STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DODGELAND EDUCATION ASSOCIATION and TIM MCKEON, Complainants,

vs.

DODGELAND SCHOOL DISTRICT and JOSEPH G. REED, Respondents.

Case 29
No. 63359
MP-4030

Decision No. 31098-C

Appearances:

Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Dodgeland Education Association and Tim McKeon.

Michael J. Julka and **Richard Verstegen,** Attorneys at Law, Lathrop & Clark, 740 Regent Street, Suite 400, Madison, Wisconsin 53715, on behalf of the Dodgeland School District and Joseph G. Reed.

ORDER ON REVIEW OF EXAMINER'S DECISION

On January 27, 2006, Examiner Sharon Gallagher issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, concluding that the Respondent Dodgeland School District (District) had violated Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally changing the status quo on wages when, in August 2003, the District unilaterally changed the basis for conferring overload pay and calculating part time pay from six periods of assignment to seven periods of assignment. As a remedy, the Examiner ordered the District to restore the status quo of using six periods as the basis for conferring overload pay and calculating part time pay, to make whole those employees whose wages were affected by the change, and to post a notice of the violation that had been found.

On February 14, 2006, the District filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Sec. 111.07(5) and 111.70(4)(a), Stats. Thereafter both parties filed written argument in support of their respective positions. Pursuant to notice, the Commission conducted oral argument regarding this matter on July 18, 2006, which was transcribed. Following oral argument, both parties submitted further written argument in support of their respective positions, the last of which was received on August 14, 2006, at which time the record was closed.

For the reasons set forth in the Memorandum that follows, the Commission affirms the Examiner's Findings of Fact except where specified below, affirms her Conclusions of Law, sets aside her Order and issues the Order, below.

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

ORDER

A. The Examiner's Findings of Fact 1 through 7 are affirmed.

B. The Examiner's Finding of Fact 8 is set aside.[1]

C. The Examiner's Findings of Fact 9 is renumbered Finding of Fact 8, and is amended to read as follows:[2]

> 8. From at least 1997 and continuing until August 2003, Middle/High School teachers who were assigned six instructional and/or supervisory assignments were considered full-time. If a full-time Middle/High School teacher accepted a 7th period assignment (whether supervisory or instructional), said teacher was paid overload pay of 1/6 of his/her regular daily rate for the additional assignment. During at least this period of time, the salaries of part-time Middle/High School teachers were determined by pro-rating their salaries according to the ratio of their supervisory/instructional assignments to the

[1] The Examiner's Finding of Fact 8 read as follows: "From 1997 and continuing until August, 2003, six period assignments have been considered full-time at the Elementary School and Elementary School teachers who were assigned more than 6 periods of assignments (either teaching or supervisor) were paid 1/6 their regular daily rate for each assignment beyond six periods per day." The record indicates that the Elementary School teachers, unlike the Middle and High School teachers, did not receive assignments or prep time in 42-minute periods, but rather had preparation time when their students were being instructed by "specialty" teachers, such as Art, Music, and Physical Education, as well as during lunch and possibly recess. It is difficult to determine on this record how to characterize the normal work load (instructional and/or supervisory time) for elementary teachers prior to August 2003, partly because the focus of the litigation was on the middle and high school work load. However, it appears clear that there was a mutually understood normal work load for full time elementary school teachers prior to August 2003, and that the District increased that normal work load effective with the 2003-04 school year.

[2] The District objected to the entirety of the Examiner's Finding of Fact 9. As discussed in the Memorandum that follows this Order, the record is sufficient to affirm the Examiner's conclusions on the main points set forth in the first paragraph of her Finding 9, which we have restated as our Finding 8, above. The eliminated portion of the Examiner's Finding of Fact 9 apparently was intended to quote a page from District Exhibit 24, a multi-page exhibit that included, inter alia, examples of how the District calculated overload pay prior to 2003-04. The quoted portion, however, was mistyped and inadvertently merged material from two different portions of the quoted page. Since the information is not essential to the decision, we have chosen to eliminate rather than correct the lengthy quote.

normal full-time work load of six such assignments.

D. The Examiner's Findings of Fact 10 through 14 are renumbered Findings of Fact 9 through 13 and are affirmed.

E. The Examiner's Finding of Fact 15 is set aside.[3]

F. The Examiner's Findings of Fact 16 through 24 are renumbered Findings of Fact 14 through 22 and are affirmed.[4]

G. The Examiner's Findings of Fact 25 through 29 are renumbered Findings of Fact 23 through 27 and are affirmed.[5]

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[3] The Examiner's Finding of Fact 15 read as follows: "The December 22, 1997 letter from McLeod to Association President Sweeney (Finding No. 13) did not clearly notify the Association that the District intended to change the manner of calculating overload for full-time teachers and the manner of calculating workload for part-time teachers. McLeod's May 27, 1998 memo to Association President Coates (Finding No. 14) merely quoted McLeod's December 22, 1997 memo and did not mention the District's method of calculating workload and overload and it did not make clear that the District by McLeod's memo, intended to change the manner of calculating overload and workload for full and part-time teachers." The District has objected to this Finding on the ground that McLeod's 1997 and 1998 communications, respectively, are most reasonably read to convey the District's intention to eliminate both the preparation time guarantee and any concomitant obligation to pay overload pay if assignments increased as a result of losing prep time. We do not necessarily agree with the District's view of the language in these documents. However, subsequent to both these memoranda, the District reached a written agreement with the Association ("Settlement Agreement" executed January 10, 2000) that, as described and implemented by former Superintendent Moon, essentially maintained the existing preparation time/work load status quo until the conclusion of the then-pending litigation over whether the prep time guarantee was a mandatory subject of bargaining, in exchange for which the Association waived any entitlement to monetary relief for any prep time loss that may have occurred between July 1, 1997 and June 30, 2001. Thereafter, until September 2003, the District maintained the pre-existing practice of providing two prep periods at the middle and high schools, paying 1/6 overload pay when a teacher accepted an additional instructional or supervisory assignment in lieu of a prep period, and of pro-rating part-time teachers' salaries based upon a six-period norm. Accordingly, whatever may have transpired regarding the specific prep time loss that was the subject of the 1998 memo, and whatever the District's view of its rights historically may have been, the parties' actual practice did not change until the beginning of 2003-04 school year. For this reason, the Examiner's Finding 15 is not material to the outcome of this case and is set aside.

[4] The District objected to the Examiner's Findings of Fact 17, 18, and 19, which recited the District's practice from 1999 until August 2003 of paying 1/6 overload pay for a seventh assignment (including study hall assignments) and pro-rating part time teachers' salaries based upon the ratio of their assignments to the standard six assignments, and also recited certain exceptions to that practice to which the Association agreed during that period of time. The District does not dispute the specific instances recounted in the Examiner's Findings, but contends that the practice was not sufficiently consistent to establish the status quo. The evidence and its sufficiency are addressed in the Memorandum that follows.

