STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KETTLE MORAINE EDUCATIONAL SUPPORT STAFF ASSOCIATION, Complainant,

vs.

SCHOOL DISTRICT OF KETTLE MORAINE, Respondent.

Case 31
No. 63283
MP-4019

Decision No. 30904-C

Appearances:

Rebecca Ferber Osborn, with **Jina L. Jonen**, Legal Counsel, Wisconsin Education Association Council, 13805 West Burleigh Road, Brookfield, Wisconsin 53005-3058, appearing on behalf of Complainant.

Michael Aldana, with **Jeffrey LaValle**, Quarles & Brady, LLP, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 27, 2004, Complainant filed a complaint of prohibited practice alleging that Respondent had violated Sec. 111.70(3)(a)1 and 4, Stats., by taking a series of unilateral actions, including reducing the hours of paraprofessional employees represented by Complainant, after the expiration of a collective bargaining agreement and prior to agreement on a successor. The Commission informally assigned David Shaw as Examiner, and during attempts to reach a mutually agreeable hearing date the District requested the appointment of another Examiner. On May 14, the Commission formally appointed Stuart Levitan to act as Examiner. Examiner Levitan set hearing on the matter for June 17. On June 2, Complainant filed an amended complaint. On June 15, Respondent filed its answer to the amended complaint. On June 16, Examiner Levitan rescheduled the hearing to July 15. On that date, the parties met in Wales, Wisconsin, and attempted to informally resolve the matter. The effort proved unsuccessful. Examiner Levitan marked a series of exhibits, but took no testimony on that date.

On September 28, 2004, the Commission issued an order substituting Coleen A. Burns as Examiner due to the unavailability of Examiner Levitan. Efforts to set the matter for hearing prior to December broke down, and the parties submitted, between October 19 and October 27, conflicting positions on whom the Commission should appoint as Examiner.

On January 6, 2005, the Commission issued an order substituting Richard B. McLaughlin as Examiner, due to the unavailability of Examiner Burns. Hearing on the matter was conducted in Wales, Wisconsin on February 2. Doreen M. Brown-Schwager filed a transcript of the hearing with the Commission on February 15. The parties filed briefs by March 28. Complainant filed its reply brief May 23, and agreed to extend the due date for Respondent's reply. Respondent submitted a reply brief via e-mail on July 22. Via e-mail dated August 15, I sought to verify the date of Respondent's submission of a reply brief and whether Respondent had received a copy of Complainant's brief. On August 15, Respondent submitted a copy of the July 22 e-mail by which it had submitted its reply brief, and noted that it had yet to receive a copy of Complainant's brief. Respondent also, on August 15, submitted an e-mail including as an attachment, a copy of JACKSON COUNTY, MA-12338 (Houlihan, 03/05), and asserted, "(t)he language of the collective bargaining agreement in question there and the final holding are relevant to the present case". Complainant submitted an e-mail dated August 16, objecting to Complainant's submission of argument and, in the alternative, asserted JACKSON COUNTY "should be given little weight considering the significant contractual and factual distinctions that exist between it and the instant case." On August 16, I supplied a paper copy of each party's reply brief to their adversary. On August 31, I issued an e-mail advising the parties that "my review of the record will not include the JACKSON COUNTY arbitration award or argument based on it."

In a September 14, 2005 e-mail to the parties, I advised the parties that my review of case law establishing a "dynamic status quo" posed potential issues regarding Article 16, Section B, a provision not argued in the parties' briefs. The e-mail stated "I write to advise you of my concern on this point and to determine if either or both of you think the point worthy of further discussion." On September 28, I conducted a teleconference with the parties to address the issues posed by the e-mail. At the close of the teleconference, I granted the parties' request for time to explore whether the record could be supplemented by further argument or factual stipulations. On October 17, I conducted another teleconference, at the conclusion of which I stated that I would issue a letter setting forth my understanding of the record on the points underlying the two teleconferences. After an e-mail exchange, I issued a letter dated November 16, which states:

> . . . The pleadings address alleged District violations of Secs. 111.70(3)(a)1 and 4, Stats., and more specifically the District's "status quo" obligations during a contract hiatus (see amended complaint and answer at Paragraph 5).

> I provoked the discussions prompting the conference calls by questioning the potential impact of Article 16, Section B, and more specifically, whether the possibility that the clause could be read to continue the expired agreement past its nominal expiration date warranted further argument from your perspectives. In my view, the difficulty turned on potential issues of contract interpretation, which could implicate the grievance arbitration process or the application of Sec. 111.70(3)(a)5, Stats.
>
> It is my understanding that the parties are satisfied that the record as it currently exists fully poses the issues for decision. More specifically, it is my understanding that the issues to be addressed concern the District's status quo obligations, and the record does not pose any issue regarding deferral or deference to the grievance arbitration process, and that the statutory issues should be addressed, drawing the contractual provisions into the analysis to the extent required by status quo law.
>
> This letter confirms my understanding and thus formally confirms the close of the record.

In an e-mail sent December 28, the District offered "a link to a very recent decision (11/30/2005) . . . in an arbitration matter regarding layoffs" and asked that I "consider the decision." I asked the Association for a response. In an e-mail dated December 30, the Association voiced its view that consideration of the award would require further briefing and that the record should remain closed. I responded to the parties in a December 30 e-mail confirming that the record was closed and would not include the case cited in the District's December 28 e-mail.

FINDINGS OF FACT

1. Kettle Moraine Educational Support Staff Association (the Association) is a labor organization which maintains its primary offices in care of the Lakewood Uniserv Council, 13805 West Burleigh Road, Brookfield, Wisconsin 53005. Miguel Salas is the Executive Director of Lakewood UniServ Council. Debbie Martin is the Association's President and Chief Negotiator.

2. School District of Kettle Moraine (the District), is a municipal employer which maintains its primary offices in care of Post Office Box 901, 563 A.J. Allen Circle, Wales, Wisconsin 53183. At all times relevant to this matter, Patricia Millichap has served as the President of the District's Board of Education; Sarah Jerome has served as the District's Superintendent; and Roger Dickson has served as the District's Assistant Superintendent/Chief Business Official. The District provides educational services though a number of facilities, including four elementary schools, a middle and a high school. Mary Schwartz serves as the high school Principal.

3. The Association and the District are parties to a collective bargaining agreement, dated on its face "July 1, 2001 through June 30, 2003", which includes, among its provisions, the following:

ARTICLE 2-MANAGEMENT RIGHTS

A. Management Rights

1. Except as provided hereinto the contrary, the Board on its behalf and on behalf of the District, retains and reserves unto itself all powers, rights, authority, duties, and responsibilities conferred upon and vested in it subject to the express provisions of this Agreement, the laws and the Constitution of the State of Wisconsin and of the United States of America.

2. These rights include, but are not limited to the following:

. . .

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

g. The direction and arrangement of all the working forces in the system including the right to hire and transfer employees. . . .

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

l. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance. . . .

n. To establish hours of employment, to schedule classes and assign workloads . . .

s. To introduce new or improved methods or facilities, or to change existing methods or facilities provided if such affects the wages, hours and/or working conditions of employees, the Association will be notified and permitted to bargain.

u. To develop job descriptions, which are illustrative, but not limited, so that any employee shall perform any reasonable assigned duties.

3. In exercise of these powers, rights, authority, duties and responsibilities, the District or its agents shall use judgment and discretion in connection therewith, and shall exercise same in conformance with the express terms of this agreement, and the laws of the State of Wisconsin and of the United States of America.

ARTICLE 4 - BARGAINING PROCEDURES

. . .

C. Amendments: This Agreement may not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties. Matters not covered by this Agreement which affect wages, hours, or conditions of employment shall be subject to negotiations between the parties during the term of this agreement. When said negotiations are required, the Agreement shall be amended or modified to incorporate any agreements reached in said negotiations. . . .

ARTICLE 8- LAYOFF, RECALL PROCEDURE

A. Procedure: This procedure shall apply when the Board reduces an Instructional Support Staff position.

1. In the event the Board anticipates that a layoff will be necessary for the next contract year, the employee affected should be notified by May 15 of the preceding year unless the decision to reduce staff occurs later than May 15, in which case the employee affected should be notified within five (5) days of any such decision, and at least twenty (20) calendar days prior to the date the layoff is effective.

