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-D

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 Kettle Moraine Educational Support Staff Association.

Michael Aldana, with **Gary M. Ruesch** and **Jeffrey LaValle**, Quarles & Brady, LLP, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of School District of Kettle Moraine.

ORDER ON REVIEW OF EXAMINER'S DECISION

On January 26, 2006, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above-referenced matter, holding that the School District of Kettle Moraine (District) had not unlawfully failed to maintain the status quo during a contract hiatus by reducing paraeducator hours for certain non-student contact time, and also had not undermined or bypassed the Association or coerced employees in the exercise of their rights by its communications with bargaining unit members about the reduction in hours. In these respects, the Examiner dismissed the Association's claimed violation of Secs. 111.70(3)(a)1 and 4, Stats. However, the Examiner held that the District had unilaterally changed the status quo during a hiatus, "[t]o the extent District reduction of paraeducator hours . . . produced a loss of an individual paraeducator's seniority rank as it existed under the 2001-03 agreement prior to the reduction in hours. . . ." Examiner's Decision at 16.

On February 8, 2006, the Association filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. On February 15, 2006, pursuant to those same provisions, the District also filed a timely petition seeking review of the Examiner's decision. Thereafter the parties filed briefs, response briefs, and reply briefs in support of their respective positions in this matter, the last of which were received on June 12, 2006.

For the reasons set forth in the Memorandum that follows, the Commission affirms the Examiner's conclusion that the District's communications with bargaining unit members did not violate the law. However, the Commission concludes, contrary to the Examiner, that the layoff clause applied to the partial layoff at issue here and that the District unilaterally deviated from that clause to the extent (1) that it changed insurance benefits before the month following the reductions and (2) that any senior paraeducator lost more hours than a less senior paraeducator. The Commission also concludes that the District's indefinite reduction of hours in the regular full time work year for bargaining unit members was a unilateral change in wages, hours, and conditions of employment during a hiatus, in violation of its duty to bargain in good faith.

Having reviewed the record and being fully advised in the premises, the Commission issues the following

ORDER

A. The Examiners Findings of Fact 1 through 14 are affirmed.[1]

B. The Examiner's Finding of Fact 15 is set aside.

C. The Examiner's Conclusions of Law 1 through 4 are affirmed.

D. The Examiner's Conclusion of Law 5 is reversed, his Conclusion of Law 6 is set aside, and the following Conclusions of Law 5 is made:

5. To the extent the District failed to provide the continued insurance benefits set forth in Article 8.A.3 of the expired 2001-03 collective bargaining agreement, reduced the hours of senior paraeducators more than less senior paraeducators, and indefinitely changed the regular work year of full time bargaining unit members, the District unilaterally changed the status quo during a contract hiatus and thereby refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

[1] The first sentence of the Examiner's Finding of Fact 13 stated, "The parties exchanged initial proposals for a *2004-06* labor agreement on February 19, *2005*." (Emphasis supplied). The reference should have been to the "2003-05 labor agreement on February 19, 2004." The Examiner's error appears to have been inadvertent and we simply note the correction here for the record.

E. The Examiner's Order is set aside and the following Order is issued:

The Respondent School District of Kettle Moraine shall:

a. Cease and desist from refusing to bargain in good faith with the Kettle Moraine Educational Support Staff Association during a hiatus between collective bargaining agreements by unilaterally reducing the hours of senior paraeducators more than less senior paraeducators, by unilaterally failing to provide the continued insurance benefits set forth in Article 8. A. 3, and by unilaterally indefinitely reducing the hours in the regular full time work year for members of the bargaining unit.

b. Take the following affirmative action that will effectuate the purposes of the Municipal Employment Relations Act:

i. Immediately restore the hours (or compensation in lieu of hours) in the regular work year of full time members of the bargaining unit as they existed prior to the District's action in or about November 2003, except insofar as those hours have been altered subsequently by mutual agreement with the Association.

ii. Make whole employees who were affected by the District's unilateral reduction of non-student contact hours from the beginning of the 2004-05 school year until the date the District complies with paragraph E.b.i. of this Order, except insofar as those hours were altered subsequently by mutual agreement with the Association, with interest at 12 percent per year./2

iii. Make whole senior employees in the bargaining unit represented by the Kettle Moraine Educational Support Staff Association, if any, whose hours were reduced more than less senior employees, by paying them the amount attributable to said discrepancy in reduction including any insurance-related amounts, between the date those additional hours were reduced in the 2003-04 school year and the date on which the discrepancy ended, with interest at 12 percent per year.

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[2] As reflected in WILMOT ASSOCIATION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83) and BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/93), the Commission has long held that simple interest on back pay at the statutorily established rate of 12% is a standard part of a make-whole remedy. BROWN COUNTY provides guidance as to the applicable calculation methodology.

iv. In accordance with Article 8, Section A.3 of the 2001-03 agreement, make whole employees for the difference, if any, between the health insurance costs (including premiums) they incurred during the month following the date on which the reductions were implemented and what they would have incurred had their hours not been changed. with interest at 12 percent per year.

v. Notify all of its employees in the bargaining unit represented by the Kettle Moraine Educational Support Staff Association by posting, in conspicuous places in its place of business where such employees are employed, copies of the notice attached hereto and marked "Appendix A." The notice shall be signed by the District Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notice is not altered, defaced, or covered by other material.

vi. Notify the Wisconsin Employment Relations Commission and the Association in writing within twenty (20) days following the date of the Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of April, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

APPENDIX "A"

NOTICE TO ALL SCHOOL DISTRICT OF KETTLE MORAINE EMPLOYEES REPRESENTED BY THE KETTLE MORAINE EDUCATONAL SUPPORT STAFF ASSOCIATION

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

1. WE WILL immediately restore the hours in the regular work year of members of the bargaining unit as they existed prior to the District's action in or about November 2003, except to the extent those hours have been altered by mutual agreement with the Association.

