that Mezera be paid for the preparation time which she lost. According to the Association, she lost all her preparation time during the first semester and half of it in the second semester. The Association proposes that Mezera be paid 25% of her salary for the first semester and half that amount for the second semester. The 25% figure comes from the last sentence of the High School Teacher Load clause (Art. VII, Sec. I). The Association maintains that the District's argument about 6.25% (for a possible remedy) "simply doesn't compute." It also seeks "such benefits as are required to fulfill the retirement and social security requirements." Finally, the Association also seeks interest on the amount awarded. The rate of interest which was referenced in the original grievance was 18%.

. . .

The Association makes the following arguments in the two emergency leave complaints.

It frames the issue thus: "Did the Employer commit a prohibited practice by unilaterally changing the practice and application of the emergency leave language without bargaining those changes during a hiatus and, as such, fail to maintain the dynamic status quo?" The Association answers that question in the affirmative. In its view, the District failed to maintain the status quo pertaining to emergency leave during the hiatus period when it refused to grant the two employees emergency leave. The Association contends this constituted a prohibited practice. It elaborates on that contention as follows.

It begins by reviewing the pertinent contract language. It notes that the emergency leave provision specifies that emergency leave can be used for the "illness or death" of a specified listed group of people. Next, it notes that the provision provides for approval by the District Administrator prior to its use. As the Association reads it, the "approval" that this

language refers to is simply that the District Administrator can determine that, indeed, the leave is going to be used for the "illness or death" of the listed persons (i.e. that it is being used for the intended purpose). According to the Association, that is the extent of what the criteria requires. The Association maintains that the District Administrator does not have the unilateral right to establish criteria other than those just listed (i.e."illness or death") if the new criteria reduces who the leave can be used for or what it can be used for. The Association argues in this regard that the District Administrator does not have the unilateral right to decide that the "illness" must be serious, that the situation be sudden and unforeseen, or that there is a time element or restriction on it. Further, the Association urges the Examiner to conclude that the word emergency does not carry such connotations, just as he did in his arbitration award in ST. CROIX FALLS SCHOOL DISTRICT, NO. 55146 (Jones, January, 1998). Given all of the foregoing, the Association asserts that the contract language is clear and unambiguous.

Having reviewed the emergency leave language, the Association next applies it to the facts. It notes in this regard that when both employees sought emergency leave, they provided a reason consistent with the contract language (i.e. it was an "illness"), and specified that the illness involved a family member listed in the contract language (i.e. their mothers). Specifically, both requested emergency leave to care for their mothers by taking them to a doctor's appointment out of town.

As the Association sees it, the two employees qualified for emergency leave under that contract language, so their requests for same should have been granted. The Association contends that since that did not happen, the District violated the emergency leave provision when it denied their requests. It elaborates with the following arguments.

First, it asserts that the District has previously granted emergency leave to other employees for doctor's appointments for various relatives. It notes in this regard that Association Exhibits 6 through 11 are six emergency leave requests that were granted. According to the Association, those situations are "similar or identical" to the circumstances here in that they involve either illness or death. Additionally, it notes that in April, 2000, Yeomans-Petrowitz was granted emergency leave for the exact same reason as she sought it here (i.e. her mother had a doctor's appointment out of town). The Association avers that since she was granted emergency leave in that instance, it should have been granted here too. Since it was not granted here, the Association contends that the District acted inconsistently with what it had done in the past. Building on that point, the Association argues there is a past practice of granting emergency leave which the District failed to follow here. The Association also calls attention to the fact that Joint Exhibit 27 shows that emergency leave was once granted for a reason other than illness or death. In that instance, it was granted for "flooding problems at home." The inference which the Association draws from all the foregoing is that in the past, emergency leave was liberally granted with little explanation needed for approval, whereas here it (i.e. emergency leave) was not granted to the two employees who requested it.

The Association therefore characterizes the Employer's denial of emergency leave for these two employees as inconsistent with what has happened in the past and as arbitrary, capricious and inequitable.

Second, the Association asserts that in the two situations involved here, the District applied a new definition of emergency leave that had not been used previously and is external to the contract. According to the Association, the District added the word "serious" as a qualifier to the word "illness". Building on that premise, the Association calls attention to the fact that the District tried to get that same qualifier (i.e. the word "serious") added to the emergency leave language in the last round of bargaining, but was not successful in doing so. The Association argues that since the District did not get that qualifier in bargaining, they could not unilaterally add it on their own volition. The Association maintains that is exactly what the District did though (i.e. unilaterally change the meaning of the emergency leave contract language to require that the illness be sudden, serious, urgent or demanding of quick action). The Association also believes that the District is now imposing a timeline for requesting emergency leave. The Association emphasizes that the contract language does not do that (i.e. impose any timeline for requesting emergency leave), so it submits that no timeline should be imposed by the Examiner. As the Association sees it, the District is essentially trying to rewrite the language to include all those criteria. Finally, the Association argues that when Business Manager Coughlin wrote his memo on emergency leave and sick leave, he "muddied the waters" by defining emergency leave in a way that "doesn't exist in any portion of the language as written in the contract between the parties."

In an effort to show that the District violated the status quo concerning emergency leave, the Association also asserts that the District Administrator altered the emergency leave approval process. According to the Association, the District Administrator changed who can grant emergency leave, and also changed the form employees use for processing emergency leave requests. With regard to the former, it notes that at the hearing, the District Administrator testified that only he could approve emergency leave used for illness. The Association avers that this was a change in the status quo because previously emergency leave for illness was approved by the building principals. The Association maintains that what the District Administrator did was remove the principals from the approval process. Building on the premise that the District Administrator made these unilateral changes, the Association asserts that these changes were implemented during the contract hiatus period without any notice to or discussion with the Association.

As a remedy, the Association asks that the two employees be made whole by having their sick leave account restored, and that the District be required to post a compliance order notifying all employees that the District will cease and desist from committing such prohibited practices.

. . .

The Association makes the following arguments in the combined classes complaint.

It frames the issue thus: "Did the District violate the clear language of the contract when it refused to pay Ms. Buehler and Mr. Rogers for teaching combined classes and commit a prohibited practice by not maintaining the status quo of the contract language while the parties were in a hiatus during the bargaining of a new contract?" The Association answers that question in the affirmative. In its view, the District failed to maintain the status quo pertaining to combined classes during the hiatus period when it assigned two employees combined classes and then refused to pay them for those combination classes required by the contract language. The Association argues this constituted a prohibited practice. It elaborates on that contention as follows.

It first reviews the contract language contained in Article XIII, Section M, which it calls the "Combined Classes" clause. It reads that language to say in clear and unambiguous terms that anytime any teacher is required to teach a "combined" class, they are to receive additional pay for doing so (the additional pay being $450 per year). The Association avers that a combined class can occur when students of two different grade levels are combined into one classroom (such as when first grade students and second grade students are combined), or when two classrooms are combined into one classroom (such a beginning math class and an algebra class at the high school level, or two first-grade classes at the elementary level). According to the Association, either scenario creates a combined class for which the additional money must be paid. The Association interprets this language to apply to all teachers, no matter what they teach. In other words, in their view, the contract language is not limited in any way. Thus, as the Association sees it, the contract language does not make any exceptions for "specials" teachers (i.e. music, art or physical education), so none should be inferred by the Examiner. Additionally, the Association calls attention to the fact that the words "regular" and "elementary" are not included in the language. The Association believes they should not be inferred either. Putting these last two points together, the Association claims that the contract language applies to "teachers who teach music, physical education, regular elementary classes or math at the high school."

Having reviewed that contract language, the Association next applies it to the facts. It asserts that what happened here was that both "specials" teachers were assigned to teach classes at B.A. Kennedy where students from two classrooms of the same grade were combined into one "specials" class at the same time, and that both were also assigned to teach two different grade levels at ECHOES. In the Association's view, it is self-evident that these work assignments constituted combined classes within the meaning of Article XIII, Section M. Building on that premise, the Association believes that the two employees were contractually entitled to receive the combination classes stipend. The Association contends that since the District did not pay Rogers and Buehler that stipend, even though it paid other teachers who

taught combined classes, the District violated the combined class provision (i.e. Article XIII, Section M). According to the Association, the Examiner need look no further than this contract language to decide this part of the complaint.

Next, the Association responds as follows to the District's past practice argument. It acknowledges that historically, employees who taught "specials" classes (i.e. art, music and physical education) at the Charter School (ECHOES) in Eastman have not been paid the additional stipend. Be that as it may, the Association asserts this did not create a practice of not paying the stipend, or somehow change the contract language. The Association notes that for a practice to exist, it has to be aware of same. It avers that no one in the Association knew or was made aware of the fact that the employees who traveled and taught at ECHOES had not received the combined class pay. Thus, the Association's position is that it was unaware that the District had previously assigned combined classrooms and not paid the teachers pursuant to Article XIII, Section M.

The Association argues in the alternative that even if a practice did exist that teachers who taught "specials" classes did not receive the additional pay, that practice conflicts with the clear contract language and should not be followed. To support that proposition, it cites an arbitration award issued by Examiner Jones which held that clear contract language trumped a conflicting past practice.

Second, the Association calls attention to the fact that before the assignment in question was finalized, Buehler sent a letter to Principal Roe outlining her (Buehler's) concerns with the combining of classes. In response to Buehler's letter, Roe sought additional staff. Roe's request for additional staff was subsequently denied by the District Administrator.

Third, the Association argues that even if the Examiner finds that the language in Article XIII, Section M requires different grade levels, the Association points out that Rogers and Buehler did teach combined grade levels at ECHOES. That being so, the Association believes that at a minimum, they are entitled to payment since other teachers at ECHOES who teach combined grades are paid the stipend.

As a remedy, the Association asks that the two employees be paid the $450 stipend referenced in Article XIII, Section M, plus interest. As part of this remedy, the Association also asks that "the District be directed to pay such benefits as are required to fulfill the retirement and social security requirements."

In summary, the Association believes it established that the District failed to maintain the status quo and therefore committed prohibited practices by its actions herein. It asks that the Examiner award the relief referenced above, and also "retain jurisdiction until such time as the relief sought by the Grievants and Association is provided."

Association's Reply Brief

The Association makes the following arguments in the Mezera complaint.

First, it calls attention to the District's admission that it explored paying additional compensation to the special education teachers who used their preparation period to instruct special education students (i.e. Bark's proposal to pay them 6.25%). According to the Association, this amounts to an admission by the District that it knew the employees were using their preparation time for teaching and simply wanted to pay them an amount that was less than what is specified in the contract. The Association characterizes this conduct as individual bargaining.

Second, the Association responds to the District's contention that the special education program changed from an inclusive approach to a self-contained classroom. The Association believes that distinction is irrelevant and inaccurate. The Association acknowledges that the District can decide to service special needs students in whatever manner it deems appropriate. According to the Association, the students have always, and are still being, assigned to special education teachers for primary services and are mainstreamed into the regular classes when the student can be so assigned to comply with the least restrictive environment.

Third, the Association argues that the District knew well in advance of the school year that a fourth special education teacher was needed to service the special education population. The Association avers that the Employer nonetheless refused to provide an instructional aide to assist the teachers, and also refused any direct assistance to the employees to alleviate their caseload. The Association characterizes the District's response as being to bury its head in the sand and have Mezera use her preparation time to provide services to the students.

Fourth, the Association responds to the District's assertion that the DPI guidelines allow for a variance of 10% in the caseload formula. It submits that even if that is the case, Mezera's caseload of 39 students was 50% higher than the 26 recommended by the DPI. The Association puts it this way in their brief: "by any mathematical concoction that is more than 10%." In response to the District's assertion that Stovey also had a caseload last spring which exceeded the DPI recommendations, the Association maintains that no teacher other than Mezera has ever had a caseload that exceeded the DPI recommendations by 50%.

Fifth, the Association responds to the District's contention that what Mezera should have done was to take a preparation period and send the students to the learning lab. The Association believes that argument misses the mark. The Association contends that as a special education teacher, Mezera was legally obligated to adhere to the students' IEPs and service her caseload. According to the Association, if she failed to service the students' needs, she could subject herself and the District to liability, and possibly even the loss of her teaching license.

Sixth, the Association responds to the District's contention that the caseload language is permissive. It notes at the outset that this is the first it has heard this contention from the Employer. Aside from that, the Association argues that the impact of any class size language is mandatory, citing OAK CREEK EDUCATION ASSOCIATION, DEC. NO. 11827-D, E (WERC, 1975). The Association argues that if the Examiner finds that the caseload language is permissive, he must also find that Article II (the Management Rights clause) is permissive too. The rationale for this contention is that Section 9 of that clause provides in pertinent part that the Board has the right to operate and manage "the direction, arrangement, assignment of workload, teaching assignment within the areas of Wisconsin Department of Public Instruction (DPI) certification of the teacher. . ." According to the Association, this language is also permissive which should evaporate. Finally, it argues that even if the caseload language is permissive, it is nonetheless a guide to understand what is reasonably considered a maximum or excessive workload for special education teachers.

Seventh, the Association avers that very few other special education teachers have ever been faced with caseloads that exceeded the DPI requirements. The Association contends that when the District makes its past practice argument here (i.e. that there is no past practice of paying employees for violating the DPI contract provision), what the District is ignoring is that Mezera's caseload was so high (namely, 39 students).

. . .

The Association makes the following arguments in the two emergency leave complaints.

First, it argues that while the District relies heavily on the District Administrator being involved in the emergency leave approval process, "that has not been the past practice." Additionally, the Association contends that the District Administrator's role in approving emergency leave is for those instances which do not fall into the category of "illness or death" (such as, when in the past, emergency leave was granted to take care of a child when the babysitter's father died, or for a flooded basement).

Second, the Association avers that when the parties expanded sick leave in the last round of bargaining to include language allowing the use of sick leave for doctor's appointments, that change in the sick leave language had no bearing at all on the emergency leave language. According to the Association, this is borne out by the granting of Yeomans-Petrowitz's first emergency leave grievance in 2000 by Dr. Rossetti. As the Association sees it, he realized that the emergency leave language had not changed, and this is why he granted Yeomans-Petrowitz emergency leave.

. . .

The Association makes the following arguments in the combined classes complaint.