2. The selection of employees to be laid off shall be made taking into account the following:

   a. Normal attrition resulting from retiring or resigning employees will be the first order of staff reduction.
   b. Employees choosing the voluntary leave of absence option will be the second order of staff reduction.
   c. Temporary and interim full-time and part-time employees will be the third order of staff reduction.
   d. If steps a, b, and c are insufficient to accomplish the necessary reduction in staff, the least senior employee in the job category of SWD paraeducators or instructional paraeducators will be laid off.

3. Health, dental and life insurance benefits shall continue until the end of the following month following the lay-off month unless a layoff is at the end of a year in which case benefits shall continue until August 31.
4. Insurance Coverage: During the two (2) year recall period, an employee on layoff shall be allowed to participate in the group health and life insurance plans then in effect at his/her own expense, provided that such participation is permitted under the insurance contracts, and provided the employee has not been reemployed in a position where health, dental and life insurance coverage is available.

B. Definition of Seniority:

1. Seniority is calculated from the date of hire in the District, and includes all continuous regular full or regular part-time permanent employment as a paraeducator. The date of hire is the date the employee first reports to work.
2. Seniority shall be defined as the employee's length of continuous service with the District, Seniority shall be computed pro-rata on an hour for hour basis including all hours paid and credited but not worked due to holidays, sick leave and leave of absence, but excluding overtime hours.

. . .

C. An employee shall lose seniority in the event:

1. He/she retires, resigns, or is discharged.
2. He/she is not recalled from layoff for a period of one (1) year.
3. He/she is recalled from layoff and does not report for work as outlined in D.2.
4. He/she does not return at the expiration of a leave of absence.

D. Recall Procedure: The last person laid off shall be the first person reemployed when work again becomes available within the bargaining unit, provided that such employee is qualified for the position, available for work and desires to return.

1. Laid off employees shall have five (5) working days in which to respond after he/she receives the recall notice. The notice may be received in person, by phone (speaking to the person, or by certified mail).

2. If the laid off employee is not in the Kettle Moraine area, or is employed by another employer when the notice is received, the District will grant him/her fifteen (15) working days to return to work. The recalled employee may request an extension not to exceed a total of thirty-one (31) days.
3. An employee who has been laid off shall retain the right to be recalled twenty-four (24) months from the date of termination.
4. A laid off employee has the right to reject a position with lesser hours of work and/or lower pay and still retain recall rights. In the event the District offers a laid off employee a reduced position with a lesser rate of pay and fewer hours of work, such offers will be made in good faith and not in an arbitrary and capricious manner. The position cannot be further altered if offered to another person for the duration of that school year.
5. Service increment on the wage scale and accumulated sick leave at the time of reinstatement shall be at the level of that at last employment. . . .

ARTICLE 11 - COMPENSATION - BENEFITS

A. Work Year:

The normal work year for employees shall be 178 days for 1997-98 and thereafter. Variations to the length of the work year may be arranged by mutual agreement. . . .

D. Work Week

The regular work week for full-time employees shall consist of 37 1/2 hours. The regular work day shall consist of 7 1/2 hours. The normal academic day shall consist of eight hours; which shall include an unpaid one-half (1/2) hour lunch and two (2) fifteen (15) minute rest periods per day.

An unpaid one-half (1/2) hour period will be provided for employees working more than four (4) hours per day or for those working over a lunch period. Employees are entitled to a paid fifteen (15) minute rest break during the work day for each four (4) hours of work. Those working six (6) hours or more are entitled to two (2) such rest periods a day.

Any time worked in excess of forty (40) hours a week will be paid at time and one-half the hourly rate.

Employees may be allowed to work out variations in individual work schedules with their immediate supervisors. Flex-time may be granted and worked out with the employee's immediate supervisor and the employee. If the employee wishes to take compensatory time in lieu of salary payment of time worked in excess of the employee's regularly scheduled hours, such time may be granted and such compensatory time taken at such time as mutually agreed to by the employee and the employee's supervisor. In cases where an employee has worked more than forty (40) hours a week and elects to take compensatory time, such time will be given in the ratio of one and one-half (1 1/2) times the actual overtime worked. . . .

G. Insurance:

Insurance and other benefits provided under this section shall be made available to all members of the bargaining unit who work half-time or more. Employees who work less than full time will be given benefits on a pro-rated basis.

1. For purposes of benefit eligibility, full time is defined as thirty-seven and one-half (37 ½) hours per week for 178 days per year.

. . .

ARTICLE 16-TERMS OF AGREEMENT

. . .

B. Duration:

1. This Agreement shall become effective as of July 1, 2001 and shall remain in full force and effect through June 30, 2003 or until a successor Agreement is ratified by the Kettle Moraine Educational Support Staff Association and the Kettle Moraine School District should that occur after June 30, 2003.

. . .

APPENDIX "D"

SCHOOL DISTRICT of KETTLE MORAINE
NOTICE OF INTENT TO RE-HIRE

. . .

> Work hours and schedules are established by building principals. You may not revise the work schedule without approval of the building principal. Please discuss your schedule with the building principal if you have questions. Schedules are subject to change as necessary.

The parties have not yet agreed upon a successor to 2001-2003 agreement.

4. During the collective bargaining that produced the 2001-03 labor agreement, Jerome and Board of Education members played a policy role, while across-the-table negotiations were handled by Dickson and by Gary Ruesch, legal counsel to the District. Salas and Martin served as the Association's across-the-table negotiators.

5. Prior to the collective bargaining that produced the 2001-03 labor agreement, the District reduced personnel and program costs to balance its budget. Between 1993 and 2003, these reductions exceeded 4.5 million dollars. In July of 2003, prior to reaching agreement on a 2001-03 labor agreement, the District laid-off 13.087 full-time equivalent (FTE) paraeducator positions. The Association did not grieve this layoff, taking the position that it complied with the provisions of Article 8. As part of its efforts to contain costs, the District sought to make insurance changes. With the exception of the custodial bargaining unit, all District employee insurance was once provided under Wisconsin Education Insurance Trust (WEAIT) Plan A. The District has sought to move employees from that plan to WEAIT Plan D, which includes higher deductibles. By the fall of 2003, the District had either implemented or bargained for the change to Plan D with its administrators, food service, secretaries and general support staff.

6. The collective bargaining for a 2001-03 labor agreement was protracted, and the distance between the parties' positions significant. The Association submitted a petition for interest arbitration to the Commission in late February of 2003. The District submitted a responsive final offer by mid March of 2003. By that point in the negotiations, the Association was seeking a number of financial improvements to the agreement, including an additional $1.00 per hour for paraeducators who substitute for a teacher as well as a $0.35 per hour increase for each year of a two-year agreement. The Association also proposed to increase the number of sick leave days an employee could accumulate. The District was seeking a reduction in insurance benefits, including the deletion of a "me-too" clause linking insurance premium and deductible provisions to the teacher bargaining unit and including a substantial increase in drug co-pays. The District also sought to cap a Tax Sheltered Annuity (TSA) at 25% of an employee's compensation. The existing TSA benefit applied to employees who were eligible to participate in the District's health insurance program, but waived coverage. For such employees, the predecessor agreement granted a District payment into a TSA of up to the single premium equivalent. In late April of 2003, the Association submitted a prohibited practice complaint to the Commission, alleging the District had violated Secs. 111.70(3)(a)1, 4 and 5, Stats., by, among other things, capping its contribution to the TSA at 25% of an employee's annual compensation. Federal law governing such compensation had changed effective

January 1, 2002, to raise contribution limits from 25% to 100% of annual compensation. The District, contrary to the Association, took the position that it could not be compelled to raise its contribution during a contract hiatus. By the completion of another final offer exchange in July of 2003, the parties' differences had narrowed somewhat. The District continued to propose significant insurance changes, including a dollar cap on its premium contributions, a three-tier point of service plan with varying levels of deductibles and co-payments, a significant increase in drug co-payments, and a 25% cap on its TSA contribution. The District's wage offer was an increase of $0.15 per cell for the 2001-02 school year and $0.10 per cell for the 2002-03 school year. Its offer included the increase in sick leave accumulation proposed in the Association's initial final offer proposal. The Association's wage offer paralleled the District's, and the Association dropped its requested increase in sick leave accumulation. The parties did not meet face-to-face after this exchange until October of 2003. The delay reflected the parties' willingness to see how negotiations with the teacher unit would progress. Salas and Martin participated in a bargaining session for the teacher unit on October 7, 2003. Ruesch and Dickson asked to meet with them at the close of that meeting to address paraeducator issues. The District representatives proposed a settlement of the 2001-03 labor agreement together with the prohibited practice complaint. The proposal accepted the Association's most recent wage proposal, together with a one-time payment to TSA participants of $40,000.00. The proposal included changing contract language governing ongoing District TSA contributions to include a 25% cap. District representatives emphasized that the settlement proposal, if accepted, could have adverse consequences, including across-the-board reductions in paraeducator hours.

