STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELMBROOK EDUCATION ASSOCIATION, Complainant,

vs.

ELMBROOK SCHOOLS JOINT COMMON SCHOOL DISTRICT NO. 21, Respondent.

Case 36
No. 61014
MP-3807

Decision No. 30322-A

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of Complainant Elmbrook Education Association.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mr. Mark F. Vetter and Daniel J. Chanen,** 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53206-6613, on behalf of Respondent School District of Elmbrook.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Elmbrook Education Association, hereinafter Complainant, on March 19, 2002, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the School District of Elmbrook, hereinafter Respondent, had committed prohibited practices by refusing to bargain with the representative of the majority of its employees, in that it unilaterally changed the wages, hours and conditions of employment of the employees represented by Complainant. On May 30, 2002, Respondent filed its answer wherein it denied it had committed prohibited practices and raised certain affirmative defenses.

The Commission appointed a member of its staff, David E. Shaw, as Examiner to conduct hearing and make and issue Findings of Fact, Conclusion of Law and Order in the matter. Hearing was held before the Examiner on June 20, 2002 in Brookfield, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted their post-hearing briefs by August 26, 2002. Based upon consideration of the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusion of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The Elmbrook Education Association, hereinafter Complainant, is a labor organization and the address of its principal office is c/o Ellen MacFarlane, Executive Director, TriWauk UniServ Council, 13805 West Burleigh Road, Brookfield, Wisconsin 53005. At all times material herein, Complainant has been the certified exclusive bargaining representative for

> "all certified full-time and regular part-time non-supervisory personnel (excluding administrators, supervisors, substitute teachers and all non-instructional personnel). . ."

employed by Respondent. The bargaining unit has existed since 1965 and the parties have had a collective bargaining relationship since 1965. Since 1996, Ellen MacFarlane has been the Executive Director of the TriWauk UniServ Council. James Barnes and Art Rupright were co-chairs of Complainant's Professional Rights and Responsibilities (PR & R) Committee in 1981 and Barnes was chair of that committee from 1981 until his retirement in 1998. The PR & R Committee is involved in the filing and processing of grievances for the Complainant and its members.

2. The School District of Elmbrook, hereinafter Respondent, is a municipal employer with its principal offices at 13780 Hope Street, Brookfield, Wisconsin 53008-1830. Since 1991, Dr. Robert Baxter has been employed in the position of Assistant Superintendent for Human Resources for Respondent and in that capacity has been involved in the negotiations and administration of the collective bargaining agreement between the Complainant and Respondent's Board of Education. Baxter's predecessor in that position was Paul Prokupek.

3. Complainant and Respondent have been parties to a series of collective bargaining agreements since the mid-1960's. Those agreements have contained salary schedules consisting of experience increments (steps) and lanes based upon educational achievement. At least since the parties' 1979-1981 agreement, each of the parties' agreements have contained the essentially identical provision stating:

> Annually each teacher will be advanced one full step on the salary schedule, provided his work has been judged satisfactory by the principal and Superintendent, and approved by the Board.

The parties' most recent agreement, their 1999-2001 agreement, contains the following provisions:

> **5.1.2 Step Advancements**
>
> Annually, each teacher will be advanced one full step on the salary schedule, provided his/her work has been judged satisfactory by the principal and Superintendent, and approved by the Board.
>
> Upon recommendation of the principal and Superintendent, the Board may withhold all or part of the annual step of any teacher whose work or maintenance of professional standards is not satisfactory.
>
> No teacher's annual step shall be withheld unless there has been adequate prior notice, supervision and an opportunity to correct the problem. Such step may in the future be restored, in part or in full, upon recommendation of the principal and the Superintendent.
>
> **5.1.3 Lane Advancement**
>
> Teachers changing preparation levels between the date of signing of their contract and the beginning of the school years must provide evidence of such change by September 1 or, if evidence is not available by that date, as soon as possible thereafter in order to realize appropriate salary adjustments for that year.

. . .

16.0 DURATION OF AGREEMENT

This Agreement shall be binding and in full force and effect commencing on July 1, 1999 and shall continue and remain in full force until June 30, 2001.

. . .

4. The parties' 1999-2001 Agreement expired on June 30, 2001 and the parties were unable to reach agreement on a successor agreement by the start of the 2001-2002 school year. The Respondent withheld payment of the experience step advancement on the salary schedule for the 2001-2002 school year, but did implement the lane changes. Respondent's teachers did not receive the experience step advancement in their September 14, 2001 paycheck and a grievance was filed on September 18, 2001 by Dr. Donald Gradeless, a grievance representative for Complainant.

By letter of November 16, 2001, Dr. Baxter responded, denying the grievance on the basis that there was a past practice of not advancing teachers on the steps when a school year starts without the contract being settled.

By letter of November 20, 2001, McFarlane notified Baxter that the Complainant believed the language of the Agreement was clear and that it was Complainant's intent to proceed to arbitration on the grievance.

By letter of January 9, 2002, Respondent's legal counsel, Mark Vetter, advised MacFarlane that as the parties' agreement had expired on June 30, 2001, Respondent was not obligated to process a grievance to arbitration that arose after expiration of the agreement, and that if Complainant desired to pursue the matter further, it could file a prohibited practices complaint with the Wisconsin Employment Relations Commission. Although the parties reached a tentative agreement on a successor agreement, the Association membership rejected the tentative agreement in early March of 2002. Thereafter, on March 19, 2002, Complainant filed the instant complaint with the Commission.