First, the Association argues that the District is trying to change the existing combination classes language. Once again, it reads that language to say that "teachers" are to be paid for combination classes. It notes that, on its face, the language does not exclude "specials" teachers. The Association submits that since both of the employees involved are "teachers" who taught "combination classes", they are entitled to be paid the $450 stipend referenced in Article XIII, Section M.

Second, the Association responds to the District's argument that the Association uses the words "combination" and "combined" interchangeably by asking rhetorically: "what is the difference" between the two terms? In the Association's view, there is none.

Third, the Association responds to the District's argument that the combined class language is ambiguous. It disputes that assertion. As previously noted, the Association believes that language is clear and unambiguous and "by any definition of 'combination', the two employees [Rogers and Buehler] taught combination classes."

Fourth, the Association responds to the District's past practice argument. It does so by disputing the assertion that there is a past practice. In its view, the District presented "little or no evidence. . .to indicate that any employees taught combined grades, or combined classes of the same grade level from two different classrooms and were not paid." According to the Association, "if employees. . .had been assigned classes at the same grade level or two different classes at the high school, it is hard to imagine the Association would not have sought an increase in the amount paid for combination classes." The Association also claims that the combining of classrooms within the same grade is a new occurrence in the District and thus a change in the status quo. As the Association sees it, there is no record evidence showing that previously classrooms were combined within a grade level. The Association characterizes what happened in the 2000-01 school year at Kennedy as an anomaly.

Fifth, the Association argues in the alternative that even if there is a past practice, the Examiner should not apply it, but rather should apply the contract language. As previously noted, the Association believes that language is clear and unambiguous, and "does not provide for a proration of the stipend for combination classes, nor does it suggest anything other than payment for the school year." The Association maintains that both Buehler and Rogers taught several classes that resulted from the uniting of different grade levels, so they should be paid for teaching combination classes.

In summary, the Association argues that in all three cases, the District inappropriately changed the status quo during the contract hiatus period. Additionally, the Association contends that the District attempted to bargain individually with the affected employees and the

Association president, and refused to bargain with the Association. It asks the Examiner to remedy same.

District

District's Initial Brief

The District begins with the following overview. It acknowledges at the outset that it has a legal obligation to maintain the dynamic status quo during a contract hiatus with respect to wages, hours and conditions of employment under the terms of the predecessor contract. It further acknowledges that it would commit a prohibited practice if it changed the status quo. That said, it then notes that in order to succeed on any of its claims, the Association must establish by clear and convincing evidence that the District unilaterally changed the status quo. The District avers that did not happen. Specifically, the District contends that the Association did not prove that it changed, and therefore violated, the status quo in the areas of caseload, emergency leave and combined classes as alleged by the Association. In its view, the Association is not seeking to enforce the status quo in those areas; instead, it is trying to expand it. The District's position is that it did not commit any prohibited practices by its conduct herein, so the Association should not prevail on any of its complaints.

. . .

It makes the following arguments in the Mezera complaint.

It begins by framing the issue in that case thus: "Did the District unilaterally alter the status quo by (a) violating the Class Size clause, without a valid defense, thereby (b) creating a *per se* violation of the High School Teacher Load clause, so that Ms. Mezera is entitled to a 25% salary bonus?" The District answers that question in the negative. In its view, it did not unilaterally alter the status quo pertaining to caseload during the hiatus period. According to the District, the Association's version of the status quo (i.e. that a teacher has the ability to control how he/she will use his/her time) is not the status quo. It elaborates on that contention as follows.

First, the District argues that it did not unilaterally change the status quo with respect to the Class Size clause because that clause (i.e. the Class Size clause) is a permissive subject of bargaining. Building on the premise that that language is permissive, the District contends it evaporated when the Master Agreement expired on June 30, 2001, so, as a matter of law, no violation of the status quo could have occurred. The District avers it is established Commission caselaw that contractual provisions regarding classroom sizes are permissive subjects of bargaining where the provision or proposal limits a school board's ability to establish a student-teacher ratio. In support thereof, it cites the cases of SCHOOL DISTRICT OF

CAMPBELLSPORT, DEC. NO. 20936 (WERC, 1983) and BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis.2D 43, 63-64 (1976). The District argues that in this case, the Class Size clause limits the ability of the District to set class size. Building on that premise, the District maintains that the Class Size clause in this case primarily relates to educational policy, not wages, hours or conditions of employment, and therefore is a permissive subject of bargaining. The District next avers that it is established Commission caselaw that an employer has no duty to continue permissive subjects of bargaining during a contract hiatus, citing GREENFIELD SCHOOL DISTRICT, DEC. NO. 14026-B (WERC, 1977). According to the District, the parties to an agreement can change this rule by adopting a so-called "evergreen clause", which would bind the parties to the terms of the contract from year-to-year after its expiration, but that is not the case here because this contract is simply for its term.

Next, the District argues in the alternative that even if the Class Size clause is not permissive and therefore did not evaporate, it forbids the District from exceeding a DPI standard that no longer exists. Said another way, it was negotiated prior to a significant change in the law which effectively rendered the Class Size clause impotent. For background purposes, the District notes that the parties stipulated that the Class Size clause was incorporated into a collective bargaining agreement between the parties as early as the 1987-89 agreement. The District avers that since then (i.e. when the Class Size clause was adopted), the state law that it incorporates has been abolished and replaced. Specifically, DPI is no longer "responsible for the publication of minimum/maximum enrollment ranges on an annual basis" under Wisconsin law. According to the District, this change resulted from a decision to eliminate the underlying regulatory concepts, so that the old system "no longer had any basis." To support that assertion, it cites Joint Exhibit 7, first paragraph after the heading "SUMMARY"; see also and compare Wis. Admin. Code Chap. PI 11, Secs. 11.26(3), 11.28(1)(b), and 11.29(1)(b) (1996) with Wis. Admin. Code PI 11 (2001). As the District sees it, this dramatic change in the administrative code demonstrates a specific legislative desire to decentralize decision-making regarding how school districts will meet the educational needs of special education students. The District argues that given this context, it is not reasonable to equate current DPI publications with administrative regulations issued under prior law.

The District also contends that this fundamental change in the relationship between DPI and local school districts is reflected in the DPI issued case-load formula. What it is referring to is that under the old law, DPI was required to publish "maximum enrollment guidelines," and school districts were required to comply with the guidelines, while under the current law no maximum enrollment guidelines are published at all, let alone annually. Instead, DPI has presented to school districts "OPTIONS FOR DETERMINING CASELOADS IN SPECIAL EDUCATION". (Joint Ex. 8 at p. 1). The District notes that among these "options" is a "Statewide Caseload Formula" and "Statewide Caseload Number Chart" that are "designed as starting points to guide discussions about caseload determination" if the district chooses to use them.

Next, the District argues that even if a district elects to identify a DPI caseload formula (as is the case here), the caseload formula itself is flexible. To support that contention, it notes that if one compares "Example 1" and "Example 2" from the caseload formula, one must note that the formula recognizes that overloads can be addressed by providing additional staff assistance. According to the District, it did that here when it provided additional staff assistance by hiring a teacher to teach a special education class to special education students, and by designating learning lab staff to provide additional instructional support to students during the special education teachers' preparation periods. Accordingly, the District believes it fulfilled its obligations under the caseload formula.

Next, the District argues in the alternative that even if the Class Size clause is a valid part of the status quo, the District violated the Class Size clause only out of valid business necessity. It notes in this regard that after it lost one of the high school special education teachers in the spring of 2001, it posted the position five times and made good faith efforts to find an additional teacher. However, it simply could not find a person with the requisite qualifications who would not have personality conflicts with existing staff members (specifically, Mezera). Eventually though, the District did hire someone to teach one special education class per day (in a school that has just four periods per day). As the District sees it, this shows that even if it did violate the Class Size clause, it did so only because of a valid business reason. It therefore submits that in this instance, the defense of business necessity is credible.

Next, the District responds to the Association's contention that it changed the status quo by not paying Mezera additional pay. For background purposes, it notes that the Association originally filed two grievances on behalf of Mezera. One grievance alleged a violation of the Class Size clause, while the other grievance alleged a violation of the High School Teacher Load clause. It further notes that when the Association filed the instant complaint, it included the Class Size clause grievance as an alleged violation of the status quo in paragraph 19 of the complaint, but it did not include the High School Teacher Load clause grievance as an alleged violation of the status quo anywhere in its complaint. The High School Teacher Load clause is the contract provision which references a remedy of a 25% salary. The District interprets the Association's theory in this case to be that the District's violation of the Class Size clause constitutes a *per se* violation of the High School Teacher Load clause, and therefore, the salary bonus that is only available under that High School Teacher Load clause is owed to Mezera.

The District asserts that the plain language of the High School Teacher Load clause grants high school teacher load based upon assigned periods, and not any alleged violation of the Class Size clause. It reads the High School Teacher Load clause to contain no reference to the Class Size clause. In the District's view, the language does not state that violation of the Class Size clause constitutes the assignment of an additional duty period, nor does it mention the word "caseload". That being so, the District believes there is nothing to link the language

of the High School Teacher Load clause to the Class Size clause. Building on that premise, the District argues that it did not violate the High School Teacher Load clause.

Next, the District responds to the Association's contention that Mezera was forced to use her preparation time to serve students, and the contention that Mezera was personally required to use her preparation period to serve students as called for by the IEPs, by the force of federal law. It disputes both contentions.

First, notwithstanding Mezera's legal opinion, the District contends that federal law does not require a particular teacher to provide services under an IEP. In support thereof, the District avers that while IEPs must contain numerous other things, the name of the teacher who developed the IEP, or the name of a specific person who will provide services under the IEP, is not required by the law. (Citing 20 U.S.C.A. Sec. 1414(d)(1)(A) and Wis. Stats. Sec. 115.787(2)). The District submits that if the law required an individual teacher to be responsible for the provision of services under an IEP, then the law would state that. However, it does not. Instead of requiring individual teachers to provide services, the law states that the District is responsible for same (i.e. making a free appropriate education available to eligible students with disabilities). Thus, the District asserts that the law does not require Mezera to personally provide services to students; instead, the law requires the District to do that (i.e. provide an education to students). The District avers that during Mezera's preparation period, it designated other staff to service the students on Mezera's caseload.

Second, the District claims that Mezera was given alternatives to using her preparation time. To support this assertion, it notes that Mezera admitted she was instructed by management not to use her preparation time to provide additional assistance to students, but rather was advised to send students who came to see her during her preparation time to the learning lab for assistance. According to the District, she chose to ignore these clear instructions because she not only did not send her students on her own IEP caseload to the learning lab, she often serviced students that were on other teachers' caseloads. The District acknowledges that while students went to see Mezera when the learning lab was "full", this was because, in her own words:

> Some students are much more comfortable coming to me. To keep the rapport built with students I also worked with those. Many of them were not on my caseload, but still they came into my room. (Record 1 at p. 52)

The District avers that by doing this, she usurped the District's ability to manage and control its workforce, contrary to the District's managerial rights under the contract and state law. In the District's view, Mezera's testimony suggests that she spent a significant portion of her preparation periods assisting students who were not on her caseload list, students who were assigned to other teachers for instruction, and providing assistance to Mr. Kopp. Given the

foregoing, it is the District's position that the record evidence does not support the conclusion that the District forced Mezera to use her preparation time by assigning her a caseload that exceeded the caseload formula.

Next, the District avers that there is no past practice of granting additional pay pursuant to the High School Teaching Load clause to special education teachers when the Class Size clause has been violated. To support that assertion, it relies on the testimony of the District's business director (Coughlin) who testified that he reviewed the records of the District, and could find no evidence that any special education teacher had ever received pay under the High School Teacher Load clause in the previous twelve (12) years. Thus, no such payment has been made in that timeframe. It also cites Mezera's testimony that in her 22 years of employment with the District, she was not aware of any special education teacher ever receiving pay under the High School Teaching Load clause.

Finally, the District submits that there is no pertinent bargaining history evidence in the record.

Addressing the matter of remedy, the District's position is that even if the District did violate the status quo, the remedy requested by the Association is unjustified. The District does not believe that any monetary remedy is available to Mezera.

. . .

It makes the following arguments in the two emergency leave complaints.

It begins by addressing the issues to be resolved. It frames the issue in the Petrowitz case thus: "Did the District unilaterally alter the status quo by exercising its discretion and refusing to grant Ms. Yeomans-Petrowitz the use of emergency leave to attend a doctor's appointment, where the request bore a date that was nearly two months prior to the appointment and the District had no indication that the request pertained to a surgical operation or follow-up care to a surgical operation?" It frames the issue in the Rogers case thus: "Did the District unilaterally alter the status quo by exercising its discretion and refusing to grant Mr. Rogers the use of emergency leave to attend a doctor's appointment, where the request bore a date that was one month prior to the appointment and the District had no indication that the request pertained to a surgical operation or follow-up care to a surgical operation?" The District answers both of these questions in the negative. It is the District's position that it did not change the status quo pertaining to emergency leave during the hiatus period when it refused to grant their emergency leave requests to attend doctors' appointments with their mothers. As the District sees it, it adhered to the status quo concerning emergency leave, and to the extent applicable, followed the plain language of the contract and the past practices of the parties. It contends that the Association's argument to the contrary ignores the contract language and the great

weight of evidence regarding past practice. The District avers that doctors' appointments should be handled under sick leave. While the Association believes that the grievants can use emergency leave for doctors' appointments, it is the District's position that the contract and the relevant past practice show that the District Administrator has the discretion to grant emergency leave, which, consequently, determines when a doctor's appointment may fall under sick leave. The District submits that under the Association's view of the status quo for emergency leave, the District has no liability to determine that a doctor's appointment scheduled one or two months in advance does not fall under "emergency leave." According to the District, the Association's view is not the status quo. It elaborates as follows.

The District notes at the outset that both Rogers and Petrowitz were granted paid leave for the days they requested; both were granted sick leave. That being so, the District believes that the issue in this case is not whether these employees were able to use some form of paid leave to attend to the needs of their family members – they were. Instead, the District believes that the issue is whether under the status quo, these employees had the absolute entitlement to use the form of paid leave that would be most advantageous to them – namely, emergency leave. It is the District's position that under the status quo as defined by the contract language, the bargaining history and past practice, the District Administrator has the discretion to determine whether or not to grant emergency leave, that doctors' appointments generally fall under sick leave, and that the denial of Rogers' and Petrowitz's requests for emergency leave was consistent with the status quo.