7. Prior to the meeting of October 7, 2003, the Board of Education instructed its negotiators to communicate clearly to the Association that it viewed the settlement proposal as excessive in light of other employee settlements and that it would necessitate District action to reduce personnel costs. The District, using cast-forward costing methodology, put the total package cost of the proposal at 9.2% for the 2001-02 school year and 14.9% for the 2002-03 school year. From this perspective, the 2001-02 settlement was 3.2% higher than the next highest settlement of a represented unit, and the 2002-03 settlement was 6.1% higher than the next highest settlement of a represented unit. Among those represented employees, only food service employees and nursing assistants have lower wage rates than the paraeducators.

8. The Association's bargaining team accepted the District's offer. In a letter to Dickson dated October 14, 2003, Salas noted it would submit the proposal to the Association for ratification on October 28. Salas also noted:

> After the written proposal was explained . . . District legal counsel, verbally remarked that by accepting this offer there may or may not be layoffs "across the board". You explained that the District could not reduce whole positions since there had been so many lay-offs already but that across the board cuts might be necessary.

> Please be advised that by accepting the District's offer the Association does not expressly or implicitly waive its right to challenge potential across the board reductions in the future. The Association believes that any attempt of across the board reductions must be bargained due to the language defining the process of reducing positions and could potentially involve other violations of the . . . Collective Bargaining Agreement as well.

The Association ratified the proposal, as did the District. In an e-mail to Salas and Martin dated October 30, 2003, Dickson stated:

> . . . the Board will be taking action at the November 11 School Board meeting in regard to a reduction in force. The reduction will . . . be applied across the board by reducing the number of hours that each paraeducator will be schedule to work. The hours that will be scheduled will include only those days when children are present.

The Board considered across the board reductions in the hours of paraeducators at its meeting on November 11, 2003. The meeting was contentious, and included public commentary from paraeducators and others opposing the reductions. The Board did not take definitive action at that meeting, putting the matter onto its agenda for a meeting on November 25.

9. Jerome issued a letter to Martin dated November 12, 2003, which states:

> It is with deep regret that the district will be changing the schedules of paraeducators. This will be accomplished by changing each paraeducator's schedule by the number of in-service hours remaining in the school year. We have chosen to eliminate inservice hours so as to minimize the impact on students.
>
> During negotiations, the district's representatives repeatedly advised the union negotiating team that the consequence of a 14 percent settlement would result in the need to reduce staff hours. Your union representatives acknowledged that consequence in a letter from Mr. Salas to Mr. Dickson on October 14, 2003. While Mr. Salas stated that he did not agree with the district's position, his letter acknowledges his awareness of the potential impact of the 14 percent settlement. The district's representatives repeatedly requested that Union representatives reconsider the proposed wage increase. The district's representatives were told that the union membership had been apprised of the consequences and wanted to move forward with the proposed settlement of 14 percent package increases despite the predictable consequences of reductions.
>
> As in any household with finite income, when heating costs rise, the homeowner turns back the thermostat. Likewise, the district must balance the rising costs of any employee unit that so greatly exceeds the settlement norms of other

> employee groups. (Please see reverse side for settlement comparisons.) Therefore, the schedule changes will be implemented November 26, 2003. In general, the changes correspond to the hours of in-service for the remainder of the school year. Each employee has different hours and different assignments; therefore, it was necessary to calculate each schedule change individually. If you have questions regarding the number of hours of the change, please discuss them with your principal.
>
> A few paraeducators' schedules will fall below 50 percent when these reductions are implemented. Because the current contract language causes loss of benefits for employees who work less than 50 percent, we have advised your union that the district will seek to work with your union representatives to continue to provide the benefits to these employees until the end of the 2003-04 school year. These negotiations are scheduled for November 19.
>
> Budgets are tougher and leaner than they have been in prior years. This has created difficulties for everyone. You can be assured that you are highly valued. We regret the circumstances that bring us to this action.

The "reverse side" of the letter included tables showing the wage and total package increases for the following groups for the school years from 1997-98 through 2002-03: Para-educators; Food Service; Support Staff; Secretaries; Custodial; Teachers; and Administrators. It also stated in a "NOTES" section:

> All employee groups with the exception of food service and custodial pay 2% of the health insurance premium. Administrators, secretaries, general support staff and food service employees have WEAIG Plan D. Teachers and Paraeducators have WEAIG Plan A. Custodial employees are insured by the Teamsters for health insurance.

The District supplied a copy of this letter to all of its paraeducators.

10. On November 19, 2003, the parties met to discuss the District's proposed reductions and the Association's intent to grieve them. Salas and Martin represented the Association, and Dickson, Jerome and Ruesch represented the District. Dickson summarized the results of the discussions in an e-mail to Salas and Martin dated November 19. Dickson's e-mail included an attachment that set forth two settlement options. One was to change the Association's insurance plan to WEAIT Plan D in exchange for the District's commitment not to reduce hours or layoff paraeducators for the balance of the 2003-04 school year. The other was to continue "in the health insurance program as a 50% employee through August 31, 2004" any employee whose hours fell below 50% FTE as a result of the District's proposed reductions, in exchange for a written understanding that "the union agrees to waive all claims by the union and all bargaining unit members relating to change in hours." In a letter dated November 21, Ruesch stated an understanding reached by the parties to streamline the

processing of a grievance. At its November 25 meeting, the Board of Education approved a "change in Schedule" for paraeducators, which reduced "scheduled hours by the amount of in-service time when students are NOT in school." The Schedule includes a "Note" that the change is, "Based on the need to offset the 14% package settlement with the paraeducators for the 01-03 contract". The Note summarized the Schedule thus:

> A fulltime paraeducator works 1335 hours per year. Subtracting the equivalent in-service hours of 19.5 would create a 1315.5 hour (.985 FTE) work year. In general, high school and middle school paraeducators schedules will be changed to reduce scheduled hours by 15 hours based on 4 half-day inservices and elementary paraeducators schedules by 19.5 hours based on 6 half-day inservices where no students are present. Schedules for part time paraeducators will have prorated changes.

At the start of the 2003-04 school year, elementary school paraeducators had been scheduled for 28 hours of inservice, while middle and high school paraeducators had been scheduled for 21 hours. Prior to the District's creation of the schedule approved by the Board, Martin met with Jerome and other administrators to assess building needs, employee workloads and the service provided by individual paraeducators before a determination was made of how many hours an individual employee would be reduced. The determination included a determination of accrued comp time for each employee, which was applied against the reduction of inservice hours. The reductions did not include any assessment of employee seniority. Martin's participation in the meeting did not indicate Association consent to the contractual propriety of the reductions. Board-approved schedules did not include reductions in examination days, and did not intend to reduce any paraeducator below a 178 day work year, unless the paraeducator had been scheduled to work fewer than 178 days prior to the reductions. In a letter to Jerome dated November 25, Salas stated the Association's rejection of the two options stated in Dickson's November 19 e-mail; the Association's intent to grieve any reduction of paraeducator hours; and the Association's belief that the reductions contemplated by the District would violate Article 8. In a November 26 e-mail to Salas, Jerome noted that the District, contrary to the Association, viewed the reductions as schedule changes, not layoffs. The e-mail notes the schedule changes will be implemented December 10, 2003, and offers to address problems regarding the effect of the changes on employees who fall below 50% FTE.