5. In March of 1981, Respondent's Board of Education issued individual teacher contracts for the coming 1981-1982 school year listing the individual teacher's salary at the same level as for the 1980-1981 school year, i.e., without an experience step advancement. The parties were engaged in negotiations for their 1981-1983 agreement at that time. A grievance was filed by Gary Schlei, then a member of Complainant's PR & R Committee, alleging as the basis for the grievance that

> "the granting of one full step advancement is independent of whether or not a new master agreement has been previously reached. The issuing of 1981-82 teaching contracts should be in accordance with the present (1979-81) master agreement."

Then-Superintendent for Respondent, Ronald Goedken, responded as follows to the grievance:

> Grievance denied. The representatives of the Board and the Elmbrook Education Association are currently in the process of negotiating a successor to their 1979-81 collective bargaining agreement. The individual teacher contracts offered by the Board for the 1981-82 school year are subject to any modifications or amendments to that agreement which might be negotiated. Since the 1979-81 agreement expires on June 30, 1981, any duty which the Board may have had to grant automatic salary increments terminates at that time. The Board has, therefore, issued the individual teacher contracts for the 1981-82 school year at the same level as the 1980-81 contracts. The Board's current position is that the status quo salaries which the teachers will be receiving will continue in effect pending the settlement of the 1981-82 agreement. This is consistent with the past practice in the district.

The Co-Chair of Complainant's PR & R Committee, Arthur Rupright, responded to Goedken's denial of the grievance as follows:

> Additional Information:
>
> 5.3.1 states at line 19:
>
> "Teachers shall be advanced each year, hereafter, one full step on the salary schedule. . ."
>
> The teachers' right to an increment vest each year.
>
> 5.3.4 states at line 35:
>
> "Annually each teacher will be advanced one full step on the salary schedule, provided his work has been judged satisfactory by the principal and Superintendent, and approved by the Board."
>
> Appendix C gives the salary schedule which should form the basis for the individual contract.

We are requesting arbitration to determine whether a legally negotiated master contract or a "philosophy" of hte (sic) Board and the Superintendent shall prevail.

Due to the absence of Dr. Goedken, we will waiver the ten day time limit.

If there is any way to resolve this without going to arbitration, please call me for a meeting. If not, please contact Mr. David Pfisterer to begin selection of an arbitrator.

Arthur Rupright 4/13/81 /s/
Arthur Rupright EEA Representative

The parties subsequently were able to settle their 1981-1983 Agreement on August 20, 1981, prior to the start of the 1981-1982 school year. By the following letter of October 14, 1981, then-Executive Director of the TriWauk UniServ Council, David Pfisterer, notified the Respondent's legal counsel that Complainant was withdrawing its grievance:

October 14, 1981

Mr. Mark Vetter
David, Kuelthau, Vergeront, Stover,
Werner & Goodland, S.C.
250 East Wisconsin Avenue
Milwaukee, WI 53202

RE: Gary Schlei – Increment Grievance

Dear Mr. Vetter,

The Elmbrook Education Association hereby withdraws the above grievance since the remedy sought, the awarding of the increment, has already been accomplished through the ratification and implementation of the new collective bargaining agreement.

Sincerely,

David C. Pfisterer /s/
David C. Pfisterer, Executive Director
TriWauk UniServ Council

DCP/skh

cc: Gary Schlei
James Barnes
Art Rupright

6. Of the parties' prior collective bargaining agreements, only in the years 1983, 1985, 1987 and 1990 were the parties unable to reach agreement on a successor agreement by the start of the new school year in those years, and in each of those years the experience step increment was withheld until after agreement was reached on the successor agreement. In 1983 the successor agreement was settled September 29, 1983, signed on November 1, 1983 and the first paycheck with the experience step advancement included was issued November 15, 1983. In 1985 the contract was settled on or about November 1, 1985 and the first paycheck with the experience step advancement was issued November 27, 1985. In 1987, the contract was settled on or about March 17, 1988 and the first paycheck with the experience step advancement was issued on April 15, 1988. In 1990, the contract was settled November 5, 1990 and the first paycheck with the experience step advancement was issued on December 15, 1990. In those instances where the experience step was withheld until after agreement was reached on a successor agreement, the Complainant only grieved the withholding of the experience step increment in 1985, and then withdrew the grievance when agreement was reached on the successor agreement. The Complainant did not file a written grievance with regard to the withholding of the experience step in 1983, 1987, or in 1990.

The Complainant's PR & R Chair, James Barnes, did have discussions with Paul Prokupek, Respondent's then-Assistant Superintendent of Personnel, in late 1987 indicating Complainant's disagreement with Respondent as to what the practice had been in the District with regard to implementing lane changes and experience steps after expiration of the collective bargaining agreement and before settlement on a successor agreement. In 1990, Barnes had discussions with Complainant's Chief Negotiator, Jeannette Wojciuk-Graf, regarding being prepared to file a grievance regarding the Respondent's withholding the experience step, but no grievance was filed in that regard.

7. At least since 1981, Complainant has not made any proposals, and there have been no discussions in negotiations of the parties' collective bargaining agreements, regarding the granting of an experience step after expiration of the agreement and before agreement is reached on a successor agreement.

8. In the negotiations for a successor agreement to the parties' 1999-2001 Agreement, after Complainant had filed the grievance and the prohibited practice in this case, Respondent presented proposals that would have modified or affected payment of the experience step.