2. WE WILL make whole all employees in the bargaining unit represented by the Kettle Moraine Educational Support Staff Association who were affected by the District's unilateral reduction in hours between the beginning of the 2004-05 school year and the date on which the District complies with Paragraph (1), above, with interest at 12 percent per year.

3. WE WILL, in accordance with Article 8, Section A.3 of the 2001-03 agreement, make whole employees for the difference, if any, between the health insurance costs (including premiums) they incurred during the month following the date on which the reductions were implemented and what they would have incurred had their hours not been changed, with interest at 12 percent per year.

4. WE WILL make whole any and all senior employees in the bargaining unit represented by the Kettle Moraine Educational Support Staff Association whose hours were reduced more than any less senior paraeducators, by paying such more senior employees the amount attributable to said discrepancy in reduction, including any insurance-related amounts, between the date those additional hours were reduced in the 2003-04 school year and the date on which the discrepancy ends, with interest at 12 percent per year.

5. WE WILL NOT refuse to bargain in good faith with the Association during a hiatus between collective bargaining agreements by unilaterally indefinitely changing the hours in the regular full time work year for members of the bargaining unit, or in any like or similar manner interfere with the rights of our employees pursuant to the provisions of the Municipal Employment Relations Act.

_____
District Administrator
School District of Kettle Moraine

THE NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

Kettle Moraine School District

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

As indicated in the Order, above, the Examiner's Findings of Fact have been largely affirmed and we summarize them as follows.

Since at least 1995, the Association has represented a bargaining unit comprising all paraeducators employed by the District. At the time of the events giving rise to this case, the unit included approximately 64 employees.

The parties' most recent collective bargaining agreement covered the period July 1, 2001 to June 30, 2003. The language of certain provisions in that agreement is significant in the analysis and thus set forth here.

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:

. . .

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.

. . .

ARTICLE 4 - BARGAINING PROCEDURES

. . .

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). (sic)

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. . . .

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. . . .

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. …

The foregoing provisions were substantially similar if not identical in the predecessor (1999-2001) agreement. Prior to a change negotiated in the 1995-97 agreement, the "normal work year" specified in Article 11, Section A, above, was 180 rather than 178 days.

As of July 2003, the parties had not yet resolved the agreement that would cover the two year period ending June 30, 2003, and the parties remained in contract hiatus. At that time, in response to its fiscal concerns, the District laid off 13.087 full-time equivalent paraeducator positions. The Association viewed these layoffs as conforming to the layoff requirements in the expired agreement and therefore did not challenge them.

The Association's initial preliminary final offer for the 2001-03 agreement, submitted in March 2003, had sought an increase of 35 cents per hour. By July 2003 the parties' offers were closely aligned regarding the wage increase (15 cents per cell in the first year of the contract and ten cents per cell in the second year). They remained at odds over the District's proposal for significant health insurance benefit reductions and for a 25% cap on District contributions to the Tax Sheltered Annuity (TSA) benefit. Another open issue involved a prohibited practice complaint that the Association had filed in April 2003, contending that the District had unlawfully implemented a 25% cap on TSA contributions. The parties did not meet again until October 2003, mutually agreeing to delay their negotiations in order to coordinate with the negotiations over the teacher unit bargaining agreement.

On October 7, 2003, directly after the teacher unit had settled, the District offered to settle the paraeducators' 2001-03 agreement by accepting the Association's most recent offer regarding wages and health insurance, a contractual 25% cap on TSA contributions, and a one-time payment to TSA participants of $40,000. The District accompanied this settlement proposal with oral statements that the District viewed such a settlement as excessive in comparison with other bargaining units and might result in the District taking action to reduce personnel costs, including possible "across the board" cuts. District representatives made statements that they would prefer to settle the contact at this level, including projected reductions, rather than spend money on interest arbitration or prohibited practice litigation.

By letter dated October 14, the Association's bargaining team accepted the District's proposal, but responded to the District's October 7 comments as follows:

> [B]y 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 collective bargaining agreement thus settled in October 2003 had expired by its terms the previous June 30. As the parties had not yet negotiated the agreement that would cover any period following June 30, 2003, they remained in a contract hiatus despite the settlement.

On October 30, 2003, the District notified the Association that the School Board "will be taking action at the November 11 School Board meeting in regard to a reduction in force," which would be "applied across the board by reducing the number of hours that each paraeducator will be scheduled to work. The hours that will be scheduled will include only those days when children are present." The Board considered the matter at its November 11 meeting but deferred action.

By letter dated November 12, 2003, conveyed to every member of the bargaining unit, the District informed paraeducators that, effective November 26, each of their schedules would be altered by removing the previously-scheduled in-service hours for the remainder of the school year. The District's letter stated, in part, "[T]he district must balance the rising costs of any employee unit that so greatly exceeds the settlement norms of other employee groups," and included on the reverse side a set of tables comparing the total package increases for various groups of District employees. The District's letter further acknowledged that these cuts would reduce some paraeducators to less than half time, which, under the terms of the contract, would deprive them of health insurance. The letter stated the District's intention to "work with" the Association to negotiate a way to prevent the loss of benefits.