11. Jerome detailed the schedule change in a letter dated December 2, 2003, to each paraeducator. Each letter included the following:

> The School Board has asked that I share with you their sincere regret for this action. The School Board has attempted to work with your elected union representatives to provide settlement options to avoid these changes in schedules on November 19th. Option 1 presented the opportunity to adopt WEAIT Plan D insurance and the $10/20/40 drug card – same as the food service, secretaries and administrators health plan. Option 2 presented the opportunity to "hold harmless" the 10 paraeducators who lose eligibility for health and dental

> benefits due to less than 50% status. In both options we believe the best interests of all paraeducators would have been served (see enclosure). Your union rejected both of these options. Both the administration and the school board had hoped a resolution could have been found to avoid these schedule changes. In absence of resolution, the board approved the changes of schedules.
>
> During these uncertain economic times with the state budget and thus with local school budgets, the struggle to create a balanced budget is ever present. We must continue to work for equitable settlements. We had hoped the union representatives would be more understanding of the difficult times we face and would have seriously considered the options that would have resulted in the district's ability to avoid these changes to schedules. The local school budget is directly connected to the state budget. All of us recognize these difficult and uncertain times and the need for a balanced budget. . . .

12. The parties met on December 9, 2003. The Association filed a grievance dated December 9 that challenges the Board's action of November 25 as a violation of Sections 2B and 4C as well as Articles 8 and 11. In a letter to Salas dated December 12, 2003, Jerome stated her "responses to the immediate and specific issues" posed by the December 9 meeting:

> Although the KMESSA has not made a demand to bargain, the District is . . . willing . . . to negotiate . . . concerning mandatory subjects of bargaining . . . on December 22nd or 23rd of 2003.
>
> Under COBRA, employees who have dropped below the 50% threshold may remain in the District's group health and dental benefit plan at their own cost.
>
> The District will allow employees who have dropped below the 50% threshold to remain on the District's group LTD policies until further notice. We will notify each employee as to the total premium for which they will be responsible and its due-date. This will be done on a non-precedent basis.
>
> The District is working with the life insurance carrier to allow employees who fall below the 50% threshold to remain in the group life plan while the grievance is being processed to completion. We will keep you advised as to the status of this item. This would be done on a non-precedent basis. . . .

Salas responded to Jerome in a letter dated December 18, in which he notes that the Association is "unable to meet on either of those two dates", and states:

> However, KMESSA representatives are willing to meet on January 27 or January 29, 2004 for the purposes of negotiating all subjects of bargaining relating to the 2003-2005 Collective Bargaining Agreement. Since we have not yet scheduled an initial exchange of proposals for the new Agreement, we thought it would be appropriate to schedule one at this time.

> The KMESSA believes it would serve both parties to bargain all mandatory subjects, including the articles the District proposed to change in its offer dated November 19, 2003. Please note that unless otherwise noted in future proposals, the KMESSA position in bargaining remains the status quo on all matters pertaining to the workday, work year, layoff provisions and insurances outlined in Articles 8 and 11 respectively. Furthermore, the KMESSA believes that the District cannot unilaterally change the above articles without first bargaining with the Union.

Changes in benefit levels traceable to the Board's action of November 25, 2003 became effective on January 1, 2004. In a letter dated January 5, 2004, Jerome issued her denial of the Association's grievance and the District's view that it was "under no obligation to proceed to arbitration during a contract hiatus."

13. The parties exchanged initial proposals for a 2004-06 labor agreement on February 19, 2005. Dickson prepared an analysis of the initial offers, which was distributed to the Board and to the Association. Using cast forward costing methodology, Dickson valued the District's total package proposal at 3.8% each year. He valued the Association's at 13.5% for the 2003-04 school year and 6.2% for the 2004-05 school year. The District implemented schedule changes for the paraeducators for the 2004-05 school year. Prior to the start of that year, the District scheduled the following reductions in hours: 28 hours for the elementary schools; 21 hours for the middle school and 51 hours for the high school. The elementary and middle school reductions reflected inservice hours, while the high school reductions reflected 21 hours of inservice and 30 hours from four scheduled exam days. Dickson discussed the reductions at the high school with Schwartz, instructing her to schedule high school paraeducators for a 178 day work year, even if the 178th day included no more than two scheduled hours. He also advised her that if an individual paraeducator wished to work fewer than 178 days in the 2004-05 school year, the individual employee should sign a statement. Based on student need, the District restored some of these hours. This determination did not include an assessment of employee seniority and was not uniform across high school paraeducators. During the summer following the 2003-04 school year, and during the 2004-05 school year, the District offered continuing education courses to paraeducators. The offerings were for volunteers, and offered a stipend for attendance. Voluntary attendance did not add to the hours of work used to calculate eligibility for contractual seniority and benefits.

14. In the bargaining for a labor agreement in effect from July 1, 1995 through June 30, 1997, the Association and the District negotiated a reduction in the "normal work year" specified in Article 11, Section A from 180 to 178 days. The normal work year for paraeducators for the 2003-04 and the 2004-05 school years is 178 days. Exceptions to a 178 day work year have been made by individual paraeducators with their immediate supervisor. Such exceptions are not referred, as a routine matter, to the Association for approval. Such exceptions have been made in that fashion throughout Jerome's fourteen year tenure with the District. The District's 1999-00, 2000-01, 2001-02 and 2002-03 school years consisted of 39 total work weeks. The 2003-04 school year consisted of 38 total weeks. The total weeks for

those school years in which elementary school was in session for each day, thus permitting a full 37 ½ hour paraeducator work week can be summarized thus: 1999-00 (19 weeks); 2000-01 (16 weeks); 2001-02 (18 weeks); 2002-03 (20 weeks); 2003-04 (20 weeks). For the middle and high schools, the totals can be summarized thus: 1999-00 (23 weeks); 2000-01 (19 weeks); 2001-02 (22 weeks); 2002-03 (22 weeks); 2003-04 (22 weeks). The reduction in hours originally approved by the Board of Education on November 25, 2003 generated cost reductions under cast-forward costing methodology that exceed the cost of the wage increases bargained for the 2001-03 labor agreement.

15. District statements to Association negotiators at the close of the October 7, 2003 negotiation session, coupled with District communications with Associated-represented paraeducators during the reduction in hours initiated by the District in December of 2003 constitute District exercise of its free speech rights and do not constitute improper coercion of protected employee rights. The reduction in hours initiated by the District in December of 2003 does not violate its duty to maintain the *status quo*, except to the extent the reduction produced a loss of an individual paraeducator's seniority rank as it existed under the 2001-03 agreement prior to the reduction in hours initiated by the District in December of 2003.

CONCLUSIONS OF LAW

1. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. A paraeducator included in the bargaining unit represented by the Association is a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

3. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. The District did not violate Secs. 111.70(3)(a)1 or 4, Stats., through its communication with Association bargaining representatives or through its communication with Association-represented employees during the bargaining for the 2001-03 collective bargaining agreement or during that portion of the bargaining for a successor agreement which is at issue in this record.

5. District reduction of paraeducator hours for the non-student contact time which is at issue in this record did not violate the District's duty, under Secs. 111.70(3)(a)1 and 4, Stats., to maintain the *status quo* during a contract hiatus.

6. To the extent District reduction of paraeducator hours for the non-student contact time which is at issue in this record produced a loss of an individual paraeducator's seniority rank as it existed under the 2001-03 agreement prior to the reduction in hours which is at issue in this record, the District has unilaterally changed the *status quo*, and, therefore, has refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, and, derivatively, of Sec. 111.70(3)(a)1, Stats.

ORDER

1. Those portions of the amended complaint challenging District conduct covered in Conclusions of Law 4 and 5 above are dismissed.