The District first addresses the contract language. It notes at the outset that of the three different paid leave provisions, only one – the Emergency Leave clause – requires advance approval by the District Administrator prior to its use. The District asserts that the inclusion of approval language in the Emergency Leave clause is significant, especially when contrasted with the language found in the other two clauses, because it suggests that approval of emergency leave is more than a ministerial formality. In its view, the language suggests that the District Administrator has a significant role to play in granting or denying emergency leave requests. The District disputes Petrowitz's assertion that she is simply entitled to choose emergency leave over sick leave. Next, the District contends that when the Emergency Leave clause is viewed in light of the Sick Leave clause, it becomes apparent that the days of leave requested by Petrowitz and Rogers did not qualify for the use of emergency leave. It contends that unlike the Emergency Leave clause, the Sick Leave clause specifically states that sick leave may be used for the purpose of attending doctor appointments for family members. Since the parties referenced doctor appointments under sick leave, but did not reference doctor appointments under emergency leave, the District believes it is reasonable to assume that the parties did not intend for emergency leave to be used for doctors appointments. The District further asserts that the validity of applying this rule of construction in this case is supported by the testimony of Nancy Trautsch, a past Association president and negotiator, who testified that "we've always used sick leave for doctors' appointments." (Record 2, p. 86). Given the

foregoing, the District submits that it is reasonable to conclude that the inclusion of doctors' appointments in the Sick Leave clause, by implication, excludes doctors' appointments from the plain meaning of "emergency leave" in the Emergency Leave clause. Thus, the District avers that it is not contractually proper to use emergency leave for doctors' appointments. Since both of the employees involved here acknowledged that the purpose of their leave requests was to attend doctors' appointments, the District believes there was good reason for it to not grant (i.e. deny) their requests for emergency leave.

Next, the District addresses the parties' bargaining history. In its view, the bargaining history also supports the District's position here. It begins by addressing the parties' bargaining history relative to the sick leave language. It notes that the sick leave language was changed in the last round of bargaining. Specifically, it notes that the District proposed new language that said that doctors' appointments for family members would be handled under sick leave, and that the Association agreed to this change. The District submits that while the Association did not view this as much of a change, it was nevertheless a change. Next, it addresses the parties' bargaining history relative to the emergency leave language. It acknowledges that in the last round of bargaining, it tried to get the word "serious" added before the word "illness", but was not successful in doing so. According to the District, the reason the District abandoned this proposal was because at the bargaining table, Association representative Leroy Roberts indicated that since the word "emergency" was not contractually defined, it was left to the discretion of the District Administrator to define it. The District inferred from this that the administrator had the discretion to determine when leave would fall under Emergency Leave, because of the overlap between the Sick Leave and Emergency Leave clauses. The District avers that is what happened here (namely, the District Administrator exercised his discretion and supplied a definition for a term not defined in the agreement). The District contends that what the District Administrator did was to consult a dictionary for a definition of the word "emergency". In doing so, he found it defined an emergency as a sudden occurrence demanding quick action. The District avers that was the definition of "emergency" that he used. Thus, when O'Meara reviewed the emergency leave requests involved here, he looked for urgency or seriousness. As the District sees it, it is not surprising that Petrowitz's and Rogers' requests for emergency leave were denied under this definition, since they were seeking to use "emergency" leave for "doctors' appointments" that they were aware of one to two months in advance, and no surgery or other extraordinary measures were scheduled. Building on the foregoing, the District submits that O'Meara properly exercised the discretion given to him under the contract, as bargained for by the parties, and properly denied these requests for emergency leave.

Next, the District addresses the parties' past practice. In its view, the parties' past practice also supports the District's position here that it did not commit a prohibited practice when O'Meara denied Rogers' and Petrowitz's requests for emergency leave. In support of that premise, it relies on the six instances documented in the record where emergency leave

was granted to an employee for a medical appointment. Specifically, it cites the following: 1) when Nancy Trautsch attended her daughter's emergency oral surgery; 2) when Nancy Wachter attended her father's surgery; 3) when Christina Mezera attended her daughter's surgery; 4) when Dale Hanson attended his son's surgery; 5) when Dale Hanson attended his son's oral surgery; and 6) when Karen Schilling accompanied her mother to a cardiac shock treatment. The District calls attention to the fact that in these six instances, a family member of an employee either had surgery or a medical procedure that was of similar magnitude. Building on that premise, the District avers that the parties' past practice was this: emergency leave is granted to employees to attend doctors' appointments with a relative who is undergoing surgery or a procedure of a similar magnitude. According to the District, Rogers' and Petrowitz's requests do not fall within the practice because neither Rogers' mother nor Petrowitz's mother was expected to undergo surgery or a procedure of a similar magnitude.

The District contends that the only instance documented in the record where emergency leave was granted to attend a doctor's appointment where surgery or treatment of a similar magnitude was not performed was Petrowitz's April, 2000 request for emergency leave to accompany her mother to Iowa City for treatment. The District notes that what happened there was that Petrowitz's request for emergency leave was denied by Rossetti, whereupon a grievance was filed. The grievance was resolved, and paid leave was granted to her via a letter from Rossetti.

The District disputes the Association's contention that Rossetti's letter constitutes a binding practice. It argues there are four problems with that claim. First, the District avers that the Association's claim that the Board regarded Rossetti's letter as a binding past practice should fail. The District's rationale is this: if the Board had relied upon Rossetti's letter as the past practice as the Association claims, then the Board would have granted the grievance. It did not. The District submits that the only reasonable inference that can be drawn from the foregoing is that the Board did not regard Rossetti's letter as a binding past practice. Second, the District calls attention to the fact that Rossetti's letter itself indicates on its face that it is limited to "this case", and that the Association offered no alternative explanation for this wording. Third, the District asserts that there is evidence in the record showing that Rossetti believed that his decision to grant Petrowitz emergency leave was consistent with the practice of granting emergency leave to attend surgical procedures. What the District is referring to is O'Meara's testimony that Rossetti believed that Petrowitz's mother was having a surgical procedure performed in Iowa City when he granted her request for emergency leave in April of 2000. Fourth, the District argues that even if Rossetti did not believe that Petrowitz's mother was having surgery on the date of the requested April, 2000 emergency leave, one instance is generally considered insufficient to constitute a past practice.

Finally, the District argues in the alternative that if the Examiner finds that the District did violate the status quo when it denied the emergency leave requests, then the only

appropriate remedy is to issue a cease and desist order, and to adjust the employees paid leave credits. The District envisions the latter process working as follows. If Rogers used one day of sick leave for the day that he requested emergency leave, then the District would add one day of sick leave to his current total of banked sick leave; Rogers would then have a deduction of one day made to his allotment of five emergency leave days for the 2001-02 school year. If Rogers used all five of his emergency leave days for the 2001-02 school year, then the District proposes that no accounting adjustment of any kind be made, because Rogers would, in that case, already be in the same position that he would have been in had the District granted the emergency leave. The District believes this same analysis also applies to any remedy for Petrowitz.

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It makes the following arguments in the combined classes complaint.

It begins by addressing the issue to be resolved. It frames the issue thus: "Did the District unilaterally alter the status quo by not granting either Mr. Rogers or Ms. Buehler the 'combination classes' stipend?" It answers that question in the negative. In its view, it did not change the status quo pertaining to combination classes during the hiatus period when it did not pay either Buehler or Rogers the stipend for teaching combination classes. As the District sees it, it adhered to the status quo concerning combination classes and to the extent applicable, followed the plain language of the contract and the past practices of the parties. It contends that the Association's contention to the contrary (i.e. that the two employees taught "combination classes" within the meaning of the contract language) ignores the contract language and the great weight of evidence to the contrary. The District notes that the Association consistently misstated the term "combination" (which is used in Article XIII, paragraph M) as "combined". According to the District, this was no accident. The District maintains that the Association intentionally misquoted the applicable term to promote its vision of what it would like the status quo to be: namely, that when students from two classrooms of the same grade level are sent to a physical education or music class at the same time, the District has "combined" two classes, and, therefore, the teacher is entitled to the "combination class" stipend. The District argues that the Association did not produce any evidence that the parties ever intended the term "combination classes" to apply to anything other than elementary classrooms consisting of students from more than one grade, nor did the Association produce any credible evidence that the parties ever intended the term to apply to "specials" (meaning art, physical education or music) classes, at all. Despite these problems, the Association nonetheless advances its vision of the status quo: that Rogers and Buehler are entitled to the "combination classes" stipend for the 2001-02 school year. The District asserts that the problem with that contention is that it is not the status quo. It elaborates as follows.

The District first addresses the contract language. It notes at the outset that the applicable contract provision (Article XIII, Section M) is entitled "Combination Classes" and provides thus:

> Those teachers who are required to teach combination classes shall receive $450.00 per school year in addition to their normal placement on the salary schedule.

It notes that the term "combination classes" is not defined. That being so, the District maintains that it is necessary to look elsewhere to determine the meaning of that term. According to the District, the term "combination classes" is a term of art that refers to teachers who exclusively teach classes consisting of students from more than one elementary grade level. It believes that the Association's conflicting view has two language problems.

The District asserts that the first language problem with the Association's interpretation of the Combination Classes clause is that it is wedded to what the District calls a "homeroom perspective" where students are defined in terms of their homeroom. As the District sees it, there is nothing in the contract to support this "homeroom perspective." Instead, Rogers' and Buehler's "specials" classes should simply be viewed as what they were: classes made up of individual students. The District maintains this view is consistent with the District's rights to schedule classes and set class sizes. The District also argues that if the Association's "homeroom perspective" prevails, it would lead to absurd results. It notes in this regard that currently, elementary homerooms are small because the District receives SAGE funding. The SAGE program is designed to limit elementary math and reading class sizes to no more than 15 students. While this benefit flows to the instruction of other topics taught by homeroom teachers, that may not always be the case. Additionally, there is no guarantee that SAGE funding will always be available in the future. Rogers acknowledged that prior to the implementation of the SAGE program, he had classes with 28-32 students, which is, in his words, "about where they're at" now when he teaches "specials" classes at B.A. Kennedy. According to the District, there is nothing in the record or the Association's arguments to suggest that class sizes in the past were somehow improper. The District argues that it is absurd to say, as the Association essentially does, that if SAGE funding is no longer available to the District then it will have the uncontested right to set class sizes at 28-32, but that presently the District must pay the combination classes stipend to Rogers and Buehler for teaching "specials" classes at that same level. The District acknowledges that this absurdity does not prevent the District from setting class sizes, but it does infringe upon that right by requiring an additional payment to be made. The District contends that such an infringement should be clearly required by contract, which is not the case.

The District argues that the second language problem with the Association's approach is that the contract itself does not define the term "combination classes." Building on that

premise, the District asserts that the language is therefore ambiguous in that respect. That said, it notes that the word "combination" is a noun, unlike the word "combined" which is a verb. It reasons from the foregoing that the term "combination classes" is likely a term of art, representing a specific situation. In its view, the testimony of witnesses Mulrooney and Miller makes it clear that the term "combination classes" has a specific meaning and is, therefore, a term of art.

Next, the District addresses the parties' bargaining history. In its view, the bulk of the bargaining history evidence, which was placed into the record by the District, shows that the stipend for combination classes is only paid to regular curriculum teachers who teach multi-grade classes. In support thereof, the District relies extensively on the testimony of former District Administrator Mulrooney, who testified that when the Combination Classes clause was negotiated, its purpose was to provide additional compensation to elementary teachers who taught classes consisting of students of two grade levels. He also testified that the clause did not refer to "specials" teachers (i.e. art, physical education or music teachers). According to the District, the Association put virtually no bargaining history evidence into the record, so there is nothing to contradict the District's view of the bargaining history. The District asserts that its refusal to pay Rogers and Buehler the combination classes stipend was consistent with the bargaining history.

Next, the District addresses the parties' past practice. According to the District, the past practice evidence shows that the combination classes stipend is only paid to regular elementary education teachers whose classes consist of students from more than one grade level, all day, every day. It cites the following record testimony to support that premise. First, it calls attention to the fact that even the Association's own witnesses, namely Rogers and Miller, acknowledged that regular teachers at ECHOES elementary who taught multi-grade classes were paid the combination classes stipend. Second, it again cites Mulrooney's testimony that he was the District Administrator when the combination classes stipend was created, and that the stipend applied only to regular elementary education teachers who taught multi-grade classes, and excluded "specials" teachers. Third, it relies on the testimony of Business Manager Coughlin, who testified that he reviewed the District's accounting records back to 1991, and concluded that only regular elementary education teachers who taught multi-grade classes received the combination classes stipend. The District summarizes all of the foregoing testimony as follows: "Every person who gave testimony agreed that in the past the combination class stipend was paid to regular curriculum elementary teachers who taught multigrade classes."

Having commented on the record evidence just noted, the District also calls attention to evidence which is not contained in the record. First, it notes that there is no evidence which supports the theory that when students from two homerooms are sent to a "specials" teacher, that this means that a "combination class" has been created. Second, the District notes that

there is no evidence which supports the theory that "specials" classes of more than one grade level are "combination classes." Third, the District notes that there is no evidence that any person has ever been paid the combination classes stipend unless they taught combination classes all day, every day.

Next, the District argues that the Association's evidence concerning the statement Principal Merle Frommelt made to Rogers in the mid-1990's has little probative value. The statement that the District is referring to is Rogers' testimony that sometime in the mid-1990's, Frommelt, who was then the principal at B.A. Kennedy, told him (Rogers) that in order to get the combined classes stipend, "it had to be something that you did every single day." The District contends that even if Frommelt said that, "the alleged statement would have been 100 percent consistent with the past practice of the District, and with Mr. Frommelt's understanding of that practice as shown by Mr. Frommelt's testimony." The District also avers that "no matter how you slice it," Rogers did not teach combination classes all day, every day, during the 2001-02 school year; at most, he taught multi-grade classes one day per week, namely, Tuesdays. That being so, it is the District's position that Rogers and Buehler are not entitled to any relief.

Next, the District addresses the statements which Rogers attributed to Coley when he protested his 2000-01 class assignment to her. The statement in question is that Coley supposedly promised Rogers that if he were required to teach "combined classes" in the next year, that he would receive the combination classes stipend. The District asserts that no weight should be given to this testimony for the following reasons. First, the District avers that Rogers made inconsistent statements on cross-examination, which, in their view, raise doubts about the validity of his claim. Second, the District notes that Coley denies ever making such statements. Third, the District argues that even if one assumes that Coley made such a statement, she had no authority to do so and thus cannot bind the District. To support this premise, it notes that O'Meara testified that as the curriculum director, Coley had no authority to bargain on behalf of the Board, and should not have bargained individually with any teacher.