On November 19, 2003, the District and the Association met to discuss the District's intended reductions and the Association's intended grievances regarding those reductions. The District proposed two options: (1) a District commitment not to reduce or lay off paraeducators for the remainder of the 03-04 school year, if the Association agreed to a change in health insurance; or (2) health insurance for those employees whose hours were being reduced to less than half time, if the Association would waive all claims relating to the change in hours, on its own behalf and on behalf of individual bargaining unit members.

At the School Board meeting on November 25, 2003, the Board approved the elimination of in-service hours from the schedules of all paraeducators, to take effect on December 10, 2003. The Board calculated those reductions as 15 hours for the remainder of the 03-04 school year for employees at the high school and middle school and 19.5 hours for those at the elementary schools, to take effect on December 10. The reductions affected every paraeducator and seniority was not a factor in the distribution of the reductions.

By letter dated November 26, 2003 the Association rejected both of the options the District had conveyed on November 19 and informed the District that the Association would grieve any reduction in hours.

By letter dated December 2, 2003, conveyed to every bargaining unit member, the District informed paraeducators about the reduction in hours, about the two alternatives it had proposed to the Association, and about the Association's rejection of same. The District's letter stated, in part, "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."

On December 9, the Association filed a grievance challenging the District's action as a violation of several contract provisions, including the layoff provisions in Article 8 and the work year, work day, work week, and insurance provisions in Article 11. The parties also met on that date to discuss the Association's grievance.

By letter dated December 12, 2003, the District conveyed its responses to several issues discussed at the December 9 meeting and stated, inter alia, "Although the KMESSA has not made a demand to bargain, the District is ready, willing and able to negotiate with the KMESSA concerning mandatory subjects of bargaining. The district is prepared to meet with your team from 8:00-11:00AM on December 22nd or 23rd of 2003."

By letter dated December 18, 2003, the Association responded that it could not meet on either of those dates, but would be "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." The Association's letter also stated, in part,

> Please note that unless otherwise noted in future proposals, the [Association] 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 [Association] believes that the District cannot unilaterally change the above articles without first bargaining with the Union.

The District eventually implemented the reduction of hours on January 1, 2004. By letter dated January 5, 2004, the District denied the Association's grievance and also stated that it was "under no obligation to proceed to arbitration during a contract hiatus."

The parties remained in contract hiatus at the outset of the 2004-05 school year. At the time, the District again implemented hours reductions for paraeducators, removing 28 in-service hours at the elementary school, 21 in-service hours at the middle school, and 51 in-service and exam day hours at the high school. Based on the need for some contact with certain students during some of those hours, the District eventually restored those hours to the affected paraeducators. Neither the reduction nor the restoration took seniority into consideration. During that school year and/or the following summer, the District offered voluntary in-service courses to paraeducators regarding a safety program the District was implementing, stating it would pay the employees their hourly wages for attendance but would not count such hours for purposes of seniority or benefits.

As a result of the reductions in hours and the pro-rating language contained in Article 11.G., virtually all bargaining unit members were required to pay more toward the costs of their health insurance coverage and some members lost health insurance entirely.

Ad hoc exceptions have been made to the 178 day work year in the past, generally through mutual agreement between individual employees and their supervisors and without reference to the Association for approval. It is not clear whether these schedule alterations changed any employee's overall work hours, either in a particular week or on an annual basis.

The District historically has maintained a regular work year of 1,335 hours for full time paraeducators, and this regular work year has not previously been reduced involuntarily for any given year for the bargaining unit as a group or for any subgroup or individual, except in situations of total layoff.

The reduction in hours that the District implemented in 2003-04 and 2004-05 generated cost savings that substantially exceeded the cost of the increases in the paraeducators' settlement for the 2001-03 agreement.

DISCUSSION

1. The District's Alleged Unlawful Communications.

As it did before the Examiner, the Association argues that the District's comments at the bargaining table about implementing reductions as a result of the settlement, and the District's several communications with individual bargaining unit members "blaming" the Association for the reduction, were intended to coerce the Association into accepting insurance concessions that the District could not secure during bargaining. The Examiner concluded that the communications with individuals were "predominantly factual" and essentially mirrored what the District had already stated to the Association; hence, they fell within the lawful boundaries set forth in ASHWAUBENON SCHOOL DISTRICT NO. 1, DEC. NO. 14774-A (WERC, 10/77). The Examiner also concluded that the District's statements during bargaining fell within the range of "free speech" and hard bargaining, rather than unlawful coercion.

The Commission agrees with the Examiner's conclusions on both issues, largely for the reasons he stated. As to the communications with individual employees, it is perhaps likely that, as the Association argues, they were designed to pressure the Association to change its position in bargaining. Even if that were the District's sole motive (which does not appear to be the case), this strikes us, as it did the Examiner, as a tactical maneuver within the permissible ambit of collective bargaining. So long as such communications are not deceptive, misleading, or threatening, do not directly disparage the union, are limited to the factual content of offers already made to the Association, and do not explicitly or implicitly offer a better deal to the individual employees, they are within an employer's legitimate sphere of communication. NORTHCENTRAL TECHNICAL COLLEGE, DEC. NO. 31117-C (WERC, 2/06) at 16. The District's communications with the bargaining unit may have walked close to these lines but remained within them.