2. To remedy the violation covered in Conclusion of Law 6 above, the District shall take the following actions to effectuate the purposes of the Municipal Employment Relations Act:

a. Cease and Desist from unilaterally implementing a reduction in hours in a manner which changes the relative seniority rank of paraeducators as that rank existed under the 2001-03 agreement prior to the reduction in hours which is at issue in this record.

b. Through collective bargaining with the Association, identify which, if any, paraeducator lost seniority rank due to the reduction in hours at issue in this record, and, restore hours and attendant benefit eligibility, if any, for any paraeducator thus identified to the extent necessary to restore their relative seniority rank as it existed under the 2001-03 agreement prior to the reduction in hours which is at issue in this record.

c. Make whole, with interest at the interest rate set forth in Sec. 814.04(4), Stats., any Association-represented paraeducator identified under Paragraph 2, b of this Order to have lost seniority rank due to the reduction in hours at issue in this record, for the wages and benefits the paraeducator would have earned but for the reduction of hours at issue in this record which produced the loss of seniority rank as it existed under the 2001-03 agreement prior to the reduction in hours which is at issue in this record.

d. Notify all Association-represented paraeducators, by posting in conspicuous places in its offices and buildings where such employees are employed, copies of the Notice marked "Appendix A." This notice shall be signed by the Assistant Superintendent and shall be posted for a period of thirty days. Reasonable steps shall be taken by the Respondent to ensure that this Notice is not altered, defaced or covered by other material.

e. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this decision of the steps taken to comply with this Order.

Dated at Madison, Wisconsin this 26th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

APPENDIX "A"

NOTICE TO PARAEDUCATORS REPRESENTED BY THE KETTLE MORAINE EDUCATIONAL SUPPORT STAFF, AFFILIATED WITH THE LAKEWOOD UNISERV COUNCIL

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

1. District authority to reduce hours during collective bargaining for a successor to the 2001-03 collective bargaining agreement does not permit the District to reduce hours in a manner which changes the relative seniority rank of paraeducators as that rank existed under the 2001-03 collective bargaining agreement prior to the reduction in hours initiated by the District in December of 2003.

2. The District will not refuse to bargain in good faith with the Kettle Moraine Educational Support Staff, affiliated with the Lakewood UniServ Council, and will not interfere with the exercise of employee rights guaranteed in Sec. 111.70(2), Stats., by failing to maintain the *status quo* with respect to mandatory subjects of bargaining during the contract hiatus following the expiration of the 2001-03 collective bargaining agreement.

3. The District will collectively bargain with the Kettle Moraine Educational Support Staff, affiliated with the Lakewood UniServ Council, to determine which, if any, paraeducator lost seniority rank and will make whole, with interest, any employee thus identified.

THE SCHOOL DISTRICT OF KETTLE MORAINE

Dated this _____ day of _____, 2006

By _____
Assistant Superintendent
Kettle Moraine School District

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY THE KETTLE MORAINE EDUCATIONAL SUPPORT STAFF, AFFILIATED WITH THE LAKEWOOD UNISERV COUNCIL, FOR A PERIOD OF 30 DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED,

KETTLE MORAINE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The amended complaint alleges District violations of Secs. 111.70(3)(a)1 and 4, Stats. The allegations primarily focus on whether District across-the-board reductions in paraeducator hours violated its duty to maintain the *status quo* during an extended contract hiatus. Related to this are allegations that the reductions are the culmination of District bargaining conduct that exceeded statutory bounds.

THE PARTIES' POSITIONS

The Association's Brief

After a review of the evidence, the Association contends that the dispute involves the District's unilateral alteration of mandatory subjects of bargaining during a contract hiatus. Article 2 provides the District with certain management rights, but those rights are specifically limited by the "plain language" of Article 8, which applies contractual layoff procedures to a reduction in hours. Section 8A refers to a reduction in "an instructional support staff position", and this clearly applies to the District's reduction of paraprofessional positions on in-service and exam days. Subsection B1, of Article 8 bases seniority accrual on "the total number of hours worked." Thus, a failure to apply Article 8 to a reduction in hours would eviscerate contractual seniority. Arbitral precedent confirms this point, and an examination of the record provides proof that more senior employees work fewer hours after the reductions than less senior employees.

That benefits, including the provision of insurance, are contractually linked to hours worked underscores the tie between the contractual layoff procedures and a reduction in hours. Prior to the reductions, a full-time position was scheduled for 1335 hours of work on 178 days. Such an employee received 98% premium payment from the District. After the reductions, all employees were required to pay a greater percentage than before, with some employees losing "their insurance benefits altogether when they were reduced to less than half-time." A failure to provide the protection of Article 8 to the reduction in hours would permit the District to "selectively reduce the hours of even the most senior paraeducators . . . making them ineligible for insurance." Fundamental fairness demands the application of Article 8 to a reduction in hours. That the District's unilateral actions violate Sections 8A3 and 4 underscores this conclusion.

Sections 11A and D make the normal work week and work year 1335 hours spread over 178 work days. Variations to the length of the work year may be made consensually.

employees and their immediate supervisors has no bearing on the complaint. In the past, no alteration in hours "adversely impacted the insurance benefits and seniority of paraeducators." Beyond this, such variations must include Association agreement. A contrary conclusion would permit the District to engage "in illegal individual bargaining." During the bargaining for a 1995-97 agreement the parties agreed on a work year reduction in return for a wage increase. This confirms that the contract demands Association consent to alter the work year.

The District's conduct surrounding the hours' reduction demonstrates an equivocal attitude toward its authority to reduce the number of days in a work year. The District's answer asserts the contract does not guarantee a 178 day work year, but its actions undercut this, particularly its "disingenuous attempts to restore employees to 178 days." Scrutiny of the attempt establishes that it failed to restore all paraeducators to a 178 day work year.

A review of the record establishes that the Association engaged in lawful, concerted activity by negotiating on behalf of the paraprofessional unit "regarding the 2001-03 Agreement and the TSA prohibited practice complaint." The District's unilateral acts had a reasonable tendency to interfere with that activity, and there was no "valid business reason" for them. Insurance was the core issue for the contract negotiations. At the October 7, 2003 meetings, the District offered to settle all of the outstanding issues, but warned the Association of the possibility of reductions if the matter settled with a pay increase. This warning was not specific and did not concern insurance concessions. The Association took it as a threat, and subsequent events bear out this view. Jerome's November 12, 2003 letter pressured the Association "to accept the insurance concessions." At a meeting held one week later, the District "sought to obtain insurance concessions." When its effort failed, it threatened to implement its proposal. Through correspondence with unit members, the District sought to blame the Association for its own unilateral actions.

Examination of the evidence establishes that the District did not need to make the reduction in hours to meet its budget. Beyond this, examination of the evidence establishes that the District overstated the cost impact of the settlement as compared to other employee groups. Even assuming the District needed to make reductions to pay the wage increases in the 2001-03 agreement, the evidence establishes that the "savings that resulted from the reductions far exceeded those necessary to compensate for the increases." In fact, the wage increases "totaled $44,534", but the "District saved more than $121,300 from performing reductions."

The District had and continues to have a need for the work performed by paraprofessionals during in-service and exam days. Their actions cannot be accounted for without concluding "it was and is determined to use the effect of reductions on insurance benefits to obtain future insurance concessions from the Association." If the District had legitimate concerns regarding the fairness of the settlement, it could have submitted those concerns to interest arbitration. The record demonstrates, however, no District interest in "a level playing field". Comments of District negotiators underscore that it sought to intimidate

cease and desist order and that paraeducators be returned to their regular workload prior to a reduction in hours and be compensated for all lost wages and benefits.

The District's Brief

After a review of the evidence, the District argues that it did not violate Sec. 111.70(3)(a)1, Stats. More specifically, the District argues that its actions were neither "coercive nor threatening" and that it had "valid business reasons for its decisions." Governing precedent demands that the District's actions "be considered within the totality of the circumstances within which they occur". That the District advised the Association at the October 7, 2003 meeting of the potential adverse consequences of the settlement is not remarkable as a matter of fact or of Commission case law. There is no evidence of District hostility toward the Association, and the District did no more than bargain in good faith.

Nor will the record show a District violation of Sec. 111.70(3)(a)4, Stats. Paraeducator schedules and the District's right to determine paraeducator-student contract time "are permissive subjects of bargaining." There was, therefore, no District obligation to bargain the reduction in hours. District statements to the Association that reductions would occur in light of the settlement of the 2001-03 agreement and the TSA complaint did no more than provide the Association with relevant and reasonably necessary information demanded by the District's duty to bargain in good faith.

In any event, the Association waived any right it had to bargain "the District's decision, or the effects thereof" regarding the reduction in hours. Salas' October 14, 2003 letter asserted an Association right to challenge District reductions, but "never demanded to bargain the decision or its impact." To the contrary, the District offered to bargain regarding the impact on November 19 as well as December 22 and 23, 2003. The Association, fully aware of the impending reductions, never demanded to bargain. Since it "is nonsensical for the Union to spurn the District's offers and then accuse the District of refusing to bargain", the "complaint must be dismissed."