9. The *status quo* with regard to the granting and payment of the experience step during the hiatus between the expiration of the parties' collective bargaining agreement and agreement on a successor agreement is to not grant and pay the experience step advancement.

10. By not granting and paying the experience step advancement following expiration of the parties' 1999-2001 Agreement, the Respondent has not unilaterally altered the *status quo* as to wages, hours and conditions of employment of its employees in the bargaining unit represented by Complainant.

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

CONCLUSION OF LAW

By not granting and paying the experience step advancement during the hiatus following expiration of the parties' 1999-2001 collective bargaining agreement, the Respondent Elmbrook School District, its officers and agents, did not unilaterally alter the *status quo* as to the wages, hours or working conditions of the employees in the bargaining unit represented by Complainant Elmbrook Education Association, and therefore, did not refuse to bargain with Complainant 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.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The complaint filed in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin, this 22nd day of November, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

ELMBROOK SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant alleges that the Respondent violated Sec. 111.70(3)(a)4, Stats., by refusing to bargain collectively with Complainant by unilaterally changing the wages, hours and working conditions of employees represented by Complainant when Respondent failed and refused to advance professional staff members one experience step on the salary schedule even though they had performed satisfactorily. Complainant also alleges that such conduct tends to interfere with, restrain or coerce those employees in the exercise of their rights in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

The Respondent filed an answer wherein it denied it had committed prohibited practices by its conduct, and raised as an affirmative defense that a practice exists of administering the experience step advancement language in the collective bargaining agreement, and that the practice is that step advances are not paid during the contract hiatus, and that this practice constitutes the *status quo*. That being the case, the Respondent's refusal to pay the step advancement during the present contract hiatus does not violate Secs. 111.70(3)(a)1 and 4, Stats.

POSITIONS OF THE PARTIES

Complainant

Complainant takes the position that the Respondent violated a well-established legal duty to maintain the *status quo*, as defined in Sec. 5.1.2, Step Advancements, in the Agreement, by refusing to grant a step advancement on the salary schedule to those employees whose work has been judged satisfactory during the 2000-2001 school year. In support of its position, Complainant asserts that unilateral changes in the *status quo* in wages, hours or conditions of employment during a hiatus after a previous agreement has expired are *per se* violations of the duty to bargain in good faith. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85). In WISCONSIN RAPIDS, the Commission held that

> As we are applying it, the dynamic status quo doctrine calls upon parties to continue in effect the wages, hours and conditions of employment in effect at the time of the expiration of the predecessor agreement or the time of the union's initial attainment of exclusive representative status. In applying that doctrine to periods of time after expiration of wage or benefit compensation plans and schedules relating level of compensation to levels of employe experience, education or other attainments, we consider the dynamic status quo doctrine to require adherence to the following partial statement of controlling principles:

> 1. Where the expired compensation plan or schedule, including any related language – by its terms or as historically applied or clarified by bargaining history, if any – provides for changes in compensation during its term and/or after its expiration upon employe attainment of specified levels of experience, education, licensure, etc., the employer is permitted and required to continue to grant such changes in compensation upon the specified attainments after expiration of the compensation schedule involved. (To do otherwise would undercut the majority representative and denigrate the bargaining process in a manner tantamount to an outright refusal to bargain.)
>
> . . .

(At p. 17)

The only exceptions to this settled precedent is where an employer establishes a valid defense, such as waiver or necessity, or where the evidence establishes a mutual understanding that step advancements are not ordinarily due as part of the *status quo*. KENOSHA COUNTY, DEC. NO. 22167-B (WERC, 3/86), at p. 8. Respondent asserts as a defense that there was such a mutual understanding in this case. However, based upon the evidence, Respondent cannot overcome either the clear and unambiguous contract language or Complainant's refusal to acquiesce with regard to the Respondent's practice.

Section 5.1.2, on its face, requires Respondent to grant a step advancement to employees whose work has been judged satisfactory during the 2000-2001 school year. The language of that provision clearly contemplates that employees have a right to expect step advancement based upon satisfactory performance in the prior school year. As the contract language clearly requires step advancement in the following school year, such compensation must be maintained during the contract hiatus, as the *status quo* is largely defined by the terms of the expired agreement. CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77). The contract language in this case clearly and unambiguously gives employees the expectation of a step advancement based upon satisfactory performance and is more compelling than the contract language in dispute in the SCHOOL DISTRICT OF WEBSTER, DEC. NO. 21312-B (WERC, 9/85). In that case, the dispute centered on increment and merit increases and the Commission concluded that

> The compensation arrangements put in place by the parties' expired agreement established a system in which specified increases must be granted corresponding to the results of a specified and ongoing system for determining performance level. Both the amounts of merit increases and the eligibility requirements for increment increases and for merit increases have been established in detail, and

> the District has no choice but to pay the established amount of increases, if any, that corresponds to the employee's performance level. . . (At pages 12-13)

In this case, the parties have a simplified version of such a performance evaluation system, i.e., an increment must be granted if the employee's performance has been judged satisfactory. Thus, all of the employees who achieved satisfactory performance in the 2000-2001 school year are entitled to a step advancement at the commencement of the 2001-2002 school year.