As to the District's allegedly coercive statements at the bargaining table on October 7, 2003, the Commission notes the longstanding principle that an employer may predict the likelihood of reductions in force as a result of a wage settlement, so long as such assertions are "based on the employer's understanding of the impact of a result on its operation, and not on hostility toward the exercise of the right to seek the result." GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/97) (emphasis in original). See also, CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94) (statements about negative consequences are not unlawful, where the employer "is not seeking to deter employes from exercising rights but rather seeking to persuade employes to change the position they are taking at the collective bargaining table when they exercise their rights.") While such predictions doubtless sound threatening when uttered to a union during negotiations, an employer is entitled to state the results of a prospective settlement, as long as the statement is based upon demonstrable realities and is not pretextual for or reflective of unlawful animus.

Here it is true that the District voluntarily accepted the Association's wage and benefit package, even though the District thought it was too costly. It is also true that the District could have opted to continue bargaining with the Association, perhaps negotiating an agreement regarding an hours reduction rather than imposing one unilaterally. If the negotiations with the Association were unsuccessful, the District could have elected to pursue interest arbitration. It is also true that the District saved substantially more from the ensuing reductions than the settlement increases cost.

Contrary to the Association's belief, however, the District need not establish that the predicted reductions were "necessary" in some literal fiscal sense, so long as circumstances support a conclusion that the asserted concerns were genuine and not a pretext for punishing the Association. As the Examiner noted, the District's asserted motive – fiscal constraints – was borne out by the recent layoffs of nearly 10% of this bargaining unit and the general history of program reductions in the District. While the District's fiscal concerns were somewhat indirect (less an inability to pay the negotiated wage increases than an aversion to spending money on interest arbitration and a desire to avoid establishing unfavorable internal

comparables), even such relatively attenuated concerns were genuinely related to the District's underlying fiscal problems. The law obviously does not require an employer to like or to use interest arbitration, if the employer prefers to achieve its cost objectives in other legitimate ways. Under these circumstances we conclude that the District's statements, even if aimed at persuading the Association to reconsider its bargaining position, were not unlawfully coercive. As discussed below, the District had legitimate avenues available during the hiatus to reduce personnel costs in this unit, albeit not quite the avenue it chose.

Accordingly, we affirm the Examiner's decision dismissing the Association's allegations that the District's communications at the bargaining table and in messages to unit members were unlawful.

2. The Reduction in Hours as a Unilateral Change

A. Applicable Legal Principles.

As to the unilateral change allegations, we begin by setting forth the governing principles. It is a fundamental tenet of Commission law, and labor relations law in general, that, where employees are represented by a union, an employer may not change the existing wages, hours, or working conditions without exhausting its obligation to bargain in good faith with the union about those subjects. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (CT. APP. 1994); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (CT. APP. 1994); MAYVILLE SCHOOL DIST. V. WERC, 192 WIS.2D 379 (CT. APP. 1995); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (CT. APP. 1997). The Commission summarized the reasons for this rule long ago as follows:

> Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining.

SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) at 14, citing CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), GREEN COUNTY, DEC. NO. 10308-B (WERC, 11/84). See also NLRB V. KATZ, 396 U. S. 736 (1962).

The concept underlying this longstanding principle is that the purposes of the Municipal Employment Relations Act (MERA) – effective bargaining and labor peace – are best effectuated by maintaining stability regarding wages, hours, and working conditions while these matters are under negotiation.

This duty to maintain the "status quo" applies whenever there is a duty to bargain, including the period between the expiration of one contract and the execution of its successor. During this "hiatus," while the parties are negotiating over the terms of the successor agreement, the Commission has long required the employer to maintain the existing wages, hours, and working conditions until the new contract is finalized. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). Either party may negotiate for changes, including a proposal to make those changes retroactive to the beginning of the hiatus. However, during the hiatus, while the bargaining process is ongoing, no changes may be implemented without the other party's consent. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), at 21.

A primary element in a unilateral change violation is establishing what the existing wages, hours, and working conditions were at the time the employer allegedly changed them. Under the Commission's traditional approach, this determination is based upon relevant language (if any) in the expired contract, bargaining history that may shed light on such contract language, and the parties' actual practices on the topic. SEE, E.G., CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). While the expired contract plays an important role, "[I]t is crucial ... to observe that, since the contract no longer exists, the duty to maintain the status quo is not contractual in nature. Rather, it is a function of the collective bargaining law." SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-B (WERC, 3/06) at 17.

B. The Examiner's Decision and the Issues on Appeal

In the instant case, as is commonly true, both parties point to contract language as the primary evidence of the status quo regarding the reduction in hours at issue here. The Association contends that the provisions of the expired contract, as they had been implemented in practice, required (1) seniority to be followed in situations involving reductions in force, and (2) a regular full time work year comprising 1,335 hours. According to the Association, the District changed these existing wages, hours, and working conditions when it took in-service and other non-student contact work away from all members of the bargaining unit, regardless of seniority, beginning in November 2003. The District, on the contrary, argues that the contractual management rights clause provided clear managerial prerogatives to determine what, how much, and when work will be available to paraeducators, especially where this right is being exercised in a manner that will maximize direct services to students. The District further argues that the layoff clause and its seniority provision clearly do not and could not apply in this situation, that the District is not required to lay off whole positions rather than reduce hours across the board, that the District has complied with the 178-day work year and 7-1/2 hour work day provisions set forth in the expired contract, and that the contract does not require or refer to a regular work year of 1,335 hours. The District adds that the Association was offered and declined an opportunity to negotiate over the loss of benefits and other "impacts" of the reductions and hence has waived any right to bargain it may have had.