The District had, in any event, valid business reasons for its reductions based on "financial and educational policy considerations." From 1993 through 2003, the District has sought "to deal with the financial restrictions imposed by statutory revenue limits and growing labor costs" without compromising educational quality. Included in those efforts was the reduction of paraeducator staff. Since the July 2003 layoffs reduced the number of positions to the point further cuts would be harmful to students, and particularly those demanding one-on-one instruction, the District determined to reduce non-contact hours.

Beyond this, the District's actions conform to the *status quo*. The agreement does not restrict District authority to schedule paraeducators "not to work on in-service days or other days on which students are not present." To the contrary, Section 2A reserves that right to the District. Nor can the reduction in hours be taken as a layoff within the meaning of Article 8.

severance of the employment relationship. Section A consistently refers to "staff reduction" not to a "reduction of hours". Since no jobs were lost, there were no layoffs. Thus, the District was not "required to follow the seniority provisions of Article 8, Section A(2), nor the insurance benefits provision of Article 8, Section A(3)."

Nor is there any contractual guarantee of 1335 hours per year. Rather, Section 11A "unambiguously refers to a 178-day work year." The evidence establishes that "all the paraeducators were scheduled to work 178 days per year, unless they voluntarily agreed to work less than that." Sections 2A, 2D and Appendix D grant the District considerable latitude to determine schedules within 178 day work year. Nor do the provisions of Section 4C alter this conclusion. Since the District had the authority to undertake the reductions under the dynamic *status quo*, it committed no violation of Secs. 111.70 (3)(a)1 or 4, Stats. Thus, the amended complaint should be dismissed "with prejudice, in its entirety."

The Association's Reply Brief

The amended complaint does not challenge the District's ability to alter schedules. Rather, it challenges the results, and specifically the results where the District reduces hours. The reductions impact contractual seniority. To comply with Article 8, the "District needed to reduce and restore hours to paraeducators consistent with the layoff provision and seniority in order to maintain the *status quo*." Nor will the record support a conclusion that the Association waived its right to bargain. The Association was not under any obligation to bargain its *status quo* rights, and in any event, the District made no offer to bargain until it "had already eliminated the first in-service day".

Existing Commission case law may shield comments made by District negotiators in October of 2003, but the totality of their conduct establishes prohibited practices. The evidence shows "a clear campaign to undermine the Association and obtain insurance concessions by bullying, rather than using the legitimate processes available . . . under the law and good faith collective bargaining." The evidence shows District conduct to undermine contract benefits to coerce insurance concessions from the Association. While there is "nothing illegal about taking a hard line in bargaining", the law prohibits the District from taking punitive actions to leverage concessions not available through the processes of good faith collective bargaining.

The District's Reply Brief

The Association's attempt to "play the sympathy card" cannot obscure that the Association's position "ignores the plain language of the contract, skews the facts of the case, and disregards the District's contractual authority to control its workforce." Precedent cited by the Association regarding the application of layoff language to a reduction in hours is distinguishable or inapplicable. Nor will other agreement provisions fill this void. More specifically, the Association arguments ignore that Section 8B fails to define when seniority

applies and that "even before the elimination of in-service hours, there were some senior

employees who were working fewer hours than junior employees." Nor can Article 11 be stretched to guarantee insurance. Subsections 3 and 4 of Section 8A do not apply because "no layoffs actually occurred." Beyond this, Association speculation on District abuse of its authority cannot obscure that the evidence shows no more than an across the board reduction of non-student contact hours implemented due to financial and educational policy. Practically speaking, the Association's arguments obscure that "it would be impossible for the District to apply the seniority provisions to these particular reductions since the number of in-service hours scheduled at the elementary (28 hours), middle (21 hours), and high (21 hours) schools varies." A contrary conclusion would mandate that senior paraeducators be assigned to the middle or high schools. In any event, the Association's unwillingness to bargain should not be encouraged through litigation.

Section 11A "clearly and unambiguously *guarantees* a work year of 178 days." The definitions of Section 11D fall short of a guarantee of a specific number of hours. Association arguments fail to read the sections of Article 11 as a whole. Doing so will not support a conclusion that Association consent is required to vary work schedules. Any contract provision can be altered by the parties' mutual consent. Section A permits paraeducators and the District to alter schedules consensually. The agreement reached in the collective bargaining for a 1995-97 agreement reflects no more than the impossibility of obtaining individual employee acceptance of the total elimination of work days. The District acted in good faith to recognize its obligation to maintain a 178 day work year.

Nor can the Association's arguments obscure that the District committed no acts likely to interfere with the exercise of lawful, concerted activity. The evidence establishes consistent good faith on the District's part to inform the Association of the implications of its bargaining proposals. Association arguments cannot obscure that the District rather than the Association brought meaningful proposals to bargain the impact of the cost of the 2001-03 settlement on existing staff. In any event, the reduction in hours is traceable to a valid business reason – the District's "bleak financial situation and student needs."

The District's cost containment efforts are long-standing and target all employee groups, not simply Association represented employees. Even if the reductions implemented by the Board generate more than the amount required to fund the 2001-03 settlement, the "District's budget forecast projected a negative balance for every year from 2004-2005 through 2007-2008." In any event, Wisconsin law does not permit the Association "to dictate the District's educational policies." Even if it did, the evidence establishes that the District cut mandatory in-service as an unnecessary expense. That it offered voluntary training to individuals shows no more than its conclusion that the training was not necessary for all employees. That few paraeducators volunteered for the training establishes how necessary they viewed the training to be.

Even if a finding of a prohibited practice is warranted, the Association's requested remedy is not. That remedy would produce a windfall, and the more appropriate response

would be "to require the District to restore hours and benefits to the most senior

paraeducators, but only to the extent necessary to allow senior paraeducators to maintain seniority relative to junior paraeducators." This argument in the alternative should not obscure that the District's fundamental position is that the amended complaint must be dismissed.

DISCUSSION

The primary focus of the litigation is the District's *status quo* obligation. Association contentions regarding the propriety of the District's bargaining conduct preface that focus. The Association highlights a series of District acts, ranging from statements made during bargaining and in District mailings to unit members to assert that the District violated Secs. 111.70(3)(a)1 and 4, Stats.

The Commission's decision in ASHWAUBENON SCHOOL DISTRICT NO. 1, DEC. NO. 14774-A (WERC, 10/77) sets the governing background to this allegation:

> Just as employees have a protected right to express their opinions to their employers, so also do employers enjoy a protected right of free speech in public sector collective bargaining. Accordingly, employers have long enjoyed the right to tell their employees what they have offered to their union in the course of collective bargaining. However, notwithstanding labor relations policies modeled on the NLRA favor 'uninhibited, robust, and wide-open debate in labor disputes,' employers' statements must stop short of coercion, threats or interference with employee rights, and the employer statements must not constitute bargaining with the employees rather than their majority collective bargaining representative. DEC. NO. 14774-A AT 7-8, citations omitted.

ASHWAUBENON drew from principles confirmed by the Court in WERC V. EVANSVILLE, 69 WIS. 2D 140 (1975). Because the Association links District statements to a course of conduct it considers bad faith bargaining, it is necessary to examine the "totality of the (the employer's) conduct," under governing Commission case law, see CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83), and EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05).

The District communicated with Association representatives prior to communicating its view of the bargaining process to unit employees. There is no assertion that the District attempted to bargain with individual members of the unit. Thus, the issue posed is whether the totality of the District's conduct constitutes improper coercion of Association-represented employees. The specific areas of Association concern focus on comments made to Salas and Martin at the close of the October 7, 2003 bargaining session. The Association views those comments as threats, which became linked to insurance concessions in the mailings to unit members from Jerome, dated November 12 and December 2, 2003, in which she criticized Association bargaining positions. To the Association, those threats coupled with District derogation of the interest arbitration process and the punitive reductions of hours constitute an

improper attempt to lever insurance concessions.