Further, it is difficult to distinguish Respondent's obligation to pay for earned credits (lane changes) from its obligation to pay step advancement during hiatuses. Regarding the former, Respondent has a practice of paying for approved earned credits pursuant to Sec. 5.1.3, Lane Advancement, but asserts that it has no obligation to pay the step advancement to teachers who are judged satisfactory. In both cases, teachers earn the additional compensation through their efforts in the preceding year. The two concepts are virtually indistinguishable. Respondent's claim that it is obligated to pay one, but not the other, should be rejected as it is inconsistent and illogical.

Next, Complainant asserts that to the extent Respondent relies upon past practice, it should be required to provide substantial evidence of a binding practice that rises to the level of a mutual understanding to change the clear and unambiguous contract language. KENOSHA COUNTY, supra. Here, Respondent has failed to present convincing evidence of such a mutual understanding that step advancements are not intended to be awarded to employees who have performed satisfactorily in the preceding year. At a minimum, Respondents should be required to meet the arbitral test of a long-standing, continuous and uninterrupted practice which evinces the parties' mutual understanding of their rights and obligations. Elkouri and Elkouri, *How Arbitration Works*, (5th Edition) Chapter 12, "Custom and Past Practice". Here, the evidence of a past practice is, at best, mixed inasmuch as a grievance was filed in 1981 and in 1985 and there is written evidence of a disagreement between the parties in 1987. In their remaining two hiatus periods, the parties reached agreement early in the school year, and it is understandable that a grievance was not filed in those instances. Further, the testimony of Barnes, Chair of the PR & R Committee from 1981 through 1998, unequivocally established that he never indicated to Respondent in any fashion, that he agreed with Respondent's position. Moreover, the best recollection of Jeannette Wojciuk-Graf, Chief Negotiator during the years in question, can be characterized as the parties essentially "agreeing to disagree". It makes sense that the Complainant focused more on negotiating the agreement than taking a grievance to arbitration, since the hiatuses were of short duration and settling the agreement resolved the issue, as employees received retroactive pay. It is unrealistic to assume Complainant would spend its limited resources to litigate a case in those circumstances.

It is also significant that Respondent did not produce any evidence whatsoever of conversations between the parties' representatives or written communications which establish a mutual understanding and acceptance of Respondent's position. Thus, Respondent's case is reduced to relying upon the 1983 and 1990 short hiatuses in which the Complainant was apparently silent. Those two instances do not establish a binding past practice. While Complainant is guilty of being somewhat lax in maintaining its position in writing, that minor laxness does not amount to a mutual understanding. Those two hiatuses are also in contrast to the Complainant's assertion of its positions in 1981, 1985, 1987 and the instant grievance in September of 2001.

Complainant also asserts that the Commission should be reluctant to infer acquiescence by Complainant when it made its position so clear in the 1981 Schlei grievance. It is unlikely that Complainant would have changed its position in the fall of 1983, considering that the Circuit Court had reversed the Commission's decision in MENASHA JOINT SCHOOL DISTRICT 1/ in July of 1983. It became well-known throughout the state that the Commission did not

---

1/ DEC. NO. 16589-B (WERC, 9/81), rev'd Cir.Ct. Winnebago, 1983.

---

appeal the Circuit Court decision. Thus, in the fall of 1983, the obvious trend was in favor of the Complainant on the issue. Given the clear contract language and the case law, the Complainant would have had no reason to acquiesce in the Respondent's position.

Also noted, is Prokupek's failure to mention the 1981 Schlei grievance in his response to the Knoedler grievance in September of 1985, in which he asserts that the Respondent's refusal to pay the increment was based on past practice.

Complainant concludes that the record evidence fails to establish that the parties reached a mutual understanding that step advancement was not intended to be paid to employees who perform satisfactorily during the 2000-2001 school year. Therefore, the clear and unambiguous contract language is controlling and the Respondent's affirmative defense of a binding past practice must be rejected.

Complainant also asserts that Respondent neither pled nor proved affirmative defenses of necessity or waiver by bargaining history and that, therefore, those defenses are not viable in this case. The defenses are also not viable for the following reasons. First, as to necessity, Baxter testified that one of the reasons for refusing to authorize the payment of an increment to employees was because Respondents proposed restructuring the salary schedule, and that if Respondent paid the increment at the beginning of the school year, it could result in a "payback situation" for teachers. Such concerns, however, do not justify Respondent's unilateral decision to refuse payment of an increment to the teachers. MANITOWOC PUBLIC

SCHOOL DISTRICT, DEC. NO. 29866-C, 30146-B (Nielsen, 2/02), *aff'd by operation of law*, DEC. NO. 29866-D, 30146-C. The Commission has repeatedly held that the underlying policies of MERA are better served by requiring the parties to use the bargaining process to resolve this type of issue, rather than permitting unilateral action by either party. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 7/84); GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). Further, since a unilateral change in wages, hours or working conditions is a *per se* violation of the duty to bargain, an employer's good faith reasoning for its conduct is not a defense. With respect to bargaining history, the record establishes that there have been only minor changes over the years to the step advancement language in the agreement, but no substantive changes. There is insufficient evidence for either party to make a case of waiver by bargaining.

Last, Complainant asserts that the appropriate remedy in this case is to require Respondent to grant the step advancement to each bargaining unit employee who performed satisfactorily during the 2000-2001 school year, with payments to be retroactive to the beginning of the school year with interest at the statutory rate. Respondent should also be ordered to cease and desist from making unilateral changes in mandatory subjects of bargaining in the future and to post the appropriate notice. Complainant asserts that this remedy is required even though the parties may eventually agree to restructure the salary schedule. GREEN COUNTY, supra.