The Examiner concluded that the status quo, as embodied in Article 8 and Article 11 of the expired contract, did not constrain the District from implementing the instant across-the-board reduction in hours. In the Examiner's view, several subsections in the layoff clause would not make sense unless the term "layoff" was intended to mean "a complete separation from employment." Examiner's Decision at 28. As to Article 11, the Examiner concluded that, if those provisions were construed as the Association urged, they would amount to a guarantee of work, which would be a permissive subject of bargaining and not binding during a hiatus. Despite the foregoing conclusions, the Examiner also held that the seniority provisions in Article 8 establish a status quo regarding each employee's seniority rank. Hence, the Examiner concluded that, if the District's reduction in hours also changed an employee's previous rank, the District would have unilaterally changed the status quo regarding a mandatory subject of bargaining.

Both the District and the Association have challenged the Examiner's conclusions. In addition to advancing their respective arguments regarding the layoff clause, the regular work year, and the management rights clause, both parties object to the Examiner's holding regarding the change in relative seniority. The Association contends that the seniority problem the Examiner identified simply reinforces the Association's contention that the District's action violated the layoff clause as a whole. The District contends that no evidence supports the Examiner's hypothetical conclusion that anyone's relative seniority has actually changed as a result of the reduction in hours.

C. The Status Quo as to Layoff.

We observe at the outset of our analysis that the circumstances of this case present an exceptionally difficult clash between strong competing equities. On the one hand, the District advances a strong interest in maintaining its discretion to deploy these educational assistants in a manner that will maximize their contact with students, while still effectuating cost savings. On the other hand, the Association advances a strong and traditional interest of its own: protecting the fundamental wage and seniority expectations of its membership. Impelled by these strong interests, both parties took rigid and somewhat inflated postures regarding their respective rights in this situation. Regardless of any of these ostensible rights, we share the Examiner's subtle suggestion that negotiations (over the reduction plan itself and not just its "impacts" on unit members) might have better addressed this dispute rather than each side seeking vindication of uncertain rights in the instant litigation. Ultimately we find neither party's rights as extensive as each has asserted. We find the District's action unlawful on relatively narrow grounds that still leave the District considerable flexibility in deploying its work force and reducing its costs.

Turning first to the Association's reliance on the Article 8 "Layoff, Recall" clause, the Association claims that the introductory language clearly demonstrates that the provision shall "apply when the Board reduces an Instructional Support Staff position." Since paraeducator

positions literally were "reduced" here, argues the Association, the District should have followed those provisions, including selection by seniority and a month of continued insurance. The District counters that the clause clearly does not apply, first, in line with the Examiner's analysis, because various subsections in the Article plainly presuppose a total separation from employment, and second because, as a practical matter, the District could not have followed seniority in implementing a reduction of non-student contact hours. In response, the Association points out that the District's first argument would lead to an unreasonable result, in that it would permit reductions in complete disregard of seniority, such that more senior full time unit members could be reduced to less than half time and lose insurance benefits, while less senior or even newly hired employees lost no hours whatsoever. As to the District's second argument, the Association responds that difficulty in compliance is not a license to violate the contract. The Association, however, does not specify how the District could have implemented the instant reductions in a manner that complied with the selection provisions of the clause. The Association seems to believe that the language required the District itself to reduce staff only by means of full layoffs of the least senior individuals.

The parties' dispute over whether their layoff language applies to so-called "partial layoffs" (reductions in hours) is a common but nonetheless thorny one under collective bargaining agreements, yielding highly idiosyncratic results based upon nuances of language in the layoff clauses, prior practices of the parties, and the extent to which important benefits, such as seniority and access to health insurance, are affected. A review of arbitration authorities reveals that, where the contract language is not clear on its face, arbitrators tend to decide the issue in an equitable manner that permits the employer to meet its reasonable needs while at the same time preserving significant benefits that the employees reasonably expect. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS (6TH ED. BNA, 2003) at 723-279, and 785-86; BORNSTEIN, GOSLINE, AND GREENBAUM (MATTHEW BENDER, 2006) at Sec. 29.05; AMPCO-PITTSURGH CORP., 80 LA 472 (BRIGGS, 1982).

In this case, contrary to the parties' arguments, the contractual layoff language does not expressly include or exclude "partial layoffs." On the one hand, the Association aptly notes that the introductory phrase "when the Board reduces an Instructional Support Staff position" could signify that the term "layoff" as used in the remainder of the article has a broader meaning than total separation from employment. On the other hand, the District and the Examiner aptly note that several subsections of the article make sense only in the context of a complete separation from employment. It does seem likely, in reviewing the clause as a whole, that the parties may have been assuming that reductions in force in the District generally would take the form of complete layoffs, but this observation could cut both ways. It could mean that the parties intended that the District could not resort to hours reductions in lieu of full layoffs, or it could mean that the clause does not restrict the District at all in partial layoff situations. Neither of those extremes is the most reasonable extrapolation of the parties' intent when they were negotiating this clause and the contract as a whole.