Finally, the District argues that if the Examiner concludes that the District violated the status quo, then the only appropriate remedy is to issue a cease and desist order. The District believes that the remedy sought by the Association (namely, a $450 payment for each complainant for the 2001-02 school year) is inappropriate here. It avers in this regard that even if Rogers expended additional time teaching this year, it was not because he taught "combined classes"; rather, it was because of the facilities that he was required to teach in. Additionally, the District believes that Rogers was able to minimize the amount of effort necessary to prepare to teach multi-grade classes by simply copying the lessons that he taught to other classes of the same grade. However, if the Examiner finds that the status quo must be stretched to require the payment of a combination classes stipend to Rogers and Buehler, then

the District requests that the amount of the stipend be prorated to reflect the relative amount of time that the complainants spent teaching "combination classes," according to whatever definition of "combination classes" the Examiner deems the status quo demands. The District envisions it working as follows. Should that happen, the order should provide that the District pay an amount equal to $450, divided by the number of total classes taught by Buehler and Rogers, and multiplied by the number of "combination classes" taught by Buehler and Rogers. To do otherwise would, in the District's view, inequitably treat those regular education teachers who teach combination classes all day, every day.

In summary, it is the District's view that in all three complaints, it did not violate the status quo during the hiatus period; instead, it acted consistent with same. It asks the Examiner to dismiss all the charges against the District.

District's Reply Brief

The District makes the following arguments in the Mezera complaint.

It begins by arguing that the Association's complaint rests upon faulty theories. It contends that contrary to the Association's assertions, the contract language does not define an "overload" based upon "DPI recommendations", nor does the contract language entitle teachers to additional payments based upon "lost preparation time." The District argues that the Association's contract "misinterpretations highlight the fact that their theory of the case rests upon a verbal sleight of hand that simply does not stand up to scrutiny."

The District concedes that while Mezera may have used her preparation time to assist students, it notes that neither the District nor the law required her to personally do so. The District emphasizes that it assigned students to other teachers and staff members for assistance during Mezera's preparation period, yet Mezera chose to use her preparation time to assist other staff members and students, to the point of assisting students who were, by her own admission, not on her caseload. While it characterizes that as admirable, the District avers that Mezera's actions are inconsistent with the theory that the District did not make preparation time available to her.

The District responds as follows to the Association's arguments about the contract language. It contends that the Association's interpretations of the contract language are, to use the Association's term, "bogus." To support that premise, it notes that while the Association argues that the clear contract "language defines an overload of students as the maximum recommended by DPI", the District believes that the contract language belies that theory. The District contends that neither the Class Size clause nor the High School Teacher Load clause define an "overload" in terms of the maximum number of students recommended by DPI. The District submits that the High School Teacher Load clause does not define a teacher's load by a

number of students (whether required by DPI or not); instead, a teacher's load is defined in terms of "assigned duty period(s)." The District emphasizes that (teaching) loads are defined in terms of "periods" that are "assigned" and "scheduled." The District argues that the Association can only achieve the result it seeks by melding these discrete contract provisions together, and inserting a word that is not found anywhere in the contract, namely, "overload." According to the District, this requires a sleight of hand centered on variations of the word "load." The District avers that by a sleight of hand, the Association attempts to blur the distinction between the Class Size clause and the High School Teacher Load clause by representing that because Mezera's caseload was overloaded, she must be entitled to the same payment received by other teachers who have an "overload". In the District's view, "the trick has some appeal, because Ms. Mezera's actions were likely motivated by good intentions." The District asserts this is why Principal Bark engaged in discussions with the Association's President regarding the working conditions of the special education teachers, and whether additional payments might be made. According to the District, what Bark discussed with the Association was more than what the contract language requires.

The District also asserts that the Association's argument that "the language provides for payment when preparation time is lost" cannot stand up to scrutiny. To support that premise, it calls attention to the fact that the High School Teacher Load clause speaks in terms of periods "assigned" and "scheduled." The District argues that contrary to the Association's claim, there is nothing in the contract language to suggest that compensation is paid "when preparation time is lost."

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The District responds as follows to these other arguments raised by the Association.

First, it disputes the Association's assertion that the parties stipulated that the District had "assigned Ms. Mezera a caseload of 39 high school students. . . during the 2001 fall semester." The District avers that is a misstatement and is misleading. According to the District, what it stipulated to was that Mezera had a caseload value of 39 during the 2001 fall semester. While Mezera had a caseload of 22 students, those 22 students yielded a caseload value of 39.

Second, it responds to the Association's claim that individual bargaining occurred between Principal Bark and Association President Dave Antoniewicz. The District argues that claim cannot be sustained. It asks rhetorically: "If the administration cannot negotiate with the Association's President, then with whom can it negotiate?"

Third, it responds to the Association's argument that the District was just "stalling" in trying to secure a teacher during the first semester until Mezera filed a grievance. The District

calls that assertion a gross mischaracterization of the facts. In support thereof, it calls attention to the fact that the position was posted five times and that Mezera testified she knew that the District was trying to secure an additional teacher.

Fourth, the District responds to the Association's argument that "the use of preparation time was required to meet the goals and objectives of each student's Individualized Education Plan (IEP)." It avers that the Association failed to cite any laws or regulations to support its contentions, leaving the District with no ability to respond to any improper interpretations, or misquotations, of statutes, regulations, or case law. The District urges the Examiner to exercise extreme caution when reviewing the Association's legal argument in this regard. As an example of the pitfalls of this area, the District cites a federal regulation, particularly Appendix A to Part 300, for the proposition that the law does not require the District or teachers to "meet the goals and objectives" of the students' IEPs. Instead, the law requires only that "good faith efforts" be made. According to the District, good faith efforts do not need to include the use of every moment of a teacher's spare time. The District also argues that the Association's contention that "(i)f the IEP is not followed, or the teacher and District fail to provide the required services, the parties are liable for not adhering to DPI regulations" cannot be sustained. It avers that a review of Wis. Admin. Code Chap. PI 11 reveals no regulations creating liability for any person if the District is unable to strictly adhere to students' IEPs.

Fifth, the District responds to the Association's argument that Mezera had no opportunity to use her preparation time. It contends that argument should fail. It asserts that even if the High School Class Load clause requires the District to do more than assign and schedule a preparation period, the District believes it met the standard proposed by the Association (i.e. to see that employees get a planning period, and that it is used for the purpose it was intended). It is the District's position that since it hired an additional teacher and directed students to another source for assistance, it made it possible for Mezera to receive her preparation period. As the District sees it, Mezera's own actions were the cause of her lost preparation time because she 1) chose to assist another teacher who was assigned to teach special education students during that period; 2) chose not to send the students who sought assistance from her to the learning lab during her preparation period even though she was directed to do so; and 3) chose to service students who were not on her caseload during her preparation period. The District characterizes Mezera's dedication to her students as admirable, but nonetheless emphasizes that she does not have a contractual or statutory right to claim that she is owed additional compensation.

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The District makes the following arguments in the two emergency leave complaints.

The District responds as follows to the Association's arguments concerning the contract language.

First, it argues that the Association is just plain wrong when it says that Business Manager Coughlin was defining "emergency leave" and that his definition cannot be found anywhere in the contract. It notes that what the Association did was to quote Coughlin's statement of how the District had been applying sick leave, which it believes is well supported by the contract language (namely, that sick leave is granted to teachers so that they may attend "doctor appointments" with "family" members). The District also believes that Coughlin's notation of the District's practice of applying the new sick leave language highlights a point that the Association refuses to acknowledge: the Sick Leave clause contains the term "doctor appointments" while the Emergency Leave clause does not. As the District sees it, the impact of the inclusion of "doctor appointments" in the contract is at the heart of this dispute. The District contends that this language necessarily has an impact on the application of emergency leave.

Second, the District contends that the Association should not be granted the luxury of ignoring the new sick leave language. It cites Elkouri for the proposition that it is a standard of contractual interpretation that agreements are to be construed as a whole, and that effect should be given to all clauses and words. In the District's view, the most reasonable interpretation of the contract language in this case is that when a person or his/her family member suffering from an "illness" attends a "doctor appointment. . .", sick leave should be used. Although emergency leave also covers "illnesses", it does not cover "doctor(s') appointments." Therefore, it is the District's position that the most reasonable construction of Article XII is that doctors' appointments must fall under sick leave.

Third, with regard to the Examiner's arbitration award in ST. CROIX FALLS SCHOOL DISTRICT, the District calls attention to the fact that the Association failed to note that the contract at issue in that case did not have a sick leave clause that included the term "doctors' appointments."

Next, the District responds to the Association's arguments concerning the parties' bargaining history. In its view, the Association ignores the impact of the inclusion of "doctors appointments" in the Sick Leave clause during the last bargain. The District maintains that two significant concepts were added to the Sick Leave clause at that time: one was the concept that doctors' appointments fall under sick leave, while the second was that sick leave could be used for family members.

The District responds as follows to the Association's arguments concerning the parties' past practice. It begins by characterizing the Association's past practice arguments as "willfully obtuse." The District argues that "it is preposterous for the Association to argue

that the question of who within the District will grant emergency leave and what form will be used to process a leave request, could constitute a 'past practice.'" It asserts that since the contract specifically gives the Superintendent or his/her designee the right to approve emergency leave, there "can be no 'mutuality' to the question of whom the Superintendent designates authority, or how much authority will be given." Similarly, it avers that the leave request form used by the District cannot be considered part of the status quo, unless it is shown that it was mutually developed. According to the District, there is no evidence of this in the record. The District also maintains that the Association's attempt to blame O'Meara for the change in procedure is misplaced because it was O'Meara's predecessor, Rossetti, "who changed the 'practice' of allowing subordinates to approve Emergency Leave." To support that premise, it cites Joint Exhibit 15 where Rossetti wrote that emergency leave requests would be granted by the District Administrator alone, to ensure consistency in approvals. The District contends that given the foregoing, "the Association cannot now be heard to complain that the 'practice' of who approves leaves has changed, just because the person holding the office of Superintendent has changed. That right, if it ever existed, was waived long ago."

Similarly, the District believes that the Association's argument that there is a "past practice" of "approval" by the District Administrator being limited to simply confirming that there was an illness or death to an eligible person under the contract is without merit. According to the District, the Association did not cite anything in the record to show that such a "practice" exists. The conclusion which the District draws from the foregoing is that there is no mutual, clear, long-standing, practice, regarding what the Administrator will consider as part of the approval process.

Next, in response to the Association's assertion that "similar or identical" requests have been approved in the past, the District avers that "the only clear practice is of granting emergency leave to attend doctors' appointments that involve surgical procedures." With respect to the emergency leave which was granted to Petrowitz by Rossetti, the District asserts that "there is some evidence that Dr. Rossetti believed this to be true in that case as well." The District argues that even if that evidence is ignored, one instance should not constitute a past practice, particularly where Rossetti's letter clearly states that leave will be granted "in this case." The District believes that the notion that the resolution of the grievance had any greater meaning than that stated in Rossetti's letter is untenable. As the District sees it, the letter from the Association's grievance chair, which broadly states its understanding that "the District will follow the contract. . . with respect to future decisions concerning leave," undermines the contention that a greater understanding was reached. The District submits that if the Association had achieved a great victory in that grievance settlement, it would have stated what the victory was in the letter from its grievance chair. It did not.

Finally, the District responds to the Association's contention that O'Meara acted in an arbitrary and capricious manner and is out to get Petrowitz. As the District sees it, "the

Association's claim is based upon half-baked quotes and thoughtless criticism." It notes in this regard that the Association quotes O'Meara as saying that he was "teaching her (Petrowitz) a lesson." The District asserts that this statement was quoted out of context because O'Meara made this statement after Petrowitz called him (O'Meara) and left him a message telling him that she was taking emergency leave. According to the District, while "the lesson may sound harsh" it (management) "has the right under the contract to approve leave, and cannot be told by an employee that leave will be granted." The District avers that while O'Meara's "statements and application of the Emergency Leave clause may not be models for a textbook on logic, they were far from arbitrary and capricious."

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The District makes the following arguments in the combined classes complaint.

It contends at the outset that the Association's arguments with respect to this complaint are frivolous. With respect to the contract language, it notes that the Association makes a plain language argument, but in doing so, consistently alters the language of the Combination Classes clause to the point of uniformly misquoting the contract. The District also maintains that the Association's brief ignores all evidence of past practice and bargaining history in this case. It elaborates on these points below. Building on the premise that the complaint is frivolous, the District demands that it be awarded attorney's fees and costs for this complaint.

The District responds as follows to the Association's arguments concerning the contract language. First, the District notes again that the Association consistently misquotes the term "combination" as "combined." It believes this misquotation was intentional. The District maintains there are significant grammatical differences between the two terms, and it asks the Examiner to observe and honor the differences. The District asks rhetorically: "If the Association is willing to blatantly, consistently and uniformly mislead the Examiner as to key contractual language in order to make an argument, how can the Examiner rely upon any of the arguments made by the Association?" The District answers that question by saying he cannot. Second, it notes again that the Association's view that two elementary classrooms can be "combined" to form one "specials class" (meaning a music, physical education or art class) depends upon grouping students from a "homeroom perspective." The District argues that the notion that the Association is entitled to view students in "specials" classes according to any group type is unfounded in the contract, and runs counter to the portions of the Management Rights clause which give the District the right to 1) schedule classes and assign workloads; 2) determine the means and methods of instruction; 3) assign students to particular classes; and 4) set class sizes. The District contends that in contrast, there is nothing in the contract that enables the Association to define the students assigned to a "specials" class in terms of the students' homerooms. The District argues that its rights as an employer, and responsibilities as an educational authority, should not be infringed in this way, absent clear and convincing

evidence to the contrary. The District contends that this also applies to the Association's argument that when any other two conceivable aspects of a class, including course content, are "combined", a "combination class" results. According to the District, there is nothing in the contract to suggest that the Association can dissect a given class in search of an entitlement to the combination classes stipend.