[5] The District stated an objection to the Examiner's Findings of Fact 25 through 28, but has presented no cognizable argument as to Findings 25 or 27 nor do we perceive any error in those findings. As to the Examiner's Findings 26 and 28, we ultimately conclude that a waiver defense is unavailable to the District in the instant situation and hence detailed findings about when the Association knew about the District's intentions and how the Association responded are not essential to our decision. Nonetheless, we find the evidence sufficient to

H. The Examiner's Finding of Fact 29 is set aside.[6]

I. The Examiners Findings of Fact 30 and 31 are renumbered Findings of Fact 28 and 29 and are affirmed.

J. The Examiner's Conclusions of Law 1 through 5 are affirmed.

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

The Respondent Dodgeland School District shall:

a. Cease and desist from refusing to bargain in good faith with the Dodgeland Education Association during a hiatus between collective bargaining agreements, by unilaterally changing the basis for determining an overload and calculating part time teachers' pay, and by unilaterally eliminating overload pay.

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

i. Immediately restore the practices of (1) paying teachers 1/6 of their salaries for instructional/supervisory assignments beyond six, and (2) calculating part-time teachers' salaries as a ratio of their instructional/supervisory assignments to the normal full time instructional/supervisory work load that existed prior to August 2003.

ii. Upon request, bargain in good faith with the Association about overload, overload pay, and the basis on which part time pay will be calculated.

iii. Unless the Association and the District mutually agree upon alternative monetary relief, make whole all employees in the

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support the Examiner's Finding that the District did not notify the Association about the changes *prior to implementing them*. The details are addressed more fully in the summary of the facts, below.

[6] In her Finding 29, the Examiner found, "Complainant did not clearly request to bargain regarding the impact of Respondent's change in the manner in which it calculated full-time teacher overload and part-time teacher pay percentages." This Finding is not material to the Examiner's or the Commission's analysis and is therefore set aside. Both the Examiner and the Commission conclude that the decision to change the norm or "basis" by which overload and part time pay is calculated is itself a mandatory subject of bargaining, as is the amount that will be paid for an overload. Accordingly, it is not pertinent whether or not the Association requested to bargain over the impacts of the Respondent's decisions, where the decisions themselves were mandatory subjects of bargaining.

who were affected by the District's unilateral changes in overload, overload pay, and part-time pay calculation between August 2003 and the date on which the District complies with Paragraph (b)(i) of this Order, with interest at 12 percent per year.[7]

iv. Notify all of its employees in the bargaining unit represented by Complainant 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.

v. Notify the Wisconsin Employment Relations Commission 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 14th day of February, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Commissioner Paul Gordon concurs in part and dissents in part.

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[7] As reflected in WILMOT UNION 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.

APPENDIX "A"

NOTICE TO ALL DODGELAND SCHOOL DISTRICT EMPLOYEES REPRESENTED BY THE DODGELAND EDUCATION 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 practices of (1) paying teachers 1/6 of their salaries for instructional/supervisory assignments beyond six, and (2) calculating part-time teachers' salaries as a ratio of their instructional/supervisory assignments to the normal full time instructional/supervisory work load that existed prior to August 2003.

2. WE WILL upon request, bargain in good faith with the Association about overload, overload pay, and the basis on which part time pay will be calculated.

3. WE WILL make whole all employees in the bargaining unit represented by the Dodgeland Education Association who were affected by the District's unilateral changes in overload, overload pay, and part-time pay calculation between August 2003 and the date on which the District complies with Paragraph (b)(i) of this Order, with 12 percent interest per year, unless alternative relief is mutually agreed upon between the District and the Association.

4. WE WILL NOT refuse to bargain in good faith with the Association during a hiatus between collective bargaining agreements by unilaterally changing the basis for determining an overload and calculating part-time teachers' pay, and by unilaterally eliminating overload pay, 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
Dodgeland School District

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.

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

For some years, the Dodgeland School District (District) maintained a practice such that teachers at the Middle School and High School were guaranteed two preparation periods out of the eight periods in the teacher work day, and Elementary School teachers were guaranteed preparation time during a 30-minute lunch and during the periods in which their students were being taught Art, Music, and Physical Education by other teachers. This practice was memorialized in a Memorandum of Understanding (MOU) executed by the District and the Dodgeland Education Association (Association) on April 1, 1996, but was never incorporated into the collective bargaining agreement. This MOU expired on June 30, 1997.

In November and December, 1997, the District informed the Association that, in its view, the teacher prep time guarantee was a permissive subject of bargaining and that, commencing in or about January 1998, the District intended to discontinue "the alleged teacher prep time past practice." Neither the MOU nor the District's communications in the fall of 1997 referred to the compensation, if any, that would be paid to a teacher who was assigned less prep time/more student contact time. In negotiations for the 1997-99 contract, which were ongoing throughout the fall of 1997, the Association proposed to continue the MOU regarding guaranteed prep time. The District proposed what it viewed as a "Qualified Economic Offer" (QEO) within the meaning of Sec. 111.70(1)(nc), Stats., that would discontinue the preparation time guarantee.

On December 30, 1997, the District filed a petition with the Commission for a declaratory ruling regarding the following issues: (1) whether the prep time guarantee contained in the MOU was a permissive subject of bargaining; (2) whether the prep time MOU was a "fringe benefit" that the District must maintain in order to make a valid QEO that would preclude the Association from proceeding to interest arbitration on economic issues; (3) whether the prep time guarantee in the MOU is an "economic issue" as defined in Sec. 111.70(1)(dm), Stats., on which the Association could not proceed to interest arbitration if the District made a valid QEO; and (4) whether the District had made a valid QEO. During the hearing regarding the District's petition, the Association offered a proposal regarding preparation time that defined a "normal workload" as two preparation periods for Middle and High School teachers and Art, Music, Physical Education and a 30-minute lunch period as prep time for Elementary School. The Association's proposal also provided that teachers would receive "overload compensation" in the amount of 1/6 of a teacher's regular salary for every forty-two minutes the teacher's preparation time was reduced from the specified "normal workload."

On January 4, 1999, the Commission issued its decision regarding the District's petition for declaratory ruling. DODGELAND SCHOOL DISTRICT, DEC. NO. 19490 (WERC, 1/99). The Commission majority (Commissioner Hempe dissenting) concluded that

the prep time guarantee in the MOU was a permissive subject of bargaining, which the Association could not submit to interest arbitration over the objection of the District. Further the Commission concluded that the prep time guarantee was not a "fringe benefit" that the District was required to maintain in order to make a valid QEO. Hence, the District had made a valid QEO. The Commission majority also held that the Association's "overload compensation" proposal submitted at hearing was a mandatory subject of bargaining, but, as an economic item, the Association could not compel the District to submit it to interest arbitration after the District had made a valid QEO. In February 2002, the Wisconsin Supreme Court upheld the Commission's decision (three justices dissenting) in DODGELAND EDUCATION ASSOCIATION V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 250 WIS.2D 357 (2002) (hereafter, together with the underlying Commission decision, referred to as "DODGELAND I"). Neither the Commission's nor the court's decision addressed the issue presented in the instant case: whether the District could lawfully change an existing practice regarding overload criteria, overload pay, or calculation of part time teacher pay.