We are reluctant to interpret ambiguous language in a manner that restricts a public employer's basic ability to deploy its staff. At the same time, we agree with the Association that the apparently limited application of some of the provisions is not inherently inconsistent with an interpretation that covers partial layoffs. It is not uncommon to give limited effect to provisions that apply in limited situations (such as full separations), while at the same giving broad effect to those that have broader applicability. See, e.g., WISN DIV. HEARST-ARGYLE TELEVISION STATIONS, INC., DEC. NO. 31183-A (GRATZ, 3/05), AFF'D DEC. NO. 31183-B (WERC, 6/05) ("It would not defeat the purposes of either [of two] provision if 'laid off' were interpreted to include both laid off from full-time employment as well as laid off from all employment with the Company.") Here, for example, the recall provisions of the layoff article include the statement, among others, that "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." Article 8.D.4. The District and the Examiner read this language as a dispositive indication that only total layoffs were covered by the Article as a whole. To the contrary, however, this provision does not refer to an employee's rights to accept or decline a layoff (or reduction) in the first place, but rather to the rights of individuals who have already been laid off and are being offered newly available work. That specific provision would generally apply only to employees on the recall list who had been fully laid off. However, providing such a benefit for fully laid off employees is not inconsistent with providing other benefits in the layoff article (such as seniority and insurance) to both those who are partially and those who are fully laid off. In this contract as a whole, very serious consequences accompany a loss of hours – including pro-rated health insurance, a total loss of insurance if below half time, and a retarded accumulation of seniority. Balancing these considerations, we conclude that the language permits the District to reduce hours in lieu of total layoffs, but, by the same token, the parties intended to protect crucial contractual benefits in all reduction situations, including such partial layoffs. Thus we construe the layoff clause, as applicable during the hiatus, as both permitting and regulating partial layoffs.

Since the layoff provisions of the expired agreement generally comprise the status quo during the hiatus, it follows that subsection A.3 of the layoff Article would also apply. That subsection provides: "Health, dental and life insurance benefits shall continue until the end of the following month following the lay-off month … ." Accordingly, in order to maintain the status quo, the District should have maintained the pre-existing coverage eligibility and premium costs, without pro-ration or elimination, until one month following the lawful reductions. To the extent the District did not maintain that eligibility and contribution level, the District changed the status quo, for which a make-whole remedy has been ordered.

The status quo requirements as to seniority are more nuanced. To conclude that the layoff clause generally covers partial layoffs does not necessarily lead to the restrictive interpretation proffered by the Association in this case, i.e., that the District could not eliminate non-student contact hours across the board without violating the seniority provisions in the contract. The general purpose of a seniority provision is to regulate the selection of employees for layoff. However, this principle assumes that the remaining work can be

reallocated within the schedules of the remaining employees. Here, for example, had the District chosen to eliminate some but not all non-student contact hours, seniority would have required the District to preserve the non-student contact hours of the more senior paraeducators to the extent possible within the existing schedules. In contrast, we can see no way (nor has the Association suggested one) for the District to eliminate non-student contact hours as a category of work, while reallocating the remaining work (presumably involving student contact) by seniority. If all paraeducators are assigned to work with students during all of their remaining assigned hours, then none is available to pick up additional hours from any less senior bargaining unit member. As the District points out, an employee cannot be in two places at once. The District's only option, under the Association's view of the layoff clause, would be to eliminate all or a portion of the positions of less senior paraeducators. Such an interpretation would prevent the District from achieving its cost-reduction goals without cutting direct services to students. Few arbitrators would be willing to so restrict a school district's educational policy choice absent explicit contractual direction. Instead, subject to the limitation explained below, we hold that the District's across-the-board elimination of non-student contact hours did not offend the status quo as contained in the seniority provisions of the layoff language.

The limitation referred to in the preceding paragraph flows from the fact that, under the contract at issue here, seniority is accumulated by hours worked. A persuasive line of arbitral thinking would interpret such a provision as a fundamental limitation on an employer's latitude to reduce hours in a manner that erodes relative seniority. See, e.g., ATHENS SCHOOL DISTRICT, NO. 6582 (EMERY, 10/03). Relative seniority is affected inherently if a loss of work falls more heavily on more senior employees. The seniority of such more senior employees will erode over time, as they will accumulate less seniority than they otherwise would have, while at the same time more junior employees will accumulate more than they otherwise would have. While the loss may not affect the seniority rankings immediately, over sufficient time the relationship between the more senior and less senior will narrow and eventually invert.[3]

In this case, the record indicates that some more senior employees worked at the high school and hence lost more non-student contact hours (because of exam days) than some less senior employees at the elementary and middle schools (that do not have final exam days). Concern over the change in relative seniority led the Examiner to conclude that the status quo required the District to maintain the ranking as it existed at the time of the District's reductions. We share the Examiner's concern, although we do not see the impact as limited to an immediate effect on rank. We conclude instead that an hours-based seniority provision requires that any differential in the number of hours removed from individual employees must

[3] The District points out that, even before these changes, some less senior paraeducators worked more hours than some more senior educators. Since the record does not suggest that the District has previously reduced hours involuntarily for paraeducators, this situation apparently is the result of paraeducators voluntarily choosing to work part time – a commonplace occurrence among educational support personnel. Since employees accrue seniority by hours worked, it is not surprising that some long-term voluntarily part-time employees have accumulated more seniority than newer full-time employees, but are nonetheless working fewer hours. This situation has no bearing on whether employees should lose relative seniority when their hours are reduced involuntarily.