The District addresses the parties' bargaining history as follows. First, it notes that the Association offered no arguments that it denoted as bargaining history arguments. Second, the District notes that it presented all the evidence of bargaining history that is in the record, and it is in the form of Mulrooney's testimony. The District believes that there is no evidence in the record that contradicts any of the statements made by Mulrooney, and the testimony of all other witnesses (except, in part, that of complainant Rogers) is consistent with Mulrooney's testimony. The District therefore maintains its refusal to pay Rogers and Buehler the combination classes stipend was consistent with this bargaining history evidence.

The District addresses the parties' past practice as follows. First, it notes that the Association offered no arguments that it denoted as past practice arguments. Second, the District argues that all the evidence shows that the combination classes stipend has consistently only been paid to regular elementary teachers who teach classes consisting of students of more than one grade level, all day, every day. According to the District, this has been the practice for 25 years, and there is absolutely no evidence in the record to the contrary. The Association believes that the mutuality of the practice can reasonably be presumed in this case, since the Association claims that the contract language applies to any teacher in the District. The District avers that its refusal to pay Rogers and Buehler the combination classes stipend was consistent with that practice.

Next, the District responds as follows to these other arguments raised by the Association.

First, it disputes the Association's contention that the Examiner should rule as he did in a previous case where he acted as an arbitrator, and eschew evidence of past practice and bargaining history in favor of the clear contract language. The District asserts that this argument is misplaced because this is not an arbitration proceeding. According to the District, the standard in a prohibited practice complaint alleging a status quo violation is different. In that setting, examiners are to look to all sources of evidence to ascertain whether the status quo has been violated. The District avers that in this case, all of that evidence supports the conclusion that the status quo has not been violated.

Second, the District responds to the Association's allegation of individual bargaining. It notes at the outset that the Association spends just one sentence in their brief on this claim. It further notes that there is no citation to the record to support this contention, and no

description of what particular factual situation the Association alleges constitutes individual bargaining. Accordingly, the District believes that the Association has effectively waived its right to claim that the District engaged in individual bargaining with respect to the Combined Classes complaint.

That said, the District assumes that the Association is referring to Rogers' conversation with Coley where Coley supposedly conveyed an "understanding" to Rogers that the District would "pay compensation" if the District continued "combined classes" during the 2001-02 school year. The District urges the Examiner not to accept Rogers' testimony at face value. It notes in this regard that Coley has denied ever making these statements.

The District argues in the alternative that even if she did make such comments to Rogers, this was not a prohibited practice for the following reasons. First, the District avers that the individual bargaining alleged by the Association is an isolated instance, unconnected to any pattern of conduct. Second, the District maintains that it is not at all clear that Coley's alleged promise that some form of compensation might be paid in the future if an uncertain event occurred in "exchange" for Rogers accepting his assigned "combined" class was sufficient to constitute "individual bargaining." It notes in this regard that the alleged individual bargaining flowed from a discussion of ways to address the increase in "specials" class sizes. According to the District, this was a legitimate discussion between two education professionals concerning class size. Building on that premise, the District avers that an isolated allegation of inappropriate conduct by one individual flowing from an otherwise legitimate discussion does not rise to the level of interference contemplated by Sec. 111.70(3)(a)2.

Next, the District responds to the Association's contention that the classes taught by Rogers and Buehler were "identical" to those of teachers who received the combination classes stipend. The District disputes that assertion. According to the District, all the teachers who received the combination classes stipend including Association witness Miller either were or are regular education teachers who taught combination classes to students of more than one grade level all day, every day. The District avers that the record shows that those regular education teachers had to create additional and separate lesson plans in order to provide grade appropriate lessons in math and reading to their students, while, in contrast, Rogers did not have to create new lesson plans in order to teach physical education classes with students of more than one grade level. Instead, he simply utilized lesson plans from other classes. The District calls attention to the fact that Rogers twice admitted that it was differences in facilities between buildings, rather than the presence of students from more than one grade level, that caused him to alter his lesson plans. Given these differences, it is the District's position that Rogers' classes were not "identical" to those teachers who received the combination classes stipend.

Fourth, the District reads the concluding section of the Association's brief to raise an argument that the District failed to answer the complaint. The District responds that if that argument was, in fact, raised, it is without merit.

Finally, the District responds as follows to some of the remedies requested by the Association. First, the District contends that the Association's demand for an order that the District cease and desist "efforts to block the procession of claims against the Employer", and for costs and attorneys' fees related to same must be denied. It notes in this regard that at the hearing, the parties stipulated that the District has an obligation to process all grievances in accordance with the grievance procedure found in the last negotiated agreement between the parties during a contract hiatus, up to, but not including the arbitration step. This stipulation was entered into the record pursuant to an oral agreement between the parties, that, by entering into the stipulation, the portions of the Association's complaint regarding the failure of the District to process grievances were resolved. The District further notes that this oral agreement was later reduced to writing in a document entitled "Partial Settlement Agreement." The District avers that despite the oral and written agreements between the parties, the Association now, again, raises this same issue before the Examiner. The District takes exception to the Association's intentional or negligent disregard of the oral agreement between the parties. The District requests that the Examiner deny this portion of the relief sought by the Association on the grounds that this portion of the Association's complaint was resolved pursuant to an oral agreement between the parties. Second, the District argues that if the Association prevails on any of its complaints, pre-judgment interest should be limited to a reasonable rate of interest that places the employee in the position that he or she would have been in but for the prohibited practice. Citing market conditions and low rates of interest offered by banking institutions since August of 2001, the District believes the interest would likely have been less than 2% annually.

DISCUSSION

Introduction

What makes this particular status quo case unique is the number of acts and factual situations involved. In many status quo cases, what happens is that the employer takes a single act, or fails to take a single act, which the union subsequently challenges as being a status quo violation. Here, though, there is not just a single act involved; there are multiple acts involved. Specifically, the complaint references eight separate acts and factual situations. The reason so many different acts and factual situations are included in the complaint is this: the Association originally filed eight separate grievances against the District. For the most part, the grievances were unrelated to one another. None of the grievances settled. It is surmised that if a collective bargaining agreement had been in place, the unresolved grievances would probably have gone to grievance arbitration. However, grievance arbitration was not available

here because the District would not proceed to arbitration on any of the grievances since there was a contract hiatus with no contract in place. Under these circumstances, what the Association chose to do was lump all eight grievances together in the instant complaint and characterize them all as status quo violations. By framing the complaint that way, and using status quo clothing, so to speak, the Association can seek adjudication by the WERC of the eight grievances (which, during the course of the hearing, were reduced to four). That is their legal right.

That said, in resolving these four grievances, I am not acting as a grievance arbitrator or even a de facto grievance arbitrator (such as when an examiner decides a Sec. 111.70(3)(a)5 breach of contract claim). Instead, I am acting as an examiner deciding whether the status quo was violated. This distinction is important because an arbitration analysis differs from a status quo analysis. The following shows how. First, when a grievance arbitrator is interpreting contract language, he/she need not decide whether the language is mandatory or permissive. An arbitrator simply interprets the relevant language whether it is mandatory or permissive and then applies it to the facts. However, as will be noted below, an examiner in a status quo case has to first decide if the language is mandatory; if it is, then the analysis continues. Second, when a grievance arbitrator reviews the contract language in question, if he/she finds that the language is clear and unambiguous, then he/she need not review the parties' past practice or their bargaining history. Said another way, in a typical grievance arbitration analysis, if the arbitrator finds that the contract's meaning is clear and unambiguous, then there is no need for the arbitrator to rely on the parties' past practice or their bargaining history. However, as will be noted below, an examiner in a status quo case has to review all three areas (i.e. the contract language, its historical application and the parties' bargaining history) to determine what the status quo is and whether it was changed or maintained. Given the foregoing, I have decided to characterize the four grievances as complaints in order to emphasize that this is a status quo case – not simply a grievance arbitration.

The Legal Standards

As noted above, this is a status quo case. Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

As part of its obligation to bargain collectively under that section, a municipal employer is legally obligated to maintain the status quo during a hiatus period after the expiration of an agreement with respect to mandatory subjects of bargaining (i.e. wages, hours and conditions of employment). A change in the status quo in those areas during a hiatus period constitutes a refusal to bargain and thus a violation of the section just referenced.

In SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85), the WERC adopted a "dynamic" view of the status quo. Under this doctrine, an employer may be required to make changes in certain matters after a labor contract expires (most notably, compensation) to uphold its duty to maintain the status quo. The WERC considers the language of the expired contract, its historical application, and the parties' bargaining history to determine whether such adjustments are required. Id. at p. 14. In essence, the dynamic status quo requires the employer to maintain the parties *agreement*; not necessarily the conditions that existed when the labor contract expired.

In WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98), the Commission summarized the law in this area:

> It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFFIRMED MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (1994) AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA.
>
> (At pages 5 and 6)

In its decision, the Commission went on to note that:

> [A] status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA.
>
> (At p. 8)

In order for a complainant to prevail on any of its claims in a status quo case, it must demonstrate, by a clear and satisfactory preponderance of the evidence, that the respondent unilaterally changed the status quo. As previously noted, in this case the Complainant Association contends that the Respondent District changed the status quo in the areas of caseload, emergency leave and combined classes during a contract hiatus period. The District disputes that assertion. It contends it did not change the status quo in any of the three aforementioned areas.

Application of the Legal Standards to the Facts

The above-referenced legal standards require that the Examiner first decide if the contract language is mandatory; if it is, then the analysis continues to the second step. Next, the Examiner has to review the pertinent contract language, its historical application and the parties' bargaining history to determine what the status quo is, and whether it was changed or maintained. If it was changed, then the status quo was violated. Each of these matters will now be reviewed.

The Mezera Complaint

In paragraph 19 of the complaint, the Association contends that the District violated the status quo "when it failed to assign Kayla Mezera students in accordance with [DPI] standards." As the Association sees it, this contention involves two contract provisions: the Class Size for Special Education clause and the High School Teacher Load clause. Each provision is addressed in the analysis which follows.

Attention is focused first on the Class Size clause. The initial line of inquiry is whether that contract provision is mandatory or permissive under Sec. 111.70(1)(a), Stats. If it is mandatory, then it continued after the contract expired. If it is permissive, then it evaporated when the contract expired.

Under Wisconsin law, the principle determining mandatory or permissive status is whether the subject matter is primarily related to wages, hours and conditions of employment or whether it is primarily related to the formulation and choice of public policy; the former subjects are mandatory and the latter permissive. CITY OF BROOKFIELD V. WERC, 87 WIS. 2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS. 2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS. 2D 43 (1976).

In SCHOOL DISTRICT OF CAMPBELLSPORT, DEC. NO. 20936 (WERC, 8/83), the Commission held that the class size proposal at issue there was a mandatory subject of bargaining. The clause in question was quite lengthy. It began:

a. The parties recognize that the number of students assigned to a teacher is a matter of basic educational policy and that the District may assign any number of students it so desires to a teacher's classes. The parties also recognize that the number of students assigned to a teacher directly affects the conditions of employment and workload of that teacher.

The next section provided thus:

b. Teachers in grades K-5 who are assigned twenty-seven (27) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with the provisions of the Salary Schedule. Split-grade teachers in grades K-6 who are assigned twenty-two (22) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with the provisions of the Salary Schedule. . .

The next section contained a wage provision and provided thus:

c. In the event the District chooses to assign more students to a teacher per school day than the class size workloads set forth above, the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation each semester in accordance with the following rates:

1. Grades K-6: Additional compensation at the rate of one percent (1%) of the teacher's yearly base salary for each student in excess of twenty-seven (27) per school day, averaged on a semester basis.

2. Split-Grades (K-6): Additional compensation at the rate of one percent (1%) of the teacher's yearly base salary for each student in excess of twenty-two (22) per school day, averaged on a semester basis.

. . .

In its analysis of the aforementioned proposal, the Commission reviewed previous proposals from other cases and noted that where class size proposals failed to acknowledge the right of school districts to set class sizes, such proposals were permissive subjects of bargaining. In considering the proposal before it in CAMPBELLSPORT, the Commission noted that, in contrast, the class size proposal before it did acknowledge the District's right to set class sizes. The Commission therefore opined:

> Contrary to the District's claim, rather than being an attempt to bargain the Association's version of what it feels is appropriate class size policy, the Association's proposal only provides a means for determining when a teacher will be entitled to additional compensation and how much the teacher is to receive. Unlike the proposal in OAK CREEK, the Association's proposal here does not limit in any way the District's authority to set whatever class size limits it feels are proper.
>
> . . .
>
> The question of the proposal's mandatory permissive status in this instance is decided by whether the proposal is worded so as to prevent the District from unilaterally determining class sizes. It has already been concluded that the proposal does not preclude the District from setting class size policy.
>
> . . .

The class size language found here in Article VII, Section G is far different from what was found mandatory in CAMPBELLSPORT. The language involved here reads as follows:

> The Wisconsin Department of Public Instruction. . .is responsible for the publication of minimum/maximum enrollment ranges on an annual basis. The recommendations regarding class size and pupil-teacher ratios will be followed in the Prairie du Chien School District.

On its face, this clause neither relates to wages, nor acknowledges the District's right to set class sizes. Given these key differences in the language at issue here versus the language at issue in CAMPBELLSPORT, it is held that the language in Article VII, Section G is permissive. As such, it evaporated at the expiration of the contract. A municipal employer has no duty to continue permissive subjects of bargaining during a contract hiatus. GREENFIELD SCHOOL DISTRICT, DEC. NO. 14026-B (WERC, 1977).

Notwithstanding the decision just reached, and assuming for the sake of discussion that the Class Size clause is mandatory, there is a big hurdle to carrying out that clause. It is this: the state law that it incorporates has been replaced. The following shows how. The Class Size clause was first incorporated into the parties' 1987-89 collective bargaining agreement. Under the state law that existed at that time, DPI was required to publish "maximum enrollment guidelines," and school districts were required to comply with the guidelines. However, since then, the law has changed. Under current state law, no maximum enrollment guidelines are published at all, let alone annually. Thus, DPI is no longer responsible for the publication of minimum/maximum enrollment ranges on an annual basis. Instead, DPI currently operates

under a document entitled "OPTIONS FOR DETERMINING CASELOADS IN SPECIAL EDUCATION". Among these "options" is a "Statewide Caseload Formula" and "Statewide Caseload Number Chart" that are "designed as starting points to guide discussions about caseload determination" if the district chooses to use them. What this shows is that the language of the Class Size clause references a DPI standard that no longer exists.