At all relevant times, the teacher work day in the District was eight hours, beginning at 7:30 a.m. and ending at 3:30 p.m., which, at the Middle and High Schools, was divided into eight periods. Until late August 2003 the prevailing practice was that the normal work load (student contact time) for Middle and High School teachers was 30 minutes before and after school and six periods of assignments. The normal work day included two preparation periods. As acknowledged by District witnesses at the hearing, the six assignments could include a mixture of classroom instruction, extra duties (such as "AODA"), and study hall supervision. In the Elementary Schools, the prevailing normal work load included teachers having preparation time during a 30-minute lunch and while their students were being instructed in Art, Music, and Physical Education. As noted in Footnote 1, above, it is difficult to determine precisely how the normal elementary teacher day was comprised, but the record is clear that it generally included the same number of student contact minutes as the middle and high school teachers' work days.

At all relevant times prior to late August 2003, the District calculated a part-time teacher's salary by pro-rating their assignments against the normal full-time work load.[8] Examples of these situations are detailed in the Examiner's Findings of Fact 19.

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8 The record is confusing about whether this ratio was computed in terms of periods (e.g., 4 out of 6 would be 66.66%), days per week (e.g., two out of five would be 2/5), minutes in the overall work day, or student contact minutes. Even aside from these inconsistencies, some anomalous situations existed; for example, there is some evidence suggesting that, prior to the change, one teacher was paid 75% rather than 83.3% for handling five classes, though it is not clear that the Association was contemporaneously aware of or acquiesced in that situation. Ultimately these are distinctions without a difference. It is clear that both parties expected and understood that part time salaries would be pro-rated according to how the part time work load compared to a normal full time work load. See discussion on issue number three, below.

Beginning with the 1992-95 collective bargaining agreement, the contract between the District and the Association has contained the following provision regarding part-time teachers' salaries:

> III. SALARY SCHEDULES FOR TEACHING EMPLOYEES
>
> . . .
>
> B. Teaching Personnel
>
> . . .
>
> 2. Part-time teachers shall be paid an amount based on the percentage of teaching time and supervision time assigned compared to the teaching time and supervision time assigned to a full-time teacher at the same teaching level and at the same building. Part-time teachers shall also be assigned to a proportionate share of preparation time and time teachers are to be present before and after the regular school day. Minutes worked per day will be the basis for calculating the full-time equivalency of part-time teachers.

Since the prep time guarantee was honored in practice prior to August 2003 and therefore overloads were voluntary, the record is not replete with examples of overloads or how they were compensated. Instances where the seventh assignment was supervisory rather than instructional comprise an even smaller set of examples. However, the record does reflect that overloads (i.e., assignments beyond the equivalent of six periods) occurred and that, when they did, the teachers received an additional 1/6 of their salary for each additional assignment. The fact that exceptions were occasionally arranged between the District and the Association serves to buttress that conclusion. Supervisory assignments (including study halls) were treated the same as instructional assignments. For example, Ms. Roth received overload pay for a seventh assignment as AODA Coordinator in 2001-02 and 2002-03. Mr. Miller received overload pay for a seventh assignment supervising a gym class in 2001-02. When Mr. Hanlon was assigned seven periods that included three study halls in 1998-99**,** the District specifically sought and obtained Association agreement to an exemption from overload pay, because he also had to prepare for only one social studies course that he taught during four periods. The record contains no substantial evidence that would undermine the existence of this practice.[9]

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[9] The District points to the testimony of the current bookkeeper, Caroline Hintze, that her research showed that one or two teachers did have a seventh assignment without receiving overload pay. As the Examiner pointed out, Hintze lacked personal knowledge of the specific circumstances that pertained to her examples, since she was not a District employee at the time of the instances she cites and was relying solely upon her interpretation of somewhat cryptic District records. The Association submitted testimony suggesting ambiguity in those records. For example, the notation "MS" as an alleged additional unpaid assignment during one of the lunch periods for Mr.Hanlon during 1997-98 may have referred to a period in which he traveled between the high school and the middle school, rather than to an assignment at the middle school. There is also no evidence that the Association

During the 2001-02 and 2002-03 school years, the District employed non-teachers to supervise study halls. On May 2, 2003, the District advised the teachers by memorandum that the District intended to assign "all [middle and high school] staff to a small study hall in lieu of one of two preparation periods." The memo explained the District's reasons, i.e., fewer students per study hall and supervision by certified staff would be educationally helpful to students; teachers could use time during study halls for preparation duties, if students did not require attention; and removing study hall aides from the budget would save more than $34,000. The memo further stated the District's intention to assign elementary teachers to recess supervision in order "to implement a playground plan that requires certified staff for its success." The memo did not explicitly inform the teachers or the Association that the District intended to change the basis upon which an overload would be determined or the pay that would accompany an overload.

At the time the District issued its May 2, 2003 memo, the District and the Association were in a hiatus between contracts. The 2001-03 agreement was executed on June 16, 2003 and expired two weeks later, on June 30, 2003. The parties officially began negotiations for the successor (2003-05) contract in May 2003. At a meeting in June 2003, the Association mentioned the likelihood that the assignment of a seventh period in lieu of a prep period would be grieved.

By memo dated August 6, 2003, the Association sought clarification from the District regarding the ramifications of the District's May 2, 2003 memorandum. The Association asked, inter alia: "… What is now considered a full-time assignment/equivalent minutes for the 4K-12 staff? What constitutes an overload assignment? … Using the basis of being paid off of a 6 period a day assignment – Staff members who have to cover 2 study halls are paid for

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was aware of these incidents, if they occurred, which would tend to undermine their significance in terms of the parties' mutual expectations and understandings. In contrast, the Association has produced evidence that the District specifically sought the Association's approval in making exceptions to the normal work load/overload pay situation where there were mitigating circumstances. One example is the Hanlon 1998-99 situation mentioned in the text, above. Another is the Elementary Physical Education situation in 2001-02, where teachers received an alternative accommodation in return for an exemption from overload pay. In Hanlon's case, the overload in question was a third study hall. The Examiner in Finding 18 also cited, in support of her conclusion about the mutually-understood practice, that in 2001-02 and 2002-03 the District Administrator discussed with the Association that aides rather than teachers would be hired to supervise study halls in order to avoid the District having to pay teachers overload pay. The District disputes the Examiner's conclusion on this point. We note that then-Association President Kay Coates testified directly to her conversation with former Superintendent Moon about this matter. Contrary to the District's argument, Moon's testimony at page 99 of the transcript does not directly controvert the Association's testimony, but instead states that he didn't "remember any such discussion at all." In any case, Moon himself acknowledged that he avoided taking actions that might inflame the parties' prep time dispute and was aware that adding a study hall would have that effect. In sum we find the record sufficient to establish a clear pattern of both overload pay and part time pro-ration based upon a six-assignment standard, in which study halls and other non-instructional duties were considered an assignment. The District's own witnesses repeatedly testified to the practice of treating six assignments as the "basis" for both overload pay and part time pro-ration of salary prior to August 2003.

one and not for the other... How much planning time will part-time employees receive? . . ." By memorandum dated August 22, 2003, the District responded at length to the Association's questions, stating, inter alia, that the District did not have a duty to bargain prior to implementing a change in the number of preparation periods assigned to middle/high school teachers, that the salary schedule was not based on six periods of work, that "the Board has no intention of paying an additional stipend to the ... teachers assigned to a study hall in lieu of one of two preparation periods," and that the District renounced any alleged practice regarding overloads. The District further stated, however, it "will comply with any legal obligations associated with the making of such an [sic] assignments."