In its reply brief, Complainant first asserts that Respondent's reliance upon past practice is overstated. Respondent quotes from its denial of the 1981 grievance where it emphasized that its denial of the grievance was 'consistent with past practice in the District.' The record reveals that there was no past practice of withholding the increment during a contract hiatus prior to 1981. In fact, ever since 1965, if employees had performed satisfactorily in the previous year, the Respondent had consistently advanced employees a step on the salary schedule. The record in this case demonstrates that the parties have essentially "agreed to disagree" as to Respondent's obligation to grant a step advancement to employees who perform satisfactorily and does not support a finding that they mutually agreed to modify the clear and unambiguous contract language.

Respondent's reliance on WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98) is also misplaced. In that case, the Commission ruled in favor of complainant based upon the employer's uniformly consistent practice of paying health insurance premium increases that occurred after the expiration of a contract with "specified year" health insurance premium language. The employer failed to produce any explanation as to why it had continued to pay health insurance increases after contract expiration, nor did it offer any evidence of disagreement with the complainant's position that it was obligated to pay the increased health insurance premiums after contract expiration. In contrast, Complainants in this case had a reasonable explanation for not taking a grievance to arbitration, as they were making progress

in their negotiations for a successor agreement which would provide retroactive pay; the same remedy available in arbitration. More importantly, Complainants made it clear as early as 1981 that it expected Respondent to pay the step increment after the contract expired. Thus, the evidence of past practice was much more compelling in the WASHBURN case than in this case, while the contract language at issue in this case is more compelling in favor of Complainant than was the contract language in WASHBURN.

Respondent's reliance on the duration clause in the agreement is also misplaced. Virtually every collective bargaining agreement has a duration clause similar to the one in this case. If such a standard duration clause is interpreted to preclude the application of the dynamic *status quo* doctrine, the Commission would essentially be reversing years of numerous precedent and reverting to the " static *status quo"* doctrine.

Complainant concludes that the evidence supports the dynamic application of the step advancement contract language and that the evidence of past practice is too equivocal to overcome the clear and unambiguous contract language.

Respondent

Respondent asserts that the "dynamic *status quo*" requires that it not pay the step advancements during the contract hiatus. During the contract hiatus, an employer has an obligation to maintain the dynamic *status quo* with respect to wages, hours and conditions of employment under the terms of the predecessor contract. The dynamic *status quo* is determined by looking not only at the contract language, but also at bargaining history and the past practice of administering the language in question. WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85). The WISCONSIN RAPIDS decision clearly states that the Respondent would commit an unfair labor practice if it reversed its well-established, unequivocal and consistent past practice, and unilaterally implemented the step advancements during the contract hiatus, as it would constitute an unauthorized unilateral change in wages. Here, the contract language as historically applied clearly demonstrates that the *status quo* with respect to step advancement is not to pay the step advancement during the contract hiatus.

Next, Respondent asserts that the plain language of the agreement does not provide that the step advancement survives its expiration. Respondent asserts that although the language of Sec. 5.1.2 might be clear and unambiguous as to what occurs during the term of the agreement, the language does not in any way address or contemplate the procedure to be followed during a contract hiatus. Sec. 5.1.2 must be read in light of Sec. 16.0, Duration of Agreement, which states: "This Agreement shall be binding and in full force and effect commencing on July 1, 1999 and shall continue and remain in full force until June 30, 2001." Neither Sec. 16.0, nor any other provision in the agreement provides that the step advancement clause survives beyond June 30, 2001. The only way the step advancement clause could

survive the duration of the agreement is if it was because the language is part of the dynamic *status quo*. Unlike a grievance arbitration, where the arbitrator must rely on the contract language, the Examiner must also rely upon the past practice during the contract hiatus and any relevant bargaining history in order to ascertain the dynamic *status quo*. WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98). The facts are undisputed as relates to the Respondent's clear and consistent past practice. In the four years in which the parties have not settled a contract prior to the start of the school year, Respondent has never paid the step advancement. This unambiguous past practice reveals that the contract language, as historically applied, does not survive the expiration of the agreement.

Complainant has failed to take any action that modifies the clear past practice. In that regard, Complainant has failed to pursue grievances over the failure to pay the step advancement during the contract hiatuses in the past. During the four years in which Respondent failed to pay step increases until the contracts were settled, there is a record of only one grievance being filed in 1985, and no grievances were filed regarding the other three occurrences. The 1985 grievance was denied, and there is no record that the Complainant pursued the matter further. While Barnes attempted to justify Complainant's failure to file grievances or object to the Respondent's actions in 1983, 1987 and 1990, he failed to do so. Barnes failed to provide any testimony whatsoever that Complainant objected to the failure to pay step advancements in 1983. As to 1987, Barnes attempted to show that a grievance was filed based upon meeting notes related to a grievance over lane changes. However, Barnes testified that "I did review the grievance files, and I was not able to find that (a grievance had been filed), and so it's possible that it was just oral discussions with Paul Prokupek about the issue." (Tr. 33-4). There being no record of a grievance being filed, it must be concluded that no grievance was in fact filed. An oral discussion about possibly filing a grievance is not the same as filing a grievance or pursuing the matter to arbitration. As to 1990, Barnes stated that he was "on call to be prepared to file a grievance in case the contract was not settled." However, the facts show that the contract was not settled prior to the start of the school year, the step advancement was not paid, and no grievance was filed. Barnes' testimony is neither plausible nor credible, particularly when compared to the Complainant's actions relative to the issue in 1985, when Complainant promptly grieved the Respondent's failure to pay the step advancement in September, well before the contract was settled in November. The notion that the Complainant so drastically altered its strategy in 1990, as compared to its handling of the 1985 grievance, is not plausible. The simple explanation as to why no record of any grievance exists in 1990 is that no grievance was filed. In order to object to the ongoing practice, Complainant had an obligation to affirmatively object by filing a grievance or pursuing a prohibited practice complaint. Absent such action, Respondent's practice must be considered the dynamic *status quo*. Given the complete lack of documentation for Complainant's assertions, Complainant has failed to satisfy its burden of proving its case by a clear and satisfactory preponderance of the evidence. Sec. 111.07(3), Wis. Stats.