Having reached these conclusions, the Examiner finds it unnecessary to address the District's remaining arguments about the Class Size clause. Consequently, no opinion is rendered on 1) the District's argument that it fulfilled its obligation under the caseload formula; and 2) the District's argument that if it violated the Class Size clause, it did so because of a business necessity.

Next, the focus turns to the other contract provision which the Association relies on in this complaint: the High School Teacher Load clause. According to the Association, the District's violation of the Class Size for Special Education clause constitutes a per se violation of the High School Teacher Load clause, and therefore the salary bonus that is available under the High School Teacher Load clause should be awarded to Mezera. Thus, the Association looks to the latter clause (i.e. the High School Teacher Load clause) to provide a remedy for violation of the former clause (i.e. the Class Size for Special Education clause).

This linkage by the Association is not surprising given the procedural posture of this case. As was noted in Finding 20, Mezera filed two grievances concerning her caseload: one alleged a violation of the Class Size for Special Education clause (i.e. the DPI standards grievance) and the other alleged a violation of the High School Teacher Load clause (i.e. the preparation time grievance). When the District would not agree to arbitrate these and other grievances because there was a contract hiatus, the Association lumped numerous grievances together and characterized them all as status quo violations. Inexplicably, the Association included the DPI standards grievance as a violation of the status quo in paragraph 19 of the complaint, but did not include the preparation time grievance as a status quo violation in that paragraph or anywhere else. While it did reference both of the aforementioned grievances in paragraph 20 of the complaint, and complain about the District's failure to process them in paragraph 21, that is completely separate from what was raised in paragraph 19. Since paragraph 19 of the complaint only included the DPI standards grievance, the Association failed to include the preparation time grievance in the complaint as a status quo violation. It could have remedied this oversight by amending the complaint during the course of the hearing to include the preparation time grievance. It never did.

The Association's failure to include the preparation time grievance as a status quo violation technically ends this complaint because there is nothing else which I need to address. However, the parties litigated this case as if the Association had included the preparation time grievance as a status quo violation. Therefore, for the purpose of completing the record, and

addressing those numerous arguments, I have decided to proceed as if the Association had included the preparation time grievance as a status quo violation in the complaint.

As was the case when the Class Size clause was addressed, the initial line of inquiry concerning the High School Teacher Load clause is whether that provision is mandatory or permissive. The focus now turns to making that call.

In DODGELAND SCHOOL DISTRICT, DEC. NO. 29490 (WERC, 1/99), the Commission held that the preparation time memorandum at issue there was a permissive subject of bargaining. However, in so finding, it noted:

> Having reached this conclusion, it is important to note that the impact of preparation time decisions on employe wages, hours and conditions of employment has always been (see OAK CREEK, SUPRA; RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 20652-A,20653-A (WERC, 1/84); STOUGHTON AREA SCHOOL DISTRICT, DEC. NO. 23666 (WERC, 5/86) and continues to be a mandatory subject of bargaining. Thus, while the District can elect to unilaterally control the amount of preparation time available to employes during a workday, it must bargain over the amount of compensation, if any, which must be paid to employes who do not receive a specified amount of preparation time.
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> (At pages 20 and 21)

That is exactly what Article VII, Sec. I does in the last sentence. Specifically, it provides that employees who do not receive a preparation period will receive a certain amount of compensation in lieu thereof. That being so, it is held that the language in Article VII, Sec. I is mandatory.

Next, the focus turns to an examination of the three elements which are considered in determining what the status quo is in the context of a contract hiatus: the contract language, its historical application and the parties' bargaining history. These elements will be addressed in the order just listed.

The first element in the status quo analysis is the contract language. In order to complete the record, both contract provisions which the Association relies on will be reviewed. The Class Size for Special Education clause will be addressed first. It reads as follows:

G. Class Size for Special Education. The Wisconsin Department of Public Instruction, Division for Handicapped Children and Pupil Services (DHCPS) is responsible for the publication of minimum/maximum enrollment ranges on an annual basis. The recommendations regarding class size and pupil-teacher ratios will be followed in the Prairie du Chien School District.

The Association argues that this "language defines an overload of students as the maximum recommended by DPI." No it does not. This clause does not define an "overload" in terms of the maximum number of students recommended by DPI. In fact, the word "overload" is not found in the Class Size clause, nor is any variation of either that word (i.e. "overload") or the word "load". Additionally, the word "overload" is not found anywhere in the contract. That being the case, the plain terms of the Class Size clause do not support the Association's contention that the "language defines an overload of students as the maximum recommended by DPI." Instead, as previously noted, this clause forbids the District from exceeding a DPI standard that no longer exists.

The focus now turns to the High School Teacher Load clause. It reads as follows:

I. High School Teacher Load. (Under Block Scheduling) In a four period day, the normal loading is three (3) teaching periods and one (1) preparation period. Two (2) teaching periods, one (1) preparation period and one (1) supervisory or other assigned duty period shall also be considered a full-time load. If a fourth (4^{th}) period is assigned, such that an employee is scheduled for no (0) preparation period, the employee shall receive additional compensation at a rate of twenty-five percent (25%) of the employee's regular scheduled salary.

This clause does not define a teacher's load by a number of students. Instead, a teacher's load is defined in terms of "assigned duty period(s)." Specifically, loads are defined in terms of "periods" that are "assigned" and "scheduled." Additionally, on its face, this clause does not refer to DPI recommendations or maximums, or make any reference whatsoever to the Class Size clause. Moreover, it does not state that violation of the Class Size clause constitutes the assignment of an additional duty period. Finally, it does not mention the word "caseload." That being so, there is nothing to link the language of the High School Teacher Load clause to the Class Size clause.

While the High School Teacher Load clause speaks in terms of "teaching load", the Association uses a different word altogether that is not contained in the clause. The word which the Association uses is "overload." The record indicates that in this District, teaching an extra class is commonly referred to as teaching an overload. The Association argues that

since Mezera's caseload was overloaded, she must be entitled to the same payment received by other teachers who have an "overload" (i.e. the 25% additional compensation referenced in the last sentence of the High School Teacher Load clause).

There is no question that Mezera had a large caseload for the 2001-02 school year. However, it was not as high as was characterized by the Association. The Association asserted that the parties stipulated that the District had "assigned Ms. Mezera a caseload of 39 high school students. . . during the 2001 fall semester." That statement does not accurately reflect the parties' stipulation. What the District stipulated to was that Mezera had a caseload value of 39 during the 2001 fall semester. The distinction is important. Mezera had a caseload of 22 students. Under the present DPI formula, those 22 students yielded a caseload value of 39. It is not accurate though to claim, as the Association does, that Mezera had a caseload of 39 students.

The Association argues that the High School Teacher Load clause "provides for payment when preparation time is lost." As the Association sees it, Mezera is entitled to pay for lost preparation time because she had to work during her preparation period to service her students. The problem with this assertion is that the High School Teacher Load clause does not say that. There simply is nothing in that clause which says explicitly or implicitly that compensation is paid "when preparation time is lost." While the language does say that "If a fourth (4^{th}) period is assigned, such that an employee is scheduled for no (0) preparation period, the employee shall receive additional compensation," Mezera was, in fact, scheduled for one preparation period.

While Mezera was scheduled for one preparation period, she seldom took it in the first semester of the 2001-02 school year. The reason was this: she often provided services to special education students during that time period. Mezera's dedication to her job and her students is admirable. However, her dedication is not at issue here; what is at issue is whether she has a contractual or statutory right to additional compensation for the work she did during her preparation period in the 2001-02 school year.

The Association's first argument in support of their contention that Mezera is owed additional compensation is that by assigning her so many students, the District forced her to use her preparation period to assist them (i.e. her students). The problem with this contention is that the record evidence shows otherwise. Mezera was, in fact, given alternatives to using her preparation period to serve students. Specifically, she was told to send students who came to her during her preparation period to the learning lab for assistance so that she could take her preparation period. She chose not to do so. Instead, she not only did not send students on her own particular caseload to the learning lab, she often serviced and assisted students that were on other teachers' caseloads during her preparation period. Additionally, on her own volition, she provided what she characterized as "assistance" to Kopp. Given the foregoing, it is held

that the District did not force Mezera to use her preparation period to assist students; instead, she chose to do so herself. Thus, it was her own actions that caused the loss of her preparation period.

The Association's second argument in support of their contention that Mezera is owed additional compensation is that Mezera was required by federal law to personally provide the services called for by the student's Individualized Education Plan (IEP). Once again, the record evidence shows otherwise. Federal law states that the District is responsible for making a free appropriate education available to eligible students with disabilities. The District, in turn, assigns students to teachers for services. While the assigned teachers have a duty to make good faith efforts to assist the child, federal law does not require a particular teacher to provide services under an IEP. In this case, the students on Mezera's caseload were assigned to other teachers and staff for instruction during Mezera's preparation period, so Mezera was under no legal obligation to service students during her preparation period. It is also held that the Association did not prove its contention that, "(i)f the IEP is not followed, or the teacher and District fail to provide the required services, the parties are liable for not adhering to DPI regulations." Insofar as this Examiner can determine, Wis. Admin. Code Chap. PI 11 contains no DPI regulations creating liability for any person if the District is unable to strictly adhere to students' IEPs.

The second element in the status quo analysis is how the contract language referenced above has historically been applied. The record shows that there is no past practice in the District of making payments under the High School Teacher Load clause to special education teachers under any circumstances or conditions. It has never happened. Additionally, the record shows that there is no past practice in the District that compensation is paid under the High School Teacher Load clause for "lost" preparation time. The additional pay referenced in the High School Teacher Load clause has only been paid to teachers who undertake an additional period of instruction. At the start of the 2001-02 school year, Principal Bark offered the three special education teachers the opportunity to teach a fourth class, entitled "core work experience" during their preparation period, and to receive additional pay for doing so in accordance with the High School Teacher Load clause. All three special education teachers declined the offer to teach an additional class during their preparation period for pay. This shows that the High School Teacher Load clause could be applied to the special education teachers if they are assigned an additional period of duties. After all three special education teachers declined the opportunity to teach a class during their preparation period, Bark secured a teacher, Kopp, to teach the class. He was paid overload pay for teaching that class.

The third element in the status quo analysis is the parties' bargaining history. In this case, the evidence concerning same is minimal. All it shows is that the Class Size for Special Education clause was first placed in the 1987-89 collective bargaining agreement. That clause is substantially the same now as it was when it was created.

As was noted earlier, in a status quo case the complainant has the burden to establish, by a clear and satisfactory preponderance of the evidence, that the status quo is what the complainant claims it to be. In this case, the Association claims that the status quo is that when the District assigns special education teachers a high caseload (especially a caseload that violates the Class Size clause), or when the teacher works through his or her preparation period, then the teacher is to be paid the 25% salary add-on referenced in the High School Teacher Load clause. The Association did not prove that was the status quo. Thus, in this case, the Association's view is not the status quo. Based on the plain language of the contract and its historical application, the Examiner finds that the status quo is as follows: when the District assigns special education teachers a high caseload, even a caseload that violates the Class Size clause, they are not paid the 25% salary add-on referenced in the High School Teacher Load clause unless they undertake an additional period of instruction so that they have no preparation period. In this case, Mezera did not undertake an additional period of instruction during her preparation period, nor did the District assign her to service students during her preparation period. The District complied with that status quo when it did not pay Mezera the 25% salary add-on referenced in the High School Teacher Load clause for her caseload in the 2001-02 school year. Hence, no violation of Secs. 111.70(3)(a)4 and 1 have been found relative to this portion of the complaint.

Finally, although the instant complaint did not plead an individual bargaining violation under Sec. 111.70(3)(a)4, both Association briefs contain a passing reference to same. Technically, since the matter was never pled, I need not address it. However, for the purpose of completing the record, I have decided to do so.

The conduct which the Association characterizes as individual bargaining is identified in Finding 21. What happened was this: in December, 2001, Principal Bark and Association President Antoniewicz met and discussed the workload of the three special education teachers, and what could be done to compensate them for their (alleged) lost preparation time. One of the options that they discussed was that the three special education teachers would be paid an additional 6.25% in the second semester. It would be one thing if Bark had negotiated over this matter with the three special education teachers. However, he did not do so. Instead, he negotiated with the Association President. The type of bargaining that Bark and Antoniewicz engaged in is not the type prohibited by Sec. 111.70(3)(a)4. Hence, no unlawful individual bargaining has been found.

The Emergency Leave Complaints

My discussion begins with an overview of what these two complaints involve. Both Petrowitz and Rogers requested a day of emergency leave to attend doctors' appointments with their mothers. The District denied their requests for emergency leave, but granted them sick leave for the days in question. Obviously, since the District granted them sick leave for the

days in question, they were able to use paid leave to accompany their mothers to doctors' appointments. However, they did not want to use sick leave; they wanted to use emergency leave. The reason is this: employees can cash out their unused sick leave at retirement; they cannot do that with their unused emergency leave. Emergency leave is use it or lose it. The Association believes that the status quo is that employees can use emergency leave to accompany family members to doctors' appointments. The District disagrees; it believes that is not the status quo. Given that framing of the dispute, the question to be answered here is whether the District violated the status quo when it refused to grant Petrowitz and Rogers emergency leave to accompany their mothers to doctors' appointments.

Just like the previous complaint, the initial focus of inquiry is whether the contract language involved is mandatory or permissive. For reasons which will be set forth below, two contract provisions in Article XII are involved here: the Sick Leave clause (Article XII, A) and the Emergency Leave clause (Article XII, B). Unlike the previous complaint, though, the District does not contend that either clause is permissive. Since there is no contention that either clause is permissive, it is presumed for the purpose of this decision that this contract language is mandatory.

Given that finding, the focus now turns to the first element in the status quo analysis – the contract language. The Association argues at the outset that since Petrowitz and Rogers were denied emergency leave, only the Emergency Leave clause need be considered herein. Thus, as the Association sees it, this is exclusively an emergency leave case so the Examiner need not even consider the Sick Leave clause. That contention is not persuasive for the following reason: it is an accepted principle of contract interpretation that agreements are to be read and construed as a whole, and effect given to all clauses and words. Application of that principle here means that the Emergency Leave clause cannot be considered in isolation from the other leave provisions.

In the following discussion about the contract language, the Examiner will address what these contract provisions say about approval of the leave request, use of leave for family illness and use of leave for doctor appointments. These points will be addressed in the order just listed.