At the beginning of the 2003-04 school year, the District also revised the manner in which it pro-rated part time teachers' salaries. It continued to base the salaries upon a ratio of the work load (number of assignments or student contact time) in the part time teacher's assignment to the work load of a full-time teacher assignment. However, since the District now viewed the number of minutes in the standard full-time teacher's assignment as including a seventh assignment (study hall), the District increased the denominator in the ratio to reflect the altered "basis." In effect, this change required the part time teachers either to accept less pay for the same work or to increase their work load in order to receive the same salary they had received for a smaller work load prior to 2003-04.

In the fall of 2003, the Association filed several grievances alleging that the District had violated the contract "and past practice" by unilaterally assigning a study hall as a seventh assignment without providing the teachers with 1/6 overload pay and by unilaterally changing the basis on which part-time teachers' salaries were pro-rated. At a negotiation session in or about September 2003, the Association brought up the overload issue, but the Board took the position that the matter should be deferred to the grievance procedure.[10] On October 13, 2003, officials of the District and the Association met for a "Board/DEA Chat" concerning the part-time and overload issues, but were unsuccessful in resolving them. Throughout the 2003-04 school year, the parties were negotiating the 2003-05 collective bargaining agreement. According to Superintendent Reed's testimony, there were "many" general discussions about both the overload and the part-time calculation issues during this period of time, some of which may have occurred at the bargaining meetings. The Association clearly conveyed to the District the Association's view that the District's actions were unlawful and should not have been taken prior to bargaining.

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[10] The District argues that this fact (Examiner Finding 26) is not supported by the record. However, we, like the Examiner, accept the testimony provided by Association witnesses, particularly Marcia Modaff, that the Association broached the subject of the seventh assignment at the bargaining table in September 2003, but was deflected by the District's response at the table that it would not discuss the prep time issue because it was not a mandatory subject of bargaining and that the prep time/overload issues should be left to the grievance procedure, which the Association had invoked. The District's witnesses did not recall the Association broaching the subject at the table, but did not directly deny the possibility that the Association may have done so.

Neither party offered any proposals during the 2003-05 contract negotiations regarding either issue. The Association filed the instant prohibited practice complaint on February 16, 2004, after which the parties engaged in unsuccessful mediation efforts over both the complaint and the related pending grievances. The 2003-05 agreement was executed in or about September 2004, without any pertinent changes in language.

Introduction

The Complaint in this case alleges that the District violated its duty to bargain in good faith with the Association during the hiatus between collective bargaining agreements, by unilaterally changing the status quo regarding work load, overload pay, and the manner in which a part time teacher's salary is calculated. It is a fundamental tenet of Commission law that an employer may not change the status quo regarding mandatory subjects of bargaining until the employer has exhausted its duty to bargain in good faith on those subjects. As the Commission has long observed:

> 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), and NLRB V. KATZ, 396 U. S. 736 (1962). The concept underlying this longstanding principle is that effective bargaining and labor peace – the purposes of MERA – are best effectuated by maintaining stability regarding wages, hours, and working conditions while these matters are under negotiation.

The duty to maintain the status quo applies whenever there is a duty to bargain, including a situation, like this, that arises during the "hiatus" between the expiration of a predecessor contract and the execution of a successor. During such a hiatus, the Commission has long held that the duty to bargain requires that the status quo be maintained until a new contract is finalized, even if the matter proceeds to interest arbitration and even if the parties have tentatively agreed that certain changes will be included in the next agreement. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04).

A primary element in establishing any unilateral change violation is determining what the "status quo" was at the time the employer allegedly changed it. Under the Commission's traditional approach, the status quo depends on examining relevant language (if any) in the expired contract, any bargaining history that may shed light on any such contract language, and the parties' actual practices on the topic. SEE, E.G., CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). However, "[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. Naturally, where the expired contract is silent on an issue, the status quo will depend upon evidence of a cognizable prevailing practice or generally understood set of expectations. While contract principles may permit a party to renounce or disavow practices that are not addressed in or conflict with the contract, CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85), such renunciation must be accomplished in a manner that is consistent with the parties' bargaining obligations. Thus, in SUN PRAIRIE, SUPRA, the Commission (Commissioner Gordon, dissenting) held that renunciation of a practice that conflicts with contract language will take effect only upon execution of the successor agreement, thus ensuring the party who wishes to keep the practice an adequate opportunity to negotiate for appropriate contract language. ID. at 19-22, aff'd on rehearing, DEC. NO. 31190-D (WERC, 8/06) at 9-10.

In some circumstances a union may be found to have waived its opportunity to negotiate by failing to make a timely request for bargaining. However, it is well established that such a waiver defense is unavailable as to unilateral changes during a hiatus; that ban is absolute. OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04) at 9, citing, inter alia, VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), where the Commission stated:

> As we pointed out in St. Croix and reaffirm here, the employer **is** entitled to force the union to bargain over new provisions in a successor agreement which retroactively change the employer's rights and obligations as to mandatory subjects of bargaining. But **during** any such employer effort, the union **is not** obligated to bargain over loss of existing status quo protections during the contract hiatus.

ID. at 21 (emphasis in original).

The Issues on Review

The District advances five principal grounds upon which the Examiner's decision in this case should be reversed and the complaint dismissed:

> (1) The six-assignment/two-prep arrangement is not a mandatory subject of bargaining, even as the basis for calculating overload pay, because the District had the managerial prerogative to eliminate a preparation period.

(2) Even if the "basis" for calculating overload pay is a mandatory subject of bargaining on which an existing practice could not be changed unilaterally, the Examiner did not hold the Association to the appropriate standard for proving the existence of such a practice.

(3) Even if such an unwritten, non-contractual practice had been proven, the Examiner failed to address the District's argument that such unwritten practice had been renounced effective with the end of the 2001-03 agreement; as to the part-time calculation, the District contends that the alleged practices were in conflict with the contract language, and that the District's renunciation of such conflicting practices lawfully took effect at the end of the 2001-03 agreement.

(4) The Association has waived any right to bargain over the impacts of the decision to eliminate a preparation period by failing to offer any proposals on the subject despite knowing of the District's intentions in that regard.

(5) The Association failed to exhaust the grievance procedure, which is a prerequisite for pursuing claims that an employer has changed the status quo during a contract hiatus.

1. The Standard Work Load as a Mandatory Subject of Bargaining.

DODGELAND I affirmed the District's managerial prerogative to decide how to distribute work during a teacher's work day, i.e., how much of the day should be devoted to preparation for instruction and how much should be devoted to working with students directly. In order to ensure the District's flexibility in this regard, DODGELAND I does not require the District to negotiate over a proposal that would *guarantee* two prep periods.

Consonant with the foregoing prerogatives, the District decided to reduce preparation time and add a study hall supervision assignment in the 2003-04 school year. The District concedes that overload pay is a wage-related "impact" of this policy decision. However, the District believes that its right to remove a prep period and add an assignment inherently allowed the District to treat the additional assignment as part of the standard work load rather than as an overload. Thus, while the District was willing to bargain with the Association about whether, when, and how much an overload should be compensated, the District regards such issues as prospective "impacts" of its managerial right to add the seventh period. Accordingly, the District believes it had a right to add the work unilaterally, without compensation, leaving it to the Association to negotiate for any such compensation or other "impacts" of the change.