The October 7 statements reflect the Board's long-standing concern with Association bargaining demands in light of what it viewed as budget reality. Jerome's mailings confirmed a theme consistently articulated during the bargaining process. In ASHWAUBENON AT 7, the Commission stated "if we were to eliminate remarks critical of employee and employer representatives from the bargaining process as prohibited practices, the process might collapse, perhaps from shock alone." Statements made between the parties in the Fall and Winter of 2003 fall into this categorization. Association arguments ignore that layoffs preceded the comments it complains of, as did an extended string of District cost-cutting initiatives. If value-laden, Jerome's mailings were predominantly factual, and did not state consequences tied to employee support for the Association. Rather, the mailings, as the October discussions, focused on the economic impact of the Association's bargaining positions. The comments mirror comments made by Association representatives and represented employees at Board meetings regarding District administrator salaries and budget decisions. All of the comments represent serious points made on serious issues, which are appropriate reflections of free speech in a public forum. The bargaining table should be no more restrictive. Excessive regulation of speech at the table chills the speech, and this record fails to show coercion warranting regulation through the prohibited practice process.

Nor will linking these statements to District disfavor of interest arbitration or to savings traceable to the then prospective reduction in hours turn this course of conduct into unlawful interference. Dickson's statements derogating interest arbitration have no more coercive force than his statements derogating District subsidizing attorneys through the litigation process. In his view, the District settled the prohibited practice in October because it made more sense to spend money on its employees than on lawyers. More significantly, there is no persuasive evidence to suggest the District impeded or the Association seriously attempted to invoke access to interest arbitration. The Association's arguments cannot explain the agreed-upon halt in face-to-face bargaining between July and October of 2003 or why the District settled the prohibited practice and the 2001-03 agreement. If District comments at the close of the October negotiation session reflect bad faith, why did the District agree to delay negotiations involving their proposal to eliminate a "me too" clause linking paraeducator insurance benefits to the teacher agreement? If Association representatives were frustrated in the attempt to take the matter to interest arbitration, what was the purpose of their agreeing to the delay? On balance, the record shows that each party took a hard line on the issue of insurance, and fought to maintain it. To bring Commission regulation of bargaining behavior into this context would constitute less regulation of improper coercion than making prohibited practice litigation a means to enforce bargaining demands. The evidence will not support finding District violation of Secs. 111.70(3)(a)1 or 4, Stats., based on the District's bargaining conduct.

This poses the more fundamental issue, which concerns the District's obligation to maintain the *status quo*. The Commission views the *status quo* obligation as dynamic, see SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85), and states it thus:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96) AT 19.

As enforced by the Commission, the duty "entitles the parties to retain those rights and privileges in existence when the old contract expired which are primarily related to wages, hours and conditions of employment while they bargain over what rights they will have under the next contract" DEC. NO. 28032-B AT 21. To determine the duty, the Commission considers "relevant language from the expired contract as historically applied or as clarified by bargaining history, if any" DEC. NO. 28032-B AT 19. These factors parallel traditional guides for contract interpretation, but as applied by the Commission, the determination of the *status quo* obligation "is different than a grievance arbitration analysis" WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98) AT 8. The determination is of a legal duty based on the parties' bargaining behavior rather than the strict interpretation of contract language. The implication of the duty seeks to preserve rights in existence at the time of the agreement's expiration to assure that changes are bargained rather than unilaterally imposed, see ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS. 2D 671(CT. APP., 1994). The duty is imposed to encourage collective bargaining processes.

These principles are more easily stated in the abstract than applied in fact. It is appropriate to narrow the scope of the parties' dispute prior to addressing the *status quo* issues. The Association's remedial request that paraeducator hours be restored, coupled with its assertion that the District continues to need the work performed under the old schedules as well as its reading of Section 4C to preclude a reduction of hours unless mutually agreed upon in writing, implies that the *status quo* obligation would preclude District decisions on service levels. Service level decisions are permissive subjects of bargaining under CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979), and the Commission does not include permissive subjects in its definition of the *status quo* obligation, see CITY OF EAU CLAIRE, DEC. NO. 29346-C (WERC, 12/02). Here, however, potential service level issues cannot obscure that the issue is whether the District was obligated to apply contractual layoff provisions to achieve the savings it sought from the paraeducator unit. Beyond this, there is no issue concerning the Association's exhaustion of the grievance procedure, see RACINE UNIFIED SCHOOL DISTRICT ET. AL., DEC. NO. 29203-B (WERC, 10/98). Contrary to District arguments, the record poses no significant issue regarding Association waiver of bargaining. Even assuming the record supports a conclusion that the Association did not request bargaining, the Commission does not view the *status quo* obligation to be waivable except by express agreement, see OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04) AT 9.

The unavoidable line between the *status quo* obligation defined under Sec. 111.70(3)(a)1 and 4, Stats., and the enforcement of an agreement under Sec. 111.70(3)(a)5, Stats., is becoming finer as the Commission increasingly applies its *status quo* law. Drawing this line is complicated here by the language of Article 16, Section B, which can be read to state a District obligation to maintain the expired 2001-03 agreement in force until it reaches agreement on a successor. This complication prompted the post-briefing discussion noted above. As noted above, this does not impact the resolution of the amended complaint. The parties mutually regard the agreement as expired and the issues thus turn on a *status quo* rather than a grievance arbitration analysis.

This poses the fundamental issue whether the District was obligated to apply the layoff, recall and seniority provisions of Article 8 to the reduction in hours. There is no bargaining history or past practice evidence to clarify how the parties handled disputes in prior contract gaps. This leaves the language of the expired agreement, with limited evidence of past practice and bargaining history concerning its interpretation to guide the *status quo* determination.

The Association cites a number of agreement provisions it contends should preclude District implementation of a unit-wide reduction in hours. Subsections k, l and n of Section 2A generally grant the District the authority to make the reductions questioned by the Association. The interpretive issue is whether Section 8A specifically limits this authority by requiring the District to apply layoff and recall provisions to a reduction. The Association persuasively argues that the "reduces an Instructional Support Staff position" reference can be read to apply the layoff provision to the reduction in hours.

This reference cannot, however, be considered unambiguous, and as read by the Association is not reconcilable to other layoff provisions of Article 8. The notice provisions of Section 8A1 indicate a complete separation of the employment relationship rather than a reduction in hours. Similarly, the selection provisions of Section 8A2 indicate a complete separation of the employment relationship. Section 8A3 is reconcilable to a reduction in hours regarding the extension of benefits, but its reference to a layoff "at the end of a year" points to a complete separation in the employment relationship rather than a reduction in hours. While these provisions can arguably be made to cover a reduction in hours, the provisions of Section 8A4 cannot be stretched that far, and preface the impossibility of applying recall provisions to a reduction in hours. The reduction of hours did not deprive all employees of insurance coverage, yet Section 8A4 mandates the extension of participation rights at the employee's expense to "an employee on layoff" during "the two (2) year recall period."

A review of Section 8D establishes that its recall provisions cannot be reconciled to a reduction in hours. While certain subsections can be stretched to cover a reduction in hours, the provisions of Subsection 4 establish that Article 8 contemplates a complete separation from employment. The "right to reject a position with lesser hours of work" cannot be squared with the reduction in hours posed here, and contemplates the complete severance of the employment relationship. In sum, the provisions of Article 8 establish that the parties did not contemplate the

application of its layoff and recall provisions to a reduction in hours. It follows that the application sought by the Association cannot be part of the District's obligation to maintain the

status quo. Section 4C of the agreement demands that "(m)atters not covered by this Agreement which affect wages, hours or conditions of employment shall be subject to negotiations between the parties". As applied to the contract hiatus, this underscores the District's ongoing duty under Sec. 111.70(3)(a)4, Stats., to bargain with the Association concerning the reduction in hours.