The approval process varies depending on what type of leave is involved. Emergency leave requires approval in advance by the District Administrator. Personal leave does not require approval; it merely requires an employee to provide notice to the District Administrator. The Sick Leave clause is silent on the issue of approval. Thus, of the three types of leave, only emergency leave requires approval in advance by the District Administrator. This means that if an employee decides to use sick leave, it (i.e. the sick leave) does not have to be approved in advance by the District Administrator. However, emergency leave does. Since approval is not explicitly required for either personal leave or sick leave, but

is required for emergency leave, this suggests that the District Administrator's control over approving emergency leave is more than just a mere formality. Said another way, the granting of approval for emergency leave is not automatic or a foregone conclusion. Instead, the implication is that the District Administrator will exercise his/her discretion when reviewing emergency leave requests and deciding whether to grant or deny them.

Having addressed what the three leave clauses say about approval, the focus shifts to what they say about family illness. Two of the three leave clauses cover family illness. Specifically, both the Emergency Leave clause and the Sick Leave clause allow leave for family illness. Since both of those types of leave can be used for family illness, the clauses overlap each other. As a result, when an employee decides to use leave because of a family illness, they can choose either sick leave or emergency leave. That said, the discussion in the preceding paragraph should make it apparent that it is easier for the employee to take sick leave than emergency leave. Once again, the reason is this: if they take sick leave, they do not have to get it approved in advance by the District Administrator; however, if they take emergency leave, they do. The District Administrator does not have to grant the emergency leave request.

Finally, the focus turns to what these contract provisions say about doctor appointments. Just one clause, the Sick Leave clause, contains the words "doctor appointment." That clause specifically states that sick leave may be used for the purpose of attending doctor appointments for family members. The phrase "doctor appointments" is not contained in the Emergency Leave clause. As previously noted, contracts are to be construed as a whole, and effect given to all clauses. Since the Sick Leave clause is the only clause that specifically references "doctor appointments", the inference is that the parties intended the Sick Leave clause to cover doctor appointments for family members who are suffering from an "illness". Said another way, doctor appointments for family members generally fall under sick leave. Were it otherwise, and the parties had intended the Emergency Leave clause to cover doctor appointments for family members, they would have included the words "doctor appointments" in the Emergency Leave clause. They did not. Since those words are not contained in the Emergency Leave clause, the inference is that the parties did not intend for emergency leave to be used for doctors' appointments.

Having interpreted those leave provisions, they will now be applied to the record facts.

The crux of this dispute concerns what type of leave applied to the employees' absences: was it emergency leave (as the Association argues), or sick leave (as the District argues)? At first glance, the emergency leave clause would certainly seem applicable to Petrowitz's situation because of what she wrote on the leave form (i.e. that she wanted to use leave that day due to "parent illness – family situation"). These words essentially reference a family illness which, as previously noted, is covered by the Emergency Leave clause.

However, in this instance, the words just noted do not dictate that this was a family illness covered by the Emergency Leave clause. Here's why. When Petrowitz wrote "parent illness – family situation", what she was actually referring to was that she planned to accompany her mother to a doctor's appointment that day. That was also the reason why Rogers wanted to use emergency leave. Thus, both Petrowitz and Rogers wanted off work to accompany their mothers to doctors' appointments. That fact is dispositive in determining whether the Sick Leave clause or the Emergency Leave clause applied to their absences because, as previously noted, just one of those clauses specifically references "doctor appointments". That clause, of course, is the Sick Leave clause. The Emergency Leave clause does not contain that phrase. A standard principle of contract interpretation is that specific language governs over more general language. Since the employees involved here wanted off work to accompany their mothers to doctors' appointments, the Sick Leave clause is more specific and on-point to that situation than is the Emergency Leave clause which simply references "illness". Hence, in this instance, the Sick Leave clause applies – not the Emergency Leave clause.

Notwithstanding the foregoing, and assuming for the sake of discussion that the Emergency Leave clause does apply in this instance, the individual employee does not decide if emergency leave is granted; the District Administrator does. Under this contract language, the District Administrator gets to make that call. The Emergency Leave clause does not define what constitutes an emergency. Given the lack of a contractual definition, the District Administrator gets to supply one in the course of exercising his/her discretion. As was noted in Finding 40, what District Administrator O'Meara did was to consult a dictionary, which defined "emergency" as "a sudden occurrence demanding quick action." He applied that meaning to both requests, and concluded that since these doctor appointments were scheduled one or two months in advance of the requests for time off, they were not emergencies within the coverage of the Emergency Leave clause. His conclusion has not been shown to be arbitrary or capricious. It therefore passes muster under the contract.

The focus now turns to the second element in the status quo analysis – how the contract language referenced above has historically been applied.

The use of sick leave for doctors' appointments is addressed first. As was noted in Finding 33, teachers in the District have historically used sick leave for doctors' appointments. Both sides essentially characterize that as the practice. This undisputed practice supports the contract interpretation reached above that the parties intended doctors' appointments to generally be covered by sick leave – not emergency leave.

Next, the use of emergency leave for doctors' appointments is addressed. While the use of sick leave for doctors' appointments is clear and straightforward, that is not the case with emergency leave for doctors' appointments. It is more factually complicated, as the following shows.

I begin by reviewing the applicable record evidence. As was noted in Finding 36, the District has granted emergency leave on at least a dozen occasions. The factual situations documented in the record where it has been granted can be summarized thus: six involved situations where a family member of an employee underwent some type of surgical procedure; one involved a non-surgical doctor's appointment for a family member; two involved the illness of a family member; two involved funerals; one involved child care; and one involved flooding.

In the opinion of the Examiner, all but two of the aforementioned instances easily fit into the categories for which emergency leave can be taken, namely "illness or death." The two instances which are not easily characterized as involving "illness or death" are the situations where emergency leave was granted for child care and flooding.

Not surprisingly, the Association cites the flooding instance for the proposition that it shows that the District has not always limited emergency leave to just illness and funerals. The Association's point is well taken. At a minimum, the flooding instance shows that the District has not always been hard and fast in limiting emergency leave to just illness and death situations.

While a grievance arbitrator might well rely on the two instances just noted where emergency leave was granted for reasons other than "illness or death" to establish that it was arbitrary for the District to do so here, it is emphasized that the undersigned is not acting as a grievance arbitrator herein. Instead, I am acting as an examiner in a status quo case. The distinction is important because my task is not to determine if there was a contractual violation here; my task is to determine if there was a statutory violation. The two forums are separate and could have different outcomes.

Having said that, the focus now turns to an examination of whether the instances noted in the record where emergency leave was granted show the existence of a practice which the Examiner can use to determine the applicable status quo and whether it was violated here. Based on the discussion which follows, I find that while there is not a practice, the instances documented in the record nonetheless give some guidance.

I begin by addressing the Association's view of the practice. According to the Association, there is a practice in the District of always granting emergency leave. While it is true that emergency leave has ultimately been granted in every instance documented in the record where it was requested, the Association overstates the point when it calls this a practice and implies that the District is obligated to grant emergency leave whenever it is requested. Here's why. If that was indeed the practice, it would either eviscerate, or conflict with, part of the contract language. The language I'm referring to is the part of the Emergency Leave clause that says that the District Administrator gets to approve emergency leave requests.

Subsumed into the power to approve is the power to deny. While the District Administrator has seldom exercised this right and denied an emergency leave request, the District has not waived its right to do so (i.e. to deny an emergency leave request).

Having addressed the Association's view of the practice, the focus turns to the District's view of same.

In its analysis, the District essentially ignores the half dozen instances documented in the record where emergency leave was granted for funerals, child care and flooding. I agree with this approach because it appropriately narrows the focus of inquiry. Here's why. Petrowitz and Rogers did not request emergency leave for a funeral, child care, or flooding. As previously noted, they requested it to accompany their mothers to doctors' appointments. Given this factual difference, none of the aforementioned instances provide any guidance herein (except, of course, for the fact that emergency leave was granted for all those reasons).

The District relies instead on the half dozen instances documented in the record where emergency leave was granted when an employee's family member underwent some type of surgical procedure. According to the District, the practice that can be discerned from these instances is this: emergency leave is granted to employees to attend doctors' appointments with a relative who is undergoing surgery or a procedure of a similar magnitude. While I am unwilling to call the foregoing a practice because these instances are only part of the total emergency leave picture, they are certainly noteworthy because they deal with the part of the emergency leave picture involved here. I'm referring, of course, to previous situations where employees were granted emergency leave to accompany family members to medical appointments. In the half dozen instances cited by the District, some type of surgical procedure was performed at the medical appointment. That was not the case though at the doctors' appointments for Petrowitz's and Rogers' mothers. No surgical procedure was either anticipated or performed at their doctors' appointments. Thus, their doctors' appointments differed, in that respect, from the half dozen instances just referenced where some type of surgical procedure was performed at the doctors' appointments.

There is just one instance documented in the record where emergency leave was granted to an employee who accompanied a family member to the doctor for a non-surgical appointment. That instance, of course, is the one which occurred in April, 2000 and involved Petrowitz. In that instance, she requested emergency leave to accompany her mother to a non-surgical doctor's appointment. Her request was denied, whereupon it was grieved. The grievance was subsequently settled when the District granted Petrowitz emergency leave for the days in question.

The Association avers that since Petrowitz was granted emergency leave to accompany her mother to a doctor's appointment in that instance, it should have been granted here too.

According to the Association, the settlement of that grievance in April, 2000, which is documented by Rossetti's letter, created a binding practice. The problem with this assertion is that the document which the Association considers the centerpiece of their case (i.e. Rossetti's letter of April 18, 2000) does not do that. Specifically, Rossetti's letter does not say that henceforth, employees can use emergency leave to attend doctors' appointments with a family member. Instead, what Rossetti wrote was that "in this case", he would grant Petrowitz emergency leave for the days in question. In labor relations circles, this type of wording (i.e. a reference to "this case") is traditionally used when a grievance settlement is intended to be non-precedential. The Association offered no alternative explanation for its usage here, so the traditional meaning will be applied. This means that while Rossetti's letter disposed of that particular grievance, it was limited to just that particular instance and was non-precedential. If the Association thought that Rossetti's letter had greater meaning, or created a precedent, or applied a new meaning to a contract provision, one would think that the Association's representative would have referenced it in his reply to Rossetti's letter. He did not. Instead, all the Association's representative wrote was this:

1. The District will credit Ms. Jane Yeomans-Petrowitz with sick leave days in question and deduct the same from emergency leave.

2. The District will follow the contract and state law with respect to future decisions concerning leave.

There is nothing in the foregoing that says that henceforth, employees can use emergency leave to attend doctors' appointments with a family member.

Having so found, the focus turns to the Association's two remaining arguments concerning past practice.

First, the Association contends that the question of who within the District will grant emergency leave and what form will be used to process a leave request are part of the past practice which the District changed. I do not find that contention persuasive for the following reasons. The Emergency Leave clause specifically gives the District Administrator and his/her designee the right to approve emergency leave prior to its use. Since the District Administrator has been given that right, there does not need to be mutuality on whom the District Administrator designates this authority to. Additionally, the emergency leave request form is not part of the status quo because insofar as the record shows, it was not mutually developed.

Second, the Association contends that there is a practice of "approval" by the District Administrator being limited to simply confirming that there was an illness or death to an eligible person under the contract. The Association did not cite anything in the record to show

that such a practice exists, and the undersigned has not found any such evidence either. Insofar as the record shows, there is no practice regarding what the District Administrator will consider as part of the approval process.

In sum then, the evidence on practice shows the following. First, sick leave has historically been used for doctors' appointments. Second, employees have sometimes used emergency leave for doctors' appointments for family members. In all but one instance (i.e. the instance which involved Petrowitz in April, 2000), some type of surgical procedure was performed at the medical appointment. That was not the case though at the doctors' appointments for Petrowitz's and Rogers' mothers. Third, the April, 2000 instance where Petrowitz was granted emergency leave to accompany her mother to a non-surgical doctors' appointment was non-precedential, and thus did not create a binding practice.

Next, the focus turns to the parties' bargaining history.

I begin by addressing the parties' bargaining history relative to the sick leave language. The sick leave language was changed in the last round of bargaining. What happened was that the District proposed new language that added the following phrase to the Sick Leave clause: "which may be used for both personal and family illness and for doctor appointments for the same parties." The Association agreed to this new language. At the time, the Association did not view this new language as being a substantive change because the past practice was that employees could use sick leave for doctors' appointments. However, the new language did more than just codify that practice. Here's why. First, it is unclear from the record whether the practice just referenced also covered employee family members. Whether they were covered or not by the practice, the new sick leave language made it clear that employees could use sick leave for their family members doctors' appointments. Second, the new language established that henceforth, employees were to use a particular type of leave to cover absences caused by doctors' appointments. Specifically, doctors' appointments were to generally be covered by sick leave instead of any other leave provision. The inclusion of "doctor appointments" in the Sick Leave clause is at the heart of this dispute. The Association avers that this new language in the Sick Leave clause has no impact at all on the application of the Emergency Leave clause. The Association is wrong. It does. While the Emergency Leave clause still covers "illnesses", it does not generally cover "doctor(s') appointments." The Sick Leave clause covers those (i.e. "doctor(s') appointments'). This bargaining history supports the contractual interpretation reached above that while both the Emergency Leave and the Sick Leave clauses cover family illness, doctors' appointments for family members are generally to be handled under sick leave – not emergency leave.

Attention is now turned to the parties' bargaining history relative to the emergency leave language. This discussion has been broken down into two separate parts. One part deals with a proposal that was made in bargaining and what effect it has on the outcome herein. The

other part deals with something that was said during bargaining and what effect it has on the outcome herein. These points will be addressed in the order just listed.

In the last round of bargaining, the District tried to get the word "serious" added as a qualifier to the word "illness" in the Emergency Leave clause. The Association did not agree, so this proposed change was not incorporated into the Emergency Leave clause.

The District's failure to get this change in bargaining would certainly be significant in this case if the District had denied the two emergency leave requests on the grounds that Petrowitz's and Rogers' mothers were not "seriously" ill. However, that was not the reason their requests for emergency leave were denied. Insofar as the record shows, District officials never even inquired of them about the reasons for the doctor appointments. Instead, as previously noted, their requests for emergency leave were denied because District officials felt that doctors' appointments for family members are covered by sick leave – not emergency leave. That being so, this part of the bargaining history dealing with emergency leave has no bearing on the outcome of this case.