Further, despite Respondent's unwavering practice of not paying step advancements during a contract hiatus, it is uncontested that between 1981 and the present, there have not been any Complainant bargaining proposals dealing with the payment of step advancements following the expiration of the contract.

Last, Respondent asserts that because changes to the salary schedule have been proposed during negotiations, it is impractical to pay a step increase until the agreement is settled. Respondent's Assistant Superintendent for Human Resources and Chief Negotiator, Dr. Baxter, testified that there were bargaining proposals being discussed at the table that could have altered the salary schedule, and that because of increasing costs of the health insurance and the impact of the qualified economic offer (QEO), it is possible that modifications of the pay schedule could result in a situation where teachers would have to pay back all or part of the step advancements under a new agreement, if they were honored prior to a settlement. This alone, justifies not paying the step advancement prior to settling the 2001-2003 agreement.

In its reply brief, Respondent first asserts that the Complainant is improperly attempting to shift the statutorily-determined burden of proof in this case by arguing that the Examiner should require substantial evidence of the binding practice from Respondent, when it is the Complainant which must present such evidence. Sec. 111.07(3), Stats. Complainant's reliance on KENOSHA COUNTY is misplaced. In its decision on rehearing in that case, the Commission examined the contract language, the bargaining history and past practice of the parties. After applying those factors, the Commission concluded that while bargaining history and contract language supported the union's position, the union was unable to establish that payment of the COLA adjustments during the contract hiatus was part of the *status quo* by a clear and satisfactory preponderance of the evidence. Rather, the preponderance of the evidence was that the practice was not to provide the adjustment during the contract hiatus. KENOSHA COUNTY makes it clear that the burden rests entirely with the Complainant to prove that Respondent's actual past practice of non-payment of the step advancement was not the mutually understood past practice. The Complainant has failed to meet its burden.

Respondent asserts that Complainant's failure to object to the non-payment of the step advancement during the 1983 contract negotiations is fatal to its argument that there is no mutually understood past practice. In KENOSHA COUNTY, the Commission concluded that a mutually-understood past practice was firmly established the first time that there was a hiatus, the COLA adjustment was not paid, and the union failed to object. On appeal, the Commission's decision was upheld, the Circuit Court commenting "Whatever the contract language and bargaining history, the petitioners' failure to complain in January of 1982 exhibited the understanding of the parties that the hiatus COLA adjustments were not part of the contract or *status quo*." LOCAL 70 V. WERC, Case 87-CV 1367 (July 31, 1989). Here, the first instance of non-payment of the step increase occurred in 1983 and the Complainant

failed to object, thus firmly establishing the past practice. The subsequent repeated non-payment of the step advancement during the contract hiatus periods in 1985, 1987 and 1990 and 2001 reinforces the validity of the mutually-understood practice.

Respondent also disputes that the contract language can overcome the Respondent's failure to object to the non-payment of the step increase in 1983. Where, as here, there is no specific reference in the agreement as to how payments are to be made during a contract hiatus, the language is *per se* ambiguous. KENOSHA COUNTY. While the Commission found in KENOSHA COUNTY that the contract language and the bargaining history furthered the union's position, it still considered that the language of the expired agreement was ambiguous because it did not specifically refer to what should be done during a contract hiatus and the bargaining history did not reveal any specific discussions on this point. In this case, there is no evidence concerning the bargaining history of the step advancement contract provision and the language of the contract providing that a teacher be advanced one step "annually" is no stronger than the contract language in KENOSHA COUNTY providing that COLA payments be paid "quarterly". In both instances, the language is equally likely to refer only to the period covered by the agreement.

Further, the cases cited by Complainant referring to an interpretation of contract language are inapplicable where there is a past practice of non-payment of the step increases during the contract hiatus. The analysis in SCHOOL DISTRICT OF WEBSTER, supra, is inapplicable, as there was no past practice of paying or not paying step increases. In WEBSTER, the Commission recognized that as "there is no specific statement in the expired agreement to the effect that increment increases and/or merit increases are or are not understood to be payable during the contract hiatus following expiration.", the language was ambiguous at best. There was no past practice and no bargaining history, and the Commission had to divine a solution from language that was not specific on its face. Thus, WEBSTER does not provide that the contract language is determinative; rather, it is only where there is no past practice and no relevant bargaining history that an analysis of otherwise ambiguous contract language is determinative. Where there is a past practice of actual non-payment, as here, ambiguous contract language is not a proper guide to determining the *status quo*. KENOSHA COUNTY, supra. Further, the cases cited by the Complainant referring to interpretation of contract language apply only to instances where no hiatus has previously occurred.