The Association contends that the seniority provisions of Section 8B coupled with the hours and benefit provisions of Article 11 establish the applicability of the layoff and recall provisions of Article 8 to the reduction in hours. While this argument has persuasive force regarding the definition of the *status quo*, it does not make the provisions of Article 8 applicable to a reduction in hours. The Association notes that the reductions caused employees to pay a larger share of the insurance load since their hours were reduced, thus raising their pro-rata share of benefit costs. Other employees fell below the eligibility threshold, thus losing insurance coverage. As a matter of contract language, the definition of "benefit eligibility" under Section 11G1 cannot be read as a guarantee of hours. Beyond this, "unfair and harsh result" pointed to by the Association affords no reliable basis to make Article 8 applicable to the reduction in hours. Under the Association's view, a smaller group of employees could have been affected, but the impact on that smaller group is arguably no less harsh than the result brought about by the District. The complete separation from employment of a smaller group of employees cannot be brushed aside as something other than a harsh result. This highlights that the hours and benefit provisions of Article 11 do not make the layoff and recall provisions of Article 8 any more applicable to the reduction of hours than do the provisions of Article 8 standing alone.

The Association persuasively contends that the work year provisions of Section 11A define the *status quo* regarding a "normal work year" of "178 days", since the parties agreed to make variations from this subject to "mutual agreement". In a past bargain, the parties honored this provision. The evidence does not, however, afford a persuasive basis to conclude that District reductions violated this standard. Exceptions to the normal work year reflect mutual agreement of employee and building principal, as contemplated by Section 11D and as underscored by the past practices noted in Jerome's testimony.

Nor can the definition of "regular work week" be construed to set a *status quo* obligation violated by the District's reduction in hours. The provisions of Section 11D, on their face do not guarantee hours. To read this section as a guarantee creates a permissive subject of bargaining if it precludes District exercise of the authority to determine service levels or contact time. The evidence affords no persuasive basis to question the District assertion that the July, 2003 layoffs reduced the number of paraeducator positions to the point that further layoffs would preclude necessary one-on-one aide work and would be impossible to schedule.

This turns the analysis to Association contentions regarding the impact of Section 8B on the reductions. The District persuasively argues that the reduction in hours is contractually permissible and fails to establish the applicability of Section 8B to a reduction in hours. There is

no evident basis in Article 8 to restrict the District's ability to limit in-service or non-contact hours to avoid reducing student contact time. This action has support in Subsections k, l and n of

Section 2A. Such reductions would, of necessity, impact elementary paraeducators more than those in the middle or high schools. Reading Section 8B to apply the provisions of Article 8 to a reduction in hours could, however, make grade level assignment a function of seniority. No contract provision supports this, and other agreement provisions and past assignment patterns would seem to contradict it.

This cannot, however, obscure the force of the Association's concern that the reductions could undermine contractual seniority. The impact of the reductions as well as the impact of restoring certain hours came about without regard for seniority. As the Association argues, District application of a right to reduce hours cannot persuasively be reconciled with the evisceration of contractual seniority. As a matter of bargaining, such results could undermine the authority of the Association as the unit's exclusive bargaining agent. As a matter of contract, it is difficult to see how the reductions could alter the seniority placement of employees without calling into question the application of Section 8C. Every employee with reduced hours "loses seniority", since Section 8B2 makes seniority "pro-rata on an hour for hour basis". As noted above, however, the *status quo* definition cannot, consistent with Commission case law, make a permissive subject of bargaining a statutory obligation under the *status quo*. Thus, the reduction of hours, standing alone, cannot establish a violation of the *status quo*. However, a Paraeducator who, in addition to losing hours, drops in rank on a seniority list would "lose seniority" in addition to the service level cut demanded by a reduction in hours. Such a loss, as the Association points out, could effectively eviscerate contractual seniority provisions.

This loss of seniority cannot be reconciled to the *status quo* obligation. The parties approached the hiatus with an established seniority list. The definition of the *status quo* should not permit the unilateral alteration of that list. The provisions of Section 8C may not automatically apply the layoff and recall provisions of Article 8 to a reduction in hours, but they cannot be reconciled with the alteration of a seniority list through unilateral implementation of a reduction in hours. None of the subsections of Section 8C permit an employee to "lose seniority" based on a reduction in hours. The *status quo* obligation cannot grant the District authority it did not bargain in the expired agreement.

In sum, the layoff and recall provisions of Article 8 cannot be read to establish a limitation on the District's authority to implement a reduction in hours. Sections B and C of Article 8 do, however, limit the District's authority to alter contractual seniority through the unilateral implementation of a reduction in hours.

With one exception, the remedy does not require extensive discussion because the evidence will not support it. It is not clear who or how many paraeducators suffered a loss in rank on the seniority list due to the reduction in hours. Nor is it clear whether the reduction in hours caused any paraeducator to lose eligibility for contractual benefits because of a loss of seniority relative to a more junior paraeducator. Against this background, the Order entered below requires bargaining, and make whole relief to the extent hours are restored to senior

paraeducators. Statutory interest is noted to the extent a make whole is necessary. Notice posting, coupled with a cease and desist relief is granted to the extent of the District's violation

of the *status quo*. Dickson's position is listed on the notice because that position served as the Board's in-house spokesman for collective bargaining.

The exception referred to in the preceding paragraph concerns the lack of detail in the Order. That lack of detail underscores the need for bargaining on points the Order cannot address without that bargaining. The Association's view of the remedy focuses on the restoration of the *status quo ante*. Presumably, if the District is required to base benefits and seniority on a 1,335 hour year, restoration of the difference in compensation for wages and benefits between the hours worked under such a year and the year actually worked effects a clear remedy. Thus, restoration of the reduced examination hours at the high school would permit those hours to continue to count toward a paraeducator's seniority and related benefit entitlement. The argument has persuasive force, since the District counted such hours toward seniority in the past. However, as noted above, this reading of Articles 8 and 11 would not reflect an application contemplated by the parties when the provisions were given contractual force. Beyond this, the Association's reading of the *status quo* precludes a reduction in hours that could render its reading of Articles 8 and 11 permissive. As noted above, permissive subjects are not included in the Commission's definition of the status quo. The Order thus reflects a lack of detail which is left for the parties to address through collective bargaining.

Before closing, it is necessary to tie the conclusions stated above more closely to the parties' arguments, since the case was well-tried and since the issues posed have a bearing on forum choices not addressed above.

The parties discussed a number of arbitration awards concerning when and if contractual layoff clauses should be applied to a reduction in hours. Those awards are not addressed above. The *status quo* analysis must respect the line between the statutory duty to bargain under Sec. 111.70(3)(a)4, Stats., and the enforcement of an agreement under grievance arbitration or under Sec. 111.70(3)(a)5, Stats. The duty to bargain does not require a "party to agree to a proposal or require the making of a concession" under Sec. 111.70(1)(a), Stats. Thus, the *status quo* analysis is to provide the context against which an agreement can be reached. Whether a specific arbitrator or arbitrators generally apply broad layoff clauses to a reduction in hours is thus less significant to a *status quo* analysis than whether the bargaining parties previously codified such an agreement in Article 8. The difficulty in reconciling the sections of Article 8 discussed above to a reduction in hours has greater significance as a matter of the *status quo* analysis than would arguably be the case before a grievance arbitrator. The presence of a statutory burden of proof in Sec. 111.70(3), Stats., has some bearing on this point. Doubts on whether binding agreement was reached in bargaining must be resolved against the complaining party.

Beyond this, interest arbitration is the preferred forum for the creation of a contractual duty and grievance arbitration is the preferred forum for enforcement of a contractual duty. The *status quo* obligation is, at best, a bridge between the two, and if there is no reluctance to

enforce a duty on bargaining parties that has yet to be clearly established in bargaining a disincentive to use preferred forums is created.

The parties addressed the merits of the reduction more deeply than does this decision. The policy merit of the decision is not for a Commission examiner to address, particularly where there is no allegation of pretext under Sec. 111.70(3)(a)3, Stats.

Somewhat related to this are allegations concerning District reluctance to invoke interest arbitration. This allegation is significant, since that is the statutory impasse resolution method for the paraeducator unit. The better forum to test the bona fides of the District's attitude toward interest arbitration would be the invocation of the process. The evidence shows neither party showed great desire to invoke the forum. Presumably, each side had its tactical reasons for the pace of the negotiations. Where those tactics cross statutory lines, prohibited practice litigation can play a defensible role. However, the restoration of the *status quo* ante under prohibited practice litigation should not become an alternative forum to interest arbitration. To the extent the use of interest arbitration is an issue on this record, the negotiation tactics at issue here do not pose a need for regulation through the prohibited practice forum.

Dated at Madison, Wisconsin this 26th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

RBM/gjc