The flaw in the District's argument is its assumption that the right to substitute additional work for prep time (a permissive subject of bargaining under DODGELAND I) also gave the District a right to treat that additional work as normal work load rather than an

overload, regardless of any prior practice regarding normal work load and overload pay. On the contrary, however, it has long been held that work load is a mandatory subject of bargaining. SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84); SCHOOL DISTRICT OF SHULLSBURG, DEC. NO. 20120-A (WERC, 4/84). In a school context, work load is often expressed in terms of class size, number of different subjects to be taught, or, as here, amount of "student contact" or "assignments." Indeed, it is not possible to craft what the District recognizes to be a mandatorily-bargainable "impact proposal" about loss of prep time without first setting forth a standard or "normal" work load. For example, in DODGELAND I, the Commission held the following language to be a mandatory subject of bargaining:

> The parties agree that the practice set forth below *shall constitute a normal workload*.
>
> | | |
> |---|---|
> | High School | Two preparation periods |
> | Middle School | Two preparation periods |

(Emphasis added). While that proposal characterized a normal work load in terms of number of preparation periods, it could just as well have set forth the number of assignments. Similarly, a District cannot be compelled to bargain over a class size *limit* or guarantee, but would be required to bargain over a proposal that set forth the normal or standard class size (say, 25 students) coupled with a compensation scheme for situations where the District chooses to create larger classes. JANESVILLE, SUPRA; SCHOOL DISTRICT OF FRANKLIN, DEC. NO. 21846 (WERC, 7/84).

Thus, whether these proposals are characterized as "impact proposals" or simply as work load and wage proposals, it is important to recognize that they contain two separate mandatorily-bargainable elements. One element is the "basis" for determining that an overload exists and/or the circumstances in which overload pay will be owed (for example, "more than six periods" or "more than 25 students"). The other element is the amount (if any) that will be paid under those specified circumstances. DODGELAND I established that the District need not bargain over proposals that would prevent it from distributing preparation time as it sees fit. However, DODGELAND I does not curb a union's time-honored right to negotiate workload standards, including what will be considered an overload, as well as what compensation will accompany such an overload. As both these elements are mandatory subjects of bargaining, the District is not free to change them unilaterally – neither the "basis" nor the pay. It follows that the District's prerogative to assign a seventh instructional or supervisory period, as ordained in DODGELAND I, did not mean the District could decide unilaterally that seven assignments would no longer be an overload for purposes of triggering overload pay.

The District suggests that, since two preparation periods had always been guaranteed, a seventh assignment by definition would have been voluntary and hence not an "overload" in the same sense as would be true now that preparation periods are at the discretion of

management. Thus, as we understand the District's argument, a practice could not have been established regarding overload pay for an *involuntary* seventh assignment. "Even if a practice is established, the practice may be discontinued by either party when the underlying basis for the practice has changed." District Position Statement at 3.

We find this argument unpersuasive. First, we see no analytical relevance to the fact that the norm or basis was developed initially in the context of a prep time guarantee. As DODGELAND I confirmed, the amount of prep time has always been a contingency within the District's control. The fact that the District chose to maintain the guarantee for many years serves to reinforce rather than undermine the mutuality in the resulting six-assignment norm. Indeed, the District chose to maintain the six assignment/two prep norm for a year and half beyond the date of the DODGELAND I decision, including paying overload pay to teachers who had assignments beyond six.

Second, as the Association notes, the prep time guarantee is not the kind of uncontrollable or unrelated circumstance that, if changed, would automatically or inherently affect what has traditionally been treated as the normal work load. One could envision a change that might have such an inherent effect, such as a change in the number of minutes in a period. That kind of change would inherently alter the assumptions of how much work is involved in each period and require a recalculation of the standard work load. In contrast, the amount of prep time could have been changed without simultaneously changing the expectation that more than six periods is an overload.

Understandably the District might prefer to refrain from adding a seventh assignment if doing so would trigger overload pay. In this case, the District clearly would have paid more for the study hall coverage if it had treated those assignments as overloads, requiring an additional 1/6 salary, than if the District had continued to use aides to cover the study halls. Nonetheless, the decision to add a seventh assignment did not inherently prevent a seventh period from being treated as an overload nor inherently preclude overload pay.

In general, therefore, if a practice prevailed in the District such that six assignments was the normal or standard work load for the purpose of calculating wages, then exceeding such a practice without increasing wages is a mandatory subject of bargaining that could not be changed unilaterally. We turn then to the District's contention that no such practice was established.

2. Is the Record Sufficient to Establish a Status Quo in September 2003, such that Six Assignments was the Normal Work Load and that a Seventh Assignment Triggered 1/6 Overload Pay?

As noted above, one element of a successful unilateral change complaint is to establish what the status quo is regarding a mandatory subject of bargaining at the time of the alleged change. In this case, the questions are: what, if anything, was the standard work load in

terms of assignments in August 2003; what, if anything, was the standard practice in terms of overload pay if that standard work load was exceeded; and what, if anything, was the standard/basis on which a part-time teacher's salary was calculated?

The existence and nature of the status quo on any given issue are quintessentially questions of fact. It is clear from the findings of fact, summarized above and detailed in the accompanying footnotes, that we, like the Examiner, have found the record sufficient to establish an existing practice on each of these subjects. The District's chief argument to the contrary is that the Examiner did not hold the Association to the proper standard in evaluating the evidence. Relying upon contract arbitration authorities, the District contends that the evidence establishing a practice of overload pay for a seventh assignment, and pro-rating part-time teachers' pay based upon a six-period assignment, was not sufficiently "clear," "mutual," "frequent," or "longstanding" to qualify as a "binding" past practice. The District argues that, in order to deter forum shopping, the evidentiary standards for what comprises a practice should be the same for purposes of status quo as for contract arbitration.

We do not agree that the quantum of evidence for proving that a past practice has become contractually binding necessarily should be the same as that which is necessary to show what an existing practice is for purposes of maintaining the status quo while parties are bargaining for a new contract. The two "past practice" concepts flow from and result in different legal duties, as explained at some length in SUN PRAIRIE, SUPRA. It may be appropriate to utilize a relatively high standard for proving that an unwritten practice has become so enduring and pronounced that it is enforceable as a contract. There is a difference, in other words, between a practice that is contractually "binding" and a practice that simply exists, since, by definition, the former has become more than "a mere nonbinding way of doing things." (Dist. Br. in Support of Petition for Review at 32, quoting LABOR AND EMPLOYMENT ARBITRATION, SEC. 10.01). Nor do we share the District's concern that forum shopping will result if we use a different standard for determining the status quo than might be used to determine whether a contractually binding practice exists. A claim that the contract has been violated is simply not the same as a prohibited practice claim alleging a violation of the duty to bargain. The forums and the available remedies are different in arbitration as compared with a prohibited practice proceeding.[11]