Even where contract language seems clear on its face, past practice is still determinative. Where there is evidence of actual payment or actual non-payment of contractual increases during a contract hiatus, that practice is determinative of the *status quo*. KENOSHA COUNTY, supra; WASHBURN PUBLIC SCHOOLS, supra. The reasoning in both KENOSHA COUNTY and WASHBURN requires the conclusion that where, as here, there is an actual past practice of non-payment of the step during as few as one or as many as four contract hiatuses, the *status quo* is the non-payment of the step advancement.

Last, Respondent asserts that Complainant has not taken any action since 1983 which alters the clearly established past practice of not paying the step advancement during the contract hiatus. The mutually-understood practice was created in 1983 when Complainant failed to object to the non-payment of the step advancement during that first contract hiatus. The applicable contract language has not changed since that time, and Complainant has made no proposal at the bargaining table to alter that language. There being no substantive change in the language of the step advancement provision since 1983, Complainant cannot argue that the provision should now be administered differently than it was in 1983 during the first contract hiatus. The filing of the grievance in 1985 does not overcome that past practice. The 1985 grievance was rejected because non-payment of the step advancement "is consistent with past practice in the School District of Elmbrook." (Joint Exhibit 10). The mere filing of the grievance does not alter the past practice established in 1983. The fact that the grievance was denied and Complainant did not pursue its legal remedies by filing for arbitration or a prohibited practice, supports the assertion that the practice of non-payment of step advancement was mutually-acknowledged and accepted. Further, the principles enunciated in KENOSHA COUNTY preclude an argument that the Complainant can fail to object during the first hiatus, and then object in a subsequent hiatus. Further, there is no record of a grievance being filed in 1987 or in 1990 during subsequent contract hiatuses. Complainant's inaction cannot change the clearly-established past practice. LOCAL 70 V. WERC, supra.

Although there was some testimony that Barnes may have been "on call" to file a grievance in 1990, that fact is meaningless. In KENOSHA COUNTY, the Commission indicated that a union must grieve the non-payment of a COLA increase during the *status quo* "upon the expiration of the 1979-81 agreement." (Emphasis added). The Commission rejected the union's attempt to explain its failure to file a grievance by saying that bargaining proposals were submitted in March, more than two months after the contract expired. Similarly, the Complainant cannot legitimately argue that it was "on call" in 1990 to file a grievance pending the outcome of contract negotiations. Complainant has a duty to promptly grieve a failure to maintain what it perceives to be the *status quo*. The contract expired on June 30, 1990 and was not settled until December 15, 1990. Complainant's failure to file a grievance for nearly six months is inexcusable and reinforces the past practice.

In summary, Complainant has failed to take any action that would alter the past practice established in 1983 when it failed to object to the non-payment of the step during the first hiatus. Complainant has not bargained about payment of the step advancement during the hiatuses, and has filed only one grievance, which it failed to fully pursue, in the three hiatuses since 1983. Complainant cannot change an established past practice by intermittently and inconsistently interjecting grievances which it fails to pursue to resolution.

Applying the WISCONSIN RAPIDS test, Complainant has failed to establish by a clear and satisfactory preponderance of the evidence that Respondent committed a prohibited practice when it failed to pay the step advancement during the contract hiatus at the start of the 2001-2002 school year.

DISCUSSION

This case involves an alleged change in the *status quo* as to wages, hours and working conditions during the hiatus following expiration of the parties' 1999-2001 collective bargaining agreement in violation of Sec. 111.70(3)(a)4, Stats.

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.
>
> . . .

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 pp. 5-6)

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. SAINT 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 this case, there is no evidence as to the bargaining history with regard to the experience step advancement language in Sec. 5.1.2 of the expired agreement, thus leaving the language of the expired agreement and how it has been historically applied to be considered in determining what constitutes the *status quo* as to the payment of the experience step.

Looking first to the applicable language of the parties' expired 1999-2001 agreement, Sec. 5.1.2 provides:

> **5.1.2 Step Advancements**
>
> Annually, each teacher will be advanced one full step on the salary schedule, provided his/her work has been judged satisfactory by the principal and Superintendent, and approved by the Board.

As the Complainant asserts, on its face that wording gives the employee the reasonable expectation that "annually" they will advance one full step on the salary schedule provided their work has been judged to be satisfactory. 2/ The language does not, however, specify

---

2/ Unlike the case in WEBSTER PUBLIC SCHOOLS, supra, Respondent is not relying on the discretion management retains under such a proviso to argue that such discretion takes experience step advancement out of the status quo.

---

whether or not step advancement is understood to be payable during a contract hiatus following expiration of the agreement. The lack of specific language addressing the parties' understanding of what is to occur during a hiatus and the lack of any bargaining history that sheds light on that point, creates an ambiguity. KENOSHA COUNTY, supra., SCHOOL DISTRICT OF WEBSTER, supra. However, the third factor to be considered, how the language of Sec. 5.1.2 has been historically applied, resolves that ambiguity. The evidence as to the practice followed in past hiatuses where the parties had not reached agreement on a successor

agreement prior to the start of the new school year, establishes that Respondent has not paid the experience step advancement in any of those four instances. 3/

3/ Whether this practice is inconsistent with how the Respondent has treated the payment of lane changes during a contract hiatus is beside the point, as it is how the parties have historically applied the experience step advancement language during a hiatus that is relevant.