fall, if practicable, upon those who are less senior. In this case, nothing suggests that the District's cost-saving goals would have been unduly compromised if the District had limited the hours reduction for more senior high school employees to an amount no greater than that suffered by less senior employees. That may have meant retaining some non-student contact hours (or compensation in lieu thereof) for some high school paraeducators. Alternatively, the District in its discretion could have equalized the reduction in other ways, e.g., by assigning the more senior high school paraeducators additional student contact time and/or other duties, such as parent-teacher conferences.[4]

Accordingly, to the extent more senior bargaining unit members lost more hours in the reduction than less senior unit members, the District unilaterally changed the status quo as contained in the hours-based seniority provision of the layoff clause.[5]

B. The Normal Work Year Status Quo.

The Association also contends that the status quo included a normal or regular work year for full time paraeducators of 1,335 hours. According to the Association, this existing practice was the inherent result of contract language that defined the "regular work day" as seven and one-half hours, the "normal work year" as 178 days, and "full time" for purposes of benefit eligibility as 37-1/2 hours per week for 178 days per year.

As a result of those provisions, there is no real factual dispute that the longstanding practice in the District was that a substantial portion, perhaps majority, of paraeducators were employed on a full time basis and expected their regular work year to comprise 1,335 hours. Contrary to the District's contention, the contract need not expressly state the contractual understanding of 1,335 annual hours in a regular full time work year, where that calculation is mathematically inherent in the contractual definitions of "full time," "regular work day" and

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[4] The record indicates that the District arranged the hours of some paraeducators in a similar manner in order to meet the contractual 178-day requirement.

[5] Since the layoff provision applies to partial layoffs, it follows that the District would be required by the recall provisions to offer available work to employees by seniority, including non-student contact hours that subsequently become available. Here the District eventually returned some of the eliminated hours to some paraeducators without regard to seniority, which the Association challenges as a violation of the recall provisions. However, the hours that were returned were student contact hours, rather than non-student contact hours. The District's action rectified an erroneous calculation about student needs during high school exams. Thus, as we see it, the returned hours were student contact hours that properly should not have been removed from those paraeducators' regular assignments, rather than a "recall" of non-student contact hours that had been reduced. Therefore, in restoring the needed student contact time, the District did not violate the status quo as to recall. The Association also challenges the District's offer of "voluntary" paid in-service training as, in effect, a subterfuge for avoiding the restoration (or "recall") of these hours to the regular schedules of the paraeducators. The District evidently was content to allow these individuals to remain untrained, since the hours were voluntary and the employees chose not to accept them under the District's conditions. That being the case, we are not persuaded that the offer was tantamount to a "recall." Had employees accepted this work, one might question whether the District could unilaterally decide that such hours would not count toward seniority or toward benefit eligibility, but, as the hours were not accepted, that issue is not before us.

"normal work year," *and*, apropos of the status quo, has also been the consistent practice. This practice/expectation formed the basis for the parties' negotiations over access to health insurance benefits, one of the most fundamental elements in contemporary collective bargaining relationships. See Article 11.G.1, set forth above. Just as importantly, this expectation would have formed the basis for the parties' wage negotiations; both parties admittedly calculated their settlement proposals by "casting forward" the work force as it was deployed prior to the reductions at issue here, on the so-called "snapshot" date referenced in Sec. 111.70(1)(nc)2, Stats.

As the Association acknowledges, these provisions and practices do not *guarantee* anyone a specific amount of work, nor do they guarantee any particular individuals full time status. Nonetheless, if they are to have any meaning, they imply a norm in which an identifiable cadre of paraeducators is assigned a full time work year, at least for purposes of compensation and fringe benefit eligibility. As a result of the District's reductions here, no paraeducators worked full time. Importantly, by removing in-service and exam days as categories of work, the District effectively changed the parameters of the job itself, making it impossible for anyone holding a paraeducator position to meet the contractual definition of "full time." This seems clearly contrary to the language and assumptions incorporated into the contract and practice. Arbitrators generally construe provisions defining "regular" or "normal" work hours as "an indication that such definitions were meant to apply to normal conditions. Employers can make unilateral changes to meet abnormal conditions, but such changes cannot be indefinite. Indeed, allowing employers to do so would be tantamount to letting them unilaterally redefine the term 'normal work week.'" HILL AND SINICROPI, MANAGEMENT RIGHTS (BNA 1986) at 377, quoting Arbitrator Steven Briggs in AMPCO-PITTSBURG CORP., 80 LA 472 (1982). See also, LABOR AND EMPLOYMENT ARBITRATION, SEC. 29.05 (BORNSTEIN AND GOSLINE, EDS., MATTHEW BENDER, 2006).

Applying these principles to the status quo ante of 1,335 hours in the regular full time work year, the most reasonable conclusion is that the District could remove the hours at issue here on a temporary or finite basis, even across-the-board, if prompted by genuine legitimate needs, but could not do so indefinitely without unlawfully changing the existing wages, hours, and working conditions of these employees. The Association was entitled to conduct its negotiations for the successor 2003-05 agreement with an understanding that these pre-existing "regular" or "normal" conditions of employment would continue, unless and until the District successfully negotiated a change. Therefore we conclude that, subject to the limitations imposed by the layoff clause, as described above, the District acted lawfully in reducing these hours for the 2003-04 work year, as a finite matter, but acted unlawfully in implementing them on an indefinite or permanent basis, without first exhausting its duty to bargain in good faith. The remedy set forth in the Order, above, recognizes this distinction by imposing make-whole relief for this violation only from the beginning of the 2004-05 school year.