The focus now turns to the District's contention that during bargaining, it secured the discretion of the District Administrator to determine if emergency leave would be granted. The basis for this contention is as follows: in bargaining, Association representative Roberts said that since the word "emergency" was not defined, it was left to the discretion of the District Administrator to define it. According to the District, Roberts' statement gave the District Administrator the right to decide if emergency leave requests are granted. I disagree. While the District Administrator does indeed have the right to grant or deny emergency leave requests, Roberts' statement in bargaining did not give the District Administrator that right. What gave the District Administrator that right was the language which was already in the contract. This language was not new, and Roberts' statement did not apply a new meaning to that language. It had the same meaning it did previously. Roberts' statement did no more than state the obvious. For these reasons, this part of the bargaining history dealing with emergency leave has no bearing on the outcome of this case either.

As was noted earlier, in a status quo case the complainant has the burden to establish, by a clear and satisfactory preponderance of the evidence, that the status quo is what the complainant claims it to be. Here, the Association claims that the status quo is for the District to grant emergency leave to employees who attend doctors' appointments with family members. The Association did not prove that was the status quo. Thus, in this case, the Association's view of emergency leave is not the status quo. Under the plain language of the Sick Leave clause, as well as the parties' bargaining history relating to the Sick Leave clause, doctors' appointments are generally to be handled under sick leave – not emergency leave. Additionally, the District Administrator has the discretion to determine whether or not to grant emergency leave. That being the case, the Association has failed to prove, by a clear and

satisfactory preponderance of the evidence, that the District changed the status quo when it

denied Petrowitz's and Rogers' requests for emergency leave to accompany their mothers to doctors' appointments. To the contrary, it adhered to the status quo concerning emergency leave. Hence, no violation of Secs. 111.70(3)(a)4 and 1 have been found relative to this portion of the complaint.

The Combined Classes Complaint

My discussion begins with a review of the following pertinent facts. In the 2001-02 school year, teachers Rogers and Buehler taught several "specials" classes at B.A. Kennedy School that contained students from two different regular elementary classrooms (i.e. homerooms). Specifically, they taught "specials" classes (i.e. physical education and music classes) that were composed of students who were from two different classrooms but of the same grade level (such as students from two different first grade classes). For example, two first grade classrooms would go to physical education at the same time. When this happened, Rogers had between 28 to 32 students in his physical education classes. Rogers and Buehler subsequently requested that they be paid the combination classes stipend referenced in Article XIII, Section M, since, in their view, the District had "combined" two classes. The District denied their requests for the combination classes stipend on the grounds that they did not teach "combination classes" within the meaning of Article XIII, Section M.

Having given that factual overview, the dispute will now be framed in its status quo context. The Association believes that the status quo is that when students from two classrooms of the same grade level are sent to a "specials" class at the same time, then the District has "combined" two classes, and therefore, the teacher is entitled to the combination classes stipend. The District disagrees; it believes that is not the status quo. Given that framing of the dispute, the question to be answered here is whether the District violated the status quo when it refused to pay Rogers and Buehler the combination classes stipend for the 2001-02 school year.

Just like the other complaints, the initial focus of inquiry is whether the contract language involved is mandatory or permissive. The parties agree that just one contract provision is involved here: Article XIII, Section M. The District does not contend that clause is permissive. Since there is no contention that the clause in question is permissive, it is presumed for the purpose of this decision that this contract language is mandatory.

Given that finding, the focus now turns to the first element in the status quo analysis – the contract language. Article XIII, Section M reads as follows:

> M. Combination Classes. Those teachers who are required to teach combination classes shall receive $450.00 per school year in addition to their normal placement on the salary schedule.

On its face, this provision says that teachers who are required to teach combination classes will

be paid an additional $450 per year for doing so. In the context of this case, just one part of the provision is at issue. It is the phrase "combination classes." The parties disagree over its meaning.

Before addressing that point though, it must first be decided if the phrase that is going to be defined is "combination classes" or "combined classes." The reason it is necessary to do so is because throughout the hearing and in both sets of briefs, the Association repeatedly referred to Article XIII, Section M as the "combined classes" clause. This was both inaccurate and intentional. As previously noted, the phrase that the parties chose to use in Article XIII, Section M was "combination classes" – not "combined classes." There are grammatical differences between the words "combined" and "combination." The Association's preferred word, "combined", is a verb which refers to the act of combining two things. The correct contractual word, "combination", is a noun. Given its usage and context, it does not refer to the act of combining two things. Instead, it refers to a specific type of classroom (i.e. a noun). Accordingly, the phrase that will be defined herein is "combination classes" – not "combined classes."

My first interpretive task is to decide whether the meaning of this phrase is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then to apply that meaning to the facts. Attention is now turned to making that call.

The phrase "combination classes" is not defined in Article XIII, Section M or anywhere else in the agreement. Additionally, the contract does not give an example of same.

Even though the phrase "combination classes" is undefined, the parties agree that a "combination class" occurs when students of two different elementary grade levels are combined into one classroom (such as when first graders and second graders are combined). Thus, the parties agree that a multi-grade class is a "combination class".

While the parties agree that a teacher who teaches a multi-grade class is teaching a "combination class" within the meaning of Article XIII, Section M, the Association asserts, contrary to the District, that that phrase also applies to another situation. The other situation is this: when two elementary classrooms of the same grade level are "combined" into one for a "specials" class. Thus, the Association believes that "specials" teachers qualify for the combination classes stipend.

My analysis of the contract language begins with the initial observation that the Association's view that Article XIII, Section M applies when two elementary classrooms of the same grade level are "combined" into one for a "specials" class certainly seems plausible. Additionally, since the Combination Classes provision does not specifically exclude "specials" teachers from its coverage, it also seems plausible that the provision applies to all teachers, including "specials" teachers.

However, while the interpretations just noted are plausible, it cannot be said that those interpretations are the only possible interpretations of the language. The following analysis shows why.

The Association's view that two elementary classrooms of the same grade level can be "combined" to form one "specials" class (i.e. a music, physical education or art class) depends on grouping students from a homeroom perspective. The problem with this is that the notion the Association can view students in the "specials" classes according to a group type, such as their homeroom, is unfounded in the contract. By that, I mean that there is nothing in the contract which explicitly supports this homeroom perspective. Rogers' and Buehler's "specials" classes were simply classes made up of 28 to 32 students. Nothing more. This view is consistent with the District's rights to schedule classes, assign students to classes and set class sizes. Conversely, the Association's view is inconsistent with those management rights. That being so, there is nothing in the collective bargaining agreement which enables the Association to define the students assigned to a "specials" class in terms of the students' homerooms.

Based on the foregoing, it is held that notwithstanding the Association's contention to the contrary, the phrase "combination classes" in Article XIII, Section M is ambiguous, and it is also unclear whether that provision applies to "specials" teachers. As a result, it is necessary to look beyond the words used in the contract language to determine what the parties intended it to mean.

In litigating their case, both sides made arguments about the District's alleged past practice and the parties' bargaining history. Past practice and bargaining history are forms of evidence which are commonly used to help interpret ambiguous contract language. The rationale underlying their use is that they can yield reliable evidence of what an ambiguous provision means. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning.

The Association asks the Examiner to ignore the evidence concerning the District's alleged past practice and the parties' bargaining history and focus only on the contract language. I cannot do that because the two elements which the Association asks me to ignore here (i.e. past practice and bargaining history) are the second and third elements of the status

quo analysis. Simply put, I have to look at them in determining whether the status quo was violated. Accordingly, those two elements will now be addressed.

As was just noted, the second element in the status quo analysis is how the contract language referenced above has historically been applied. While the contract language is ambiguous about the two points noted above (i.e. the meaning of "combination classes" and whether the provision applies to "specials" teachers), there is no ambiguity at all about how the contract language has historically been applied. It is crystal clear. The record shows that the combination classes stipend has been paid only to regular elementary teachers who taught the same class, all day, every day, except during lunch, recess and "specials" classes, to students of two different grade levels. Thus, the teachers who received the combination classes stipend taught multi-grade classes such as second and third grade together. There is no evidence in the record to the contrary, or evidence which shows the practice to be broader than what was just noted. Thus, the combination classes stipend has not been paid in those factual situations when students from two classrooms of the same grade level (such as two third grade classes) are sent to a "specials" class at the same time. Insofar as the record shows, the combination classes stipend has never been paid to a "specials" teacher or a non-elementary teacher under any circumstances or in any elementary building. This is the way the contract language was administered for the 15 years that Mulrooney was the district administrator, and it continued to be administered this way in the ten years since his retirement. As was noted in Finding 48, in the mid-1990's, Rogers essentially asked then-B.A. Kennedy Principal Frommelt how the combination classes stipend provision was being administered by management, and Frommelt responded that in order to get the stipend, the teacher had to teach combination classes every day. Given the length of time that the contract language has been administered this way (i.e. 25 years), there is no merit to the Association's contention that it was unaware how teachers were being paid pursuant to Article XIII, Section M.

In sum then, it is held that while the term "combination classes" is ambiguous, its meaning has been supplied by the District's past practice. The practice is the decisive evidence in this dispute. The practice establishes that the phrase "combination classes" refers to classes which consist of students from more than one elementary grade level (such as students from kindergarten and first grade being in the same classroom); it does not refer to classes which consist of students who are from two different classrooms but of the same grade level. Under the District's practice, the combination classes stipend has been paid only to regular elementary education teachers who teach multi-grade classes all day, every day, except during lunch, recess and "specials" classes. The combination classes stipend has never been paid to "specials" teachers. Having found the existence of that practice, the final question concerning same is whether that practice conflicts with the Combination Classes provision. I find it does not. The practice can be reconciled with the contract language.

Next, the Association contends that the classes which Rogers and Buehler taught in the 2001-02 school year were identical to those of the teachers who received the combination classes stipend. That is not true. As was previously noted, the teachers who received the combination classes stipend were regular education teachers who taught classes of more than one grade level all day, every day. The classes which Rogers and Buehler taught at B.A. Kennedy in the 2001-02 school year were not multi-grade classes. Rogers and Buehler did teach some multi-grade classes at ECHOES in the 2001-02 school year, but they did not do so all day, every day. Rogers taught multi-grade classes just one day per week. The record does not indicate how often Buehler taught multi-grade classes at ECHOES, but it certainly was not all day, every day. Given these critical factual differences, the Association's attempt to bootstrap Rogers' and Buehler's factual situations into the existing practice is unsuccessful.

The third element in the status quo analysis is the parties' bargaining history. In this case, the parties' bargaining history supports the District's past practice. Here's why. The only evidence on bargaining history came from one District witness – former District Administrator Mulrooney. He was the district administrator when the combination classes stipend was incorporated into the parties' 1976 collective bargaining agreement. Mulrooney testified that the purpose of the combination classes stipend was to provide additional compensation to regular elementary teachers who taught classes consisting of two grade levels (i.e. students of more than one grade level), and that the extra pay was to compensate them for the additional work necessary to prepare classes for students in two separate grade levels. The phrase which the parties decided to use to describe these classes was "combination classes." He further testified that the combination classes stipend did not apply to "specials" teachers. None of Mulrooney's testimony was contradicted by any Association witness. That being so, his testimony establishes that when the combination classes stipend language was incorporated into the contract, the parties did not intend the term "combination classes" to apply to anything other than elementary classrooms of students from more than one grade, nor did they intend the combination classes stipend to apply to "specials" (meaning art, physical education or music) classes or teachers. That interpretation is still valid today because the contract language has not changed since then.

As was noted earlier, in a status quo case the complainant has the burden to establish, by a clear and satisfactory preponderance of the evidence, that the status quo is what the complainant claims it to be. In this case, the Association claims that the status quo is that a combination class occurs when students from two different classrooms of the same grade level are sent to a "specials" class. The Association did not prove that was the status quo. Thus, in this case, the Association's view is not the status quo. Based on the District's past practice and the parties' bargaining history, the Examiner finds that the status quo is as follows: the District pays the combination classes stipend to regular elementary education teachers who teach multi-grade classes all day, every day. In this case, Rogers and Buehler did not teach any multi-grade classes at B.A. Kennedy. While they taught some multi-grade classes at

ECHOES, they did not teach them all day, every day. Under these circumstances, the District's refusal to pay Rogers and Buehler the combination classes stipend was consistent with the District's past practice and the parties' bargaining history. The District therefore complied with the status quo when it did not pay them the combination classes stipend in the 2001-02 school year. Hence, no violation of Secs. 111.70(3)(a)4 and 1 have been found relative to this portion of the complaint.

Next, although the instant complaint did not plead an individual bargaining violation under Sec. 111.70(3)(a)4, the Association's initial brief contains a passing reference to same. Specifically, it spends one sentence asserting and discussing a claim that the District engaged in individual bargaining with respect to the Combined Classes complaint. Technically, since the matter was never pled, I need not address it. However, for the purpose of completing the record, I have decided to do so.

Although the Association does not specify which conversations constitute individual bargaining, the Examiner assumes that the Association is referring to Rogers' conversation with Curriculum Coordinator Coley. That conversation is identified in Finding 50. What happened in that conversation was this: at the beginning of the 2000-01 school year, Rogers complained to Coley about one of the classes he was teaching that year. The class he complained about consisted of students from two different classrooms that were of the same grade level (specifically, two different first grade classes). Rogers viewed that class as a "combined class". Rogers testified that Coley replied to him as follows: give it a try and by the end of the year, we'll make our decision on what is best for the kids. Assuming for the sake of discussion that Coley said that or something similar, it did not constitute individual bargaining. While Rogers inferred from Coley's statement that she was promising him compensation (via the Combination Classes provision) if he taught "combined classes" in the next school year, she did not say that, and his "understanding" that she meant that by her statement is an insufficient basis upon which to find that the District violated Sec. 111.70(3)(a)4. Hence, no individual bargaining has been found.

Finally, with regard to the District's request for attorney's fees for the Combined Classes complaint, the Commission currently reads its statutory authority to preclude awarding attorney's fees to a respondent. See, WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 29177-C (WERC, 5/99). In this case, the District appears as a respondent, so its request for attorney's fees is denied.

In sum then, the Association failed to prove that the status quo was violated in any of the complaints litigated herein. Accordingly, the instant complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of April, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

REJ/gjc
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