The parties stipulated at hearing that the only instances either party could find of where such a hiatus occurred were in 1983, 1985, 1987 and 1990. In 1981 the Respondent had issued individual teaching contracts in March for the coming school year that did not indicate advancement to the next experience step, which Complainant grieved. However, the parties reached a settlement on their successor agreement, which included payment of the experience step, before the start of the 1981-1982 school year and the grievance was withdrawn.

Of the four hiatuses, the parties stipulated that the only written record of a grievance being filed regarding the failure to advance teachers an experience step and pay them accordingly during the hiatuses was in 1985. That grievance was withdrawn after settlement was reached on a successor agreement in December of 1985. There is no evidence of any challenge in 1983 by Complainant to the failure to pay the step advancement during the hiatus. There is evidence that in the 1987 hiatus there was a dispute as to what the practice had been, with verbal discussion and correspondence between the Chair of Complainant's PR & R Committee, James Barnes, and Respondent's then-Assistant Superintendent in charge of personnel, Paul Prokupek. However, despite references in Complainant's Executive Board minutes to a pending grievance regarding "lane changes", which Barnes testified included the step advancement issue, Barnes conceded he could find no written record of a grievance actually being filed in 1987 regarding the failure to pay the step increase during the hiatus. The only evidence with regard to 1990 is Barnes' testimony that the head negotiator for Complainant's bargaining team, Jeannette Wojcuik-Graf, called him and advised him to be prepared to file a grievance, but that he was never asked to file, and did not file a grievance before the contract was settled in November of 1990. 4/

4/ The parties also stipulated that had Wojcuik-Graf testified, she would have testified that the following is her recollection in the Fall of 2001, but that after reviewing her notes, she could find no written corroboration as to the last sentence:

> *"Habitually, the school district refused to pay steps or lane changes when the parties had not reached a settlement by the beginning of a school year and until an agreement was reached. Once the agreement was ratified, back pay was issued. As a matter of course, when the district failed to implement step and lane change payments, the EEA promptly filed a grievance. Such a grievance did not usually proceed through its steps because we subsequently made progress at the negotiations table and agreed to hold the grievance in abeyance. Part of the quid pro quo in order to reach tentative agreement on all remaining issues was always that the association would drop its grievance without prejudice."*

With the exception of the 1985 grievance, there is also no written corroboration as to her recollection that grievances were filed when the step advancement was not paid.

Complainant attempts to explain the lack of a formal challenge to Respondent's refusal to pay the step advancement during the hiatuses in 1983, 1987 and 1990 by asserting that the parties simply "agreed to disagree" and that as a practical matter, Complainant did not want to spend its limited resources to litigate an issue that would likely be resolved in a relatively short time when agreement was reached on a new collective bargaining agreement. The explanation is not persuasive. At a minimum, filing a written grievance would have at least memorialized the Complainant's lack of acquiescence in Respondent's actions in withholding the step advancement, at little or no cost to Complainant. Further, there is a lack of consistency in the Complainant's actions in that regard. In 1981 it filed a written grievance in March before the existing agreement expired. In 1985, the grievance was filed on September 20, 1985. No grievance was filed in 1987 even though the step advancement was not paid until April 15, 1988. Similarly, no grievance was filed in 1990, even though the step advancement was not paid until December after the contract was settled in November.

The Complainant also asserts that acquiescence should not be inferred from its failure to file a grievance over the failure to pay the step advancement during the hiatus in 1983, since it had made its position so clear with the Schlei grievance filed in 1981 and the case law was developing in its favor with the Circuit Court's reversal of the Commission's decision in MENASHA JOINT SCHOOL DISTRICT and the Commission's decision not to appeal the Court's decision. Albeit the parties settled their successor agreement on September 29, 1983, one would think that if the Complainant continued to hold the position it took in 1981, that with the development of the case law in its favor, it would have actively pressed the matter when the step advancement was not paid (as it did in 1985), rather than simply ignored it.

As the Commission has pointed out, in a *status quo* case it is the complainant's burden to establish, by a clear and satisfactory preponderance of the evidence, that the *status quo* is what the complainant claims it to be. KENOSHA COUNTY, supra. In this case, Complainant has the burden of establishing that the *status quo* is to pay the experience step advancement with the start of the new school year, regardless of whether or not the collective bargaining agreement has expired and agreement has not yet been reached on a successor agreement. Given that the evidence establishes that this has not been the case in the four prior instances of a contract hiatus and that the Complainant has only formally challenged the Respondent's actions in one of those instances (1985), and not at all in the most recent hiatus (1990), it is concluded that the Complainant has not met its burden. That being the case, the Complainant has failed to prove, by a clear and satisfactory preponderance of the evidence that the Respondent unilaterally changed the *status quo* by failing to pay the experience step advancement at the start of the 2001-2002 school year after the expiration of the parties' 1999-2001 agreement, and thereby refused to bargain collectively with Complainant in violation of Sec. 111.70(3)(a)4, Stats., or interfered with the employees' rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats. Thus, the complaint has been dismissed in its entirety.

In dismissing the complaint, however, no merit is given to the Respondent's assertion that proposals in the ongoing negotiations to alter the salary schedule, or that implementation of a qualified economic offer could have resulted in teachers having to pay back the step increase due to the cost of their health insurance benefit, constitute defenses to a unilateral change in the *status quo* in a mandatory subject of bargaining during a contract hiatus. The Commission has consistently rejected such arguments in these cases. SCHOOL DISTRICT OF WEBSTER, supra, citing, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84).

Dated at Madison, Wisconsin, this 22nd day of November, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc
30322-A.doc