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[11] The District notes that the Commission itself frequently refers to arbitration authorities, such as ELKOURI & ELKOURI, HOW ARBITRATION WORKS (6TH ED., BNA, 2003), to support its reasoning in decisions. Hence, argues the District, the Commission should not penalize the District for relying upon the "current state of arbitration law as it relates to terminating a past practice that is neither inconsistent with nor written as part of the contract." (Dist. Post-Oral Argument Brief at 10). The Commission often cites arbitration authorities when an issue involves contract principles. However, as discussed above, contract principles do not necessarily coincide with duty-to-bargain principles. Regarding the right to renounce unwritten practices as a matter of contract, we agree with the District that arbitrators generally permit renunciation effective with the termination of the contract. In arbitral precedent, however, "termination of the contract" is generally and implicitly coterminous with the beginning of a successor contract. Arbitrators rarely confront the issue presented here (the bargaining obligation during a hiatus), because arbitral jurisdiction is exclusively contractual. Hence, they are rarely if ever in a position to consider issues that arise when no contract is in effect. Thus, hiatus situations, like the present one,

Thus, whatever the appropriate standard may be for evidencing a contractually binding practice, we have little trouble discerning what the status quo was (that is, what was actually occurring) in the District prior to the 2003-04 school year, as set forth in the Facts, above. As the District argues, it may very well have believed that it had a right to eliminate a prep period and concomitantly add a seventh assignment without overload pay, and the District may very well have articulated this belief to the Association from time to time. However, there is no evidence the Association agreed with the District's view of its rights. The District's belief as to its legal rights cannot be the standard for determining the existence of a practice, but rather the objective facts about what actions have actually been taken.

In this case, there is little question that what was actually occurring regarding work load prior to 2003-04 is that the standard work load was six assignments and two preparation periods out of an eight-period day. It is slightly less clear that teachers who were given a seventh assignment prior to 2003-04 were paid 1/6 overload pay, as discussed in the Facts, above, because overloads had been voluntary and hence infrequent. A practice that occurs infrequently but is handled consistently can be sufficiently clear to create a status quo. For example, if an employer has consistently granted travel time in connection with funeral leave, but such a situation has arisen only occasionally over the years, the expectation that leave will be available for funeral-related travel may very well have become the status quo for purposes of the duty to bargain.

Accordingly, as we see it, the nature of the status quo prior to 2003-04 is relatively straightforward. It was six assignments, which could include both instructional and non-instructional assignments, including study halls. DODGELAND I determined that the District could not be compelled to *guarantee* two prep periods. The District therefore had a managerial prerogative to eliminate a prep period and add a seventh assignment. However, when the District exercised that right, the seventh period was still an overload from the standpoint of past practice and status quo. As Superintendent Reed forthrightly testified, when the District eliminated overload pay for the seventh assignment, the District changed the "basis" for determining what an overload was. Since this change affected a mandatory subject of bargaining and was imposed unilaterally, it was unlawful.

Similarly, prior to 2003-04 there is no real dispute that the District had pro-rated its part-time teachers' salaries based upon the proportion of their assignments to a six-assignment norm (or elementary school equivalent). Again, as Superintendent Reed acknowledged, in 2003-04 the District changed the "basis" against which the part-time teachers' assignments were measured, from six to seven. As discussed above, the basis or norm is itself a mandatory subject of bargaining which could not be changed unilaterally during a contract hiatus.

Finally, as the District acknowledges, the amount of overload pay was also a mandatory subject of bargaining. As discussed in the Facts, above, we have concluded that a practice and

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involve bargaining rather than contract principles.

expectation existed regarding overload pay, i.e., that it would be 1/6 of annualized base salary. This also could not be changed unilaterally during a hiatus.

3. The Effect of the District's Renunciation of Prior Practices Regarding Overload and Part-time Pro-ration.

A. The Six-Assignment Workload and Overload Pay.

The District contends that, even if a six-assignment work load practice existed, the six-assignment "basis" was unwritten and not addressed in the contract. Hence, the District contends it could lawfully renounce such practices during the hiatus, effective immediately.

In SUN PRAIRIE, SUPRA, the Commission unanimously held, consonant with its much earlier decision in CITY OF STEVENS POINT, SUPRA, that contract principles generally would permit a party to disavow unwritten practices that *conflict with* contract language. The Commission further unanimously held in SUN PRAIRIE that proper notice of such disavowal puts the onus on the other party to negotiate an amendment to the contract if it wishes to preserve the prior practice. Where, as here, the disavowed practice does not conflict with contract language, but is simply not addressed in the contract, a more difficult question arises about the circumstances and the time in which a party may effectively renounce such a practice, and about which party should bear the onus of securing contract language in the successor agreement.

Upon reflection (and the Association has not argued otherwise), we think it appropriate to permit renunciation of practices not addressed in the contract and to place the burden of securing contract language upon the party who wishes to continue the practice. This is so because, as the District points out, absent such a rule, an unwritten practice would carry the same legal effect as a written agreement on a subject, thus obliterating the significant line between the status quo and a collective bargaining agreement – a line emphasized in SUN PRAIRIE. Similarly, if a party cannot disavow a practice without the other party's agreement, then the practice is just as binding as an agreement, which would undermine the importance the law places upon reducing agreements to writing (Sec. 111.70(3)(a)4, Stats.) and create uncertainty about the nature of the parties' contractual commitments. Accordingly, sound policies compel the conclusion that a party may disavow practices on mandatory subjects of bargaining that are not addressed in a collective bargaining agreement, so long as that renunciation is accompanied by clear, proper, and timely notice – generally at or near the outset of negotiations for the successor agreement. Such a proper renunciation would place the onus on the other party to negotiate language if it wishes to preserve the practice.[12]

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[12] It is important to note that this principle has no bearing upon the quite different and extremely common question of whether the parties' practices in implementing contractual provisions may shed light upon the proper interpretation of those provisions. In those situations, the practice aids in discerning the parties' mutual intent regarding the meaning of contract language, but it is the contract language (as interpreted through practice) that is being enforced. While this most commonly occurs during grievance arbitration, the Commission may also rely upon past practice as an aid in construing contact language for purposes of determining the status quo during a hiatus. The contract provision, as so construed, is the status quo. See, e.g., ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93), AFF'D, ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS. 2D 671 (CT. APP. 1994) (holding that a sick leave provision in expired contract, as interpreted through past practice, required

As explained in SUN PRAIRIE, disavowal of unwritten practices must be accompanied by an opportunity to bargain in good faith over the subject. In turn, it is well-established, for reasons set forth in the Introduction, above, that the duty to bargain in good faith is accompanied by a duty to maintain the status quo on mandatory subjects of bargaining until bargaining is completed. Under MERA, bargaining is not completed and the status quo may not be changed until a successor agreement is finalized, even if the parties have tentatively agreed upon a particular subject during the interest arbitration process. CITY OF BROOKFIELD, SUPRA; GREEN COUNTY, SUPRA; OZAUKEE COUNTY, SUPRA. Accordingly, as the Commission held in SUN PRAIRIE (Commissioner Gordon dissenting), the duty to bargain in good faith prohibits changing the status quo during a contract hiatus on any mandatory subject of bargaining, whether or not the status quo coincides with the language in the expired contract.

The District notes its disagreement with the SUN PRAIRIE holding, but also attempts to distinguish SUN PRAIRIE on the ground that that case (like STEVENS POINT) involved contract language that conflicted with a practice, whereas the overload practice at issue here was simply not addressed in the contract at all. However, it seems clear that pre-existing contract language would make renunciation of a conflicting practice easier, not more difficult, since in the former situation the parties have actually agreed upon a written provision regarding the subject. In SUN PRAIRIE, the contract language was asserted as a defense, one that would not be available in the absence of contract language. If renunciation of an unwritten practice that conflicts with contract language cannot lawfully take effect until bargaining is completed, then a fortiori an employer may not lawfully depart from an unwritten practice on which the parties have never reached a contract.[13] Accordingly, for the same reasons articulated in SUN PRAIRIE, we hold that disavowal of unwritten practices not addressed in the contract cannot take effect until a successor agreement is reached.