Having reached the foregoing conclusions, it is apparent that we have not accepted the District's arguments (1) that its contractual management rights clause permitted these changes, (2) that these contractual provisions/practices, as so interpreted, are permissive subjects of bargaining, or (3) that the Association waived any right to bargain by rejecting the bargaining opportunity offered by the District at or about the time it implemented the reductions.

As to the management rights clause, it is well established that general references to an employer's rights to set hours and schedules, determine the size of the work force, and allocate and assign work, like the ones on which the District relies here, do not overcome specific contractual provisions that limit those general prerogatives. CITY OF EAU CLAIRE, DEC. NO. 29346-C (WERC, 12/02). The management rights clause itself acknowledges that the exercise of managerial discretion will be "subject to the express provisions of this Agreement," exercised "in conformance with the express terms of this agreement, and the laws of the State of Wisconsin," presumably including the collective bargaining law. As the foregoing discussion indicates, we have interpreted the status quo to include contractual provisions, reinforced by practice, that somewhat confine the District's general discretion to schedule and deploy its work force. Accordingly, the management rights clause does not avail the District in this situation.[6]

As to the whether the foregoing interpretation of the status quo creates a permissive subject of bargaining, this issue is also well-settled to the contrary. In GREEN COUNTY, DEC. NO. 20056 (WERC, 11/82), the Commission held the following proposal to be mandatory: "All employees shall be guaranteed forty (40) hours work per week for Monday through Friday work week." Rejecting the employer's claim that such a work guarantee would conflict with the employer's right to determine the size of its work force, as established in CITY OF BROOKFIELD, 87 WIS.2D 819 (1979), the Commission concluded that the hours guarantee, when balanced against the employer's ability to reduce staff under the contractual layoff clause, was not a permissive subject of bargaining:

> . . . It is undeniable that the provision here sought by the Union could impose costs for unworked time upon the County, or pay for time spent working at jobs which the County deems less than essential. But the same could be said about vacations and holidays, and the County's argument that the challenged language restricts its ability to lay-off employees, carried to its logical conclusion, would vitiate any set hours whatever in any labor contract, since by definition set hours restrict an employer's ability to lay-off an employee at one hour and call him back the next. The County's objection would thus expand vastly the rule of Brookfield and, in the process, eliminate, to all intents and purposes, the right to bargain hours, which is fundamental in the statute. And to the extent that the challenged language does not identify precisely what hours are to be worked, it both allows the County discretion, which the County presumably would desire, and identifies that forty hours per week shall be paid for. Accordingly, to whatever degree the proposal fails to relate directly to specified hour, it relates directly to specified pay. . . .

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[6] Having reached that conclusion, we need not reach the District's argument that general prerogatives stated in a management rights clause would be part of the "dynamic status quo" so as to permit unilateral action on mandatory subjects of bargaining during a contract hiatus, even without support from other contract language, bargaining history, or practice. That proposition is subject to question. See, GORMAN AND FINKIN, BASIC TEXT ON LABOR LAW (2D ED., THOMSON/WEST, 2004), at 638 ("The law is quite clear that, when a collective agreement expires, any management-rights (and zipper) clause it contains expires with it. Consequently, an expired provision cannot work a waiver of a duty to bargain, although a well-established practice under it – such as subcontracting – may continue as part of the dynamic status quo even as the employer is required to bargain about it.") (Citations omitted).

If an hours of work guarantee (or pay in lieu thereof) is not a permissive subject of bargaining, then, perforce, neither is the much more flexible commitment to a "regular" complement of hours (or the pay in lieu of same) that is at issue here.

Finally, equally longstanding precedent contradicts the District's waiver argument. As noted earlier in this discussion, the Commission has long and consistently held that the status quo must be maintained during a hiatus and that neither party can be compelled to waive that right. The underlying concept is to stabilize the parties' relationship while they have no contract and are in the process of hammering out a new one. Unless both parties voluntarily agree otherwise, the stability must continue until a successor agreement is finalized. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96). While, as mentioned earlier, negotiations may have a productive way to handle the instant dispute, such negotiations are not required as a matter of law. As the Commission has stated many times before, waiver simply is not an available defense to allegations of unilateral changes during a hiatus.

For the foregoing reasons, the Commission concludes that the status quo, as contained in the provisions of the expired contract, permitted the District to eliminate non-student contact hours as a temporary or intermittent response to demonstrable fiscal needs. Given the nature of the eliminated work, the District was free to reduce those hours across the entire bargaining unit. The District could also modify the insurance benefits of the affected employees in accordance with subsection 3.A of the layoff Article. However, the District unilaterally changed the status quo by (1) reducing the hours of some employees more than those of some less senior employees; (2) failing to provide continued insurance benefits during the month following the reduction; and (3) indefinitely altering the regular full-time work year for bargaining unit employees. We have remedied these violations as set forth in the Order, above.

Dated at Madison, Wisconsin, this 12th day of April, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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