In this case, therefore, the District was entitled to disavow the unwritten practice of maintaining a six-assignment standard work load and the unwritten practice of paying 1/6 overload pay for assignments beyond six. However, despite that disavowal, the District could not lawfully terminate such practices pending exhaustion of its bargaining obligation – that is, during a hiatus, until good faith bargaining has been completed and a successor agreement is executed.

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the employer to permit employees to use sick leave in one hour increments). The instant decision does not address practices of this nature.

[13] The District also cites OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94) in support of its right to depart from an unwritten practice during a contract hiatus. The Commission in OUTAGAMIE COUNTY was faced with a question similar to that in SUN PRAIRIE, i.e., whether it was the practice or the contract language that established the status quo during a hiatus, when they conflicted with each other. In OUTAGAMIE COUNTY, where the practice had been of very short duration and possibly inadvertent, the Commission concluded the practice was the contract language rather than the practice. Thus the Commission decided that, when the employer reverted to the contract language during the hiatus, this did not "change" the status quo. OUTAGAMIE COUNTY thus provides no guidance in the instant situation, where there is no contract language arguably establishing the status quo, but only an unwritten practice.

B. The Part-time Proration Issue

The District's argument is somewhat different with respect to the part-time pro-ration issue. The District contends that basing part-time salaries upon a ratio of the number of assignments in the part-timer's load compared with the standard six assignments was in conflict with Article III.B.2 of the contract, set forth above at page **9**. The District principally points to an alleged conflict between the contractual directive that "Minutes worked per day will be the basis for calculating the full-time equivalency of part-time teachers," and the practice that was in operation prior to August 2003.

We see no relevant conflict. The pertinent issue in this case is whether the District had a practice of pro-rating part-time teachers' salaries in accordance with how their work loads compared with the normal full time work load of six assignments (or the elementary school equivalent). As discussed above, it is clear that this was the practice, although there may have been incidental anomalies. Article III.B.2 appears to require that part-timers be pro-rated according to the work load of full time teachers, but it does not specify what is meant by the term "work load of full time teachers." We have found that, prior to August 2003, the practice was that the "work load of full time teachers" was six assignments/two preparation periods or the elementary school equivalent. When and if the full time teacher work load is lawfully changed, then presumably the basis for pro-rating part-time teachers' work loads and salaries will change correspondingly, consistent with Article III.B.2. The Association does not claim otherwise. Accordingly, there is no apparent conflict between the basic pro-rating concept of Article III.B.2 and the status quo that existed prior to August 2003.

As to the reference in Article III.B.2 to "minutes," the District appears to be arguing that its prior practice generally was to use periods rather than minutes in calculating part time teachers' pay and that this prior practice conflicted with the contract language. Since the work day is organized into stable time segments, using minutes rather than periods would not significantly change the ultimate salary calculation. Hence, we do not perceive the practice to vary in any meaningful way from the contract language. Again, the Association does not contend otherwise. Where the District erred was in using a seven-assignment/one prep work load (translated into minutes) as the basis for determining part-time salaries in 2003-04, compared with the six-assignment/two prep work load that had prevailed previously. Accordingly, this case simply does not present an issue similar to that in SUN PRAIRIE about a conflict between contract language and practice regarding treatment of part-time teachers.[14]

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[14] The dissent finds a conflict between the part-time practice and the contract language, suggesting that the contract clearly required the District to change the way it calculated part-time teachers' pay, once the District had unilaterally changed the "basis" or meaning of full time from six to seven periods out of the eight hour work day. If the District had lawfully changed the meaning of "full time," then we would agree that the contract language would require that the part-timers be pro-rated accordingly. Nor does the Association disagree. This is why we have concluded that the practice and the contract language are in harmony. Here, however, the District unlawfully (unilaterally) changed the meaning of "full time." Under the dissent's rationale, the contract would

4. Did the Association Waive its Right to Bargain?

The District forcefully argues that it gave the Association notice in May 2003 that it intended to assign a seventh work period in lieu of a prep period in the upcoming school year and reinforced this notice again in August 2003. The District notes that these communications stated the District's willingness to "comply with any legal obligations associated with the making of such an [sic] assignments." The District contends that the phrase "legal obligations" referred to the District's duty to negotiate over the impacts of its decision to eliminate a prep period. According to the District, the Association's failure to advance any proposals regarding overload pay (or part time pro-ration) in the ongoing negotiations for the successor 2003-05 contract requires the conclusion that the Association has waived its right to bargain over these issues by "inaction."

The Association responds that it did promptly bring the issue to the bargaining table but was deterred by the District's refusal to discuss "the prep time issue" and the District's stated preference to handle the overload and part-time issues in the grievance procedure, since the Association had filed grievances. The Association also argues that the District's action in eliminating the overload pay and changing the basis for calculating part time pay was a fait accompli, thus preempting any true bargaining opportunity as to the successor agreement, under established Commission precedent. Finally, the Association agrees with the Examiner's conclusion that the Association has no duty to bargain over whether the District will maintain the status quo during hiatus; that duty is imposed upon the District by law.

We turn first to the question whether the District has advanced a valid defense to its unilateral change, which was announced in May 2003, clarified in August 2003, and took effect at the beginning of the 2003-04 school year (late August 2003). It is undisputed that there was no contract in effect and that the parties were in a hiatus between collective bargaining agreements when the District implemented the unilateral changes at issue here. The Commission's case law is exceptionally clear on this point. "[A] union need not bargain over discontinuing the *status quo* –i.e., the *status quo* is not subject to waiver and will be deemed relinquished only by express agreement." OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04) at 9, citing, inter alia, VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96) at 21. Clearly there was no "express agreement" in this case from the Association allowing the District during a hiatus to change the basis for determining an overload, the overload pay itself, or the basis for pro-rating part time salaries. Accordingly, the Examiner correctly held that, whether or not the District's notices in May or August were sufficient to inform the Association that the District intended to make these changes and/or was willing to negotiate, the Association was entitled to have the status quo maintained until a successor agreement was reached.

The more difficult issue is whether the Association waived by inaction its right to

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require the District to pro-rate part-time salaries in accordance with an unlawful unilateral change in the full time work load. This does not seem to us a reasonable interpretation.

negotiate over standard work load, overload pay, and part-time salaries for purposes of the successor collective bargaining agreement, which was executed in or about September 2004. The Association responds in two ways. First, the Association correctly notes the longstanding

principle that a union need not pursue bargaining if the unilateral change in question is a fait accompli at the time the union learns of the change. ST. CROIX FALLS SCHOOL DISTRICT, SUPRA. Second, the Association argues that, even if a request to bargain were required, the Association satisfied its obligation by its comments at the bargaining table.

As discussed above, the parties' predecessor collective bargaining agreement does not address or set forth the normal work load for purposes of calculating overload or part-time teacher pay, nor does it specify what and when overload pay will be required. Therefore, as held above, the District had a right to disavow and depart from these practices when a successor agreement was executed, provided the District properly notified the Association of its disavowal and complied with its duty to bargain. As also held above, the duty to bargain required the status quo to be maintained until a successor agreement was finalized. The initial question, therefore, is whether the Association had an obligation to request bargaining regarding language for the successor agreement, even though the District had already unlawfully changed the status quo during hiatus. If so, and if the Association were found to have failed to request such bargaining, the District could lawfully implement the changes in or about September 2004, when the successor agreement was finalized. The District's liability for any make-whole relief would end at that point.

On careful consideration, sound policies, as well as traditional labor law principles, lead us to reject the District's argument. As the Association points out, longstanding precedent– epitomized in the U. S. Supreme Court's opinion in NLRB V. KATZ, SUPRA, and followed by the Commission – relieve a union from pursuing negotiations under the disadvantage cast by an employer's unlawful unilateral action on the subject. See discussion in BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/93) at 17-19. In that case, the employer had unilaterally subcontracted work and as a consequence laid off bargaining unit employees. The Court of Appeals, in confirming the Commission's order requiring the employer to reinstate the employees with the back pay as a condition precedent to bargaining, stated, "'a simple bargaining order would require the union to bargain from a disadvantageous position: to bargain on behalf of wrongfully laid off employees who remain uncompensated throughout an indefinite period of negotiation.'" ID. at 17. This principle is colloquially referred to as the fait accompli doctrine.

In theory, the availability of interest arbitration under MERA, which is not available under the National Labor Relations Act, could serve as an antidote to such traditional concerns. Having a neutral forum available for achieving bargaining goals arguably neutralizes the negative effects that an employer's unlawful unilateral changes otherwise has upon the union's negotiating power. Countering that argument, however, is the fact that only a small percentage of negotiations culminate in interest arbitration; by far the majority are resolved through bilateral negotiations. Hence, the debilitating effects on a union's leverage

that flow from unlawful unilateral action are likely to affect the outcome of most negotiations. The QEO law further complicates matters, by making interest arbitration unavailable over economic issues such as the work load, overload, and part-time wage issues here. See DODGELAND I, SUPRA.

Accordingly, on balance the policies underlying the collective bargaining law are better served by requiring an employer that renounces a practice to maintain that practice while negotiations are underway, if it wishes to preserve the right to terminate the practice under the successor agreement. Put another way, an employer that has undermined the bargaining climate by acting unlawfully on a subject during negotiations is estopped from claiming that the union has not properly pursued bargaining on that subject. This result is not only consistent with traditional principles, but offers predictability. Most importantly, this outcome will foster MERA's underlying purpose by encouraging genuine efforts to resolve disputes at the time they arise, through negotiations rather than unilateral action and litigation.

Having reached this result, it is not necessary to decide whether the Association adequately requested negotiations over the District's intended changes in work load, overload pay, and calculation of part-time teacher pay. We note, however, that the Association did not respond by "inaction" when confronted with the District's unilateral changes. The Association immediately, in May 2003, informed the District that it would grieve any such changes. The Association protested the District's right to make the changes during the summer of 2003 and periodically throughout the course of negotiations during the 2003-04 school year. In these circumstances, it would be difficult to conclude that the Association's conduct amounted to a waiver by inaction.

5. Did the Association have a duty to exhaust the grievance procedure?

The District lastly contends that the Association's complaint should be dismissed because the Association failed to exhaust the grievance procedure before resorting to the Commission, citing RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98). Responding to this argument requires a brief journey through the somewhat arcane concepts developed under the Commission's hiatus cases.

The terms and conditions of a contract on mandatory subjects of bargaining usually are part of the status quo after a contract expires. Hence an employer that violates or departs from those terms during a hiatus will thereby have unilaterally changed the status quo in violation of Sec. 111.70(3)(a)4, Stats. While disputes as to the meaning of a contract that arise during the contract term are typically resolved through the contractually bargained dispute resolution mechanism of grievance arbitration, arbitration is not part of the status quo in effect during a contract hiatus because arbitration has long been viewed to be ineluctably contractual in nature. SCHOOL DIST. NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77). Accordingly, during a contract hiatus, when arbitration is not available, it is common for unions to use a unilateral change prohibited practice complaint as a mechanism for challenging

alleged violations of rights contained in the expired contract, as these are usually included in the status quo.

As the District points out, GREENFIELD also held that, unlike arbitration, the bilateral steps in the grievance procedure that precede arbitration remain part of the status quo during a hiatus. This is so because "the grievance procedure itself is the established mechanism for resolving alleged departures from the terms and conditions" set forth in the contract. ID. The Commission in that case reasoned that the bilateral portions of the grievance procedure should be maintained during the hiatus as a negotiating forum for trying to resolve claims that the status quo, in the form of the expired contract's "terms and conditions," had been violated.

In RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98), the Commission built upon the GREENFIELD rationale to hold that, during a hiatus between contracts, a union must exhaust the grievance procedure in the expired contract before the Commission will assert jurisdiction over a unilateral change claim based upon alleged departures from terms and conditions set forth in the expired contract. The Commission stated:

> Reviewing the policy considerations recited in GREENFIELD, we are persuaded that exhaustion of the status quo grievance procedure should be required as a pre-condition to assertion of jurisdiction over duty to bargain complaints which allege a violation of the status quo. ... Thus, as to all complaints filed after the date of this decision, we will not asset jurisdiction over alleged violations of the status quo unless any *applicable* grievance procedure contained in the expired contract has been utilized and exhausted.

ID. at 15. (Emphasis added).

The term "applicable" as used in the RACINE rule is not superfluous. As the instant case itself demonstrates, not every mandatory subject of bargaining will have found expression in any particular collective bargaining agreement. Practices can exist on mandatory subjects of bargaining that have not been negotiated into binding contractual commitments. For that matter, a bargaining obligation can exist on issues that are not addressed in practice or in the contract. An employer is not free to act unilaterally on mandatory subjects of bargaining that are not addressed in a collective bargaining agreement, even if the issue arises mid-contract. CADOTT EDUCATION ASS'N V. WERC, 197 WIS.2D 46 (1995). By the same token, absent mutual acquiescence, the Commission does not defer refusal to bargain/unilateral change allegations to the grievance procedure even mid-contract, if the matter is not addressed in the contract and therefore not likely to be resolved through contractual arbitration. BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83).

Merging these principles into a coherent form, then, the grievance procedure is a mechanism for handling claims that arise under a contract's terms and conditions. Where those terms and conditions do not address a particular subject, the grievance procedure is obviously

not "applicable" within the scope of the RACINE rule. The RACINE case itself involved a unilateral change during a hiatus that was based upon an alleged violation of the terms and conditions contained in the expired contract. Thus, while the language in RACINE is broad, it cannot reasonably be read to apply to situations not covered by the expired contract.

Accordingly, although the Association filed several grievances regarding the overload pay and/or part-time pay issues and pursued those grievances through at least Step 2 of the expired contract's grievance procedure (i.e., the Superintendent level), it is undisputed that these issues were not addressed in the expired contract. The parties' mutual willingness to use the grievance procedure to explore resolution of these matters is laudable. Nonetheless, the grievance procedure was not "applicable" to these issues in the sense that the Association had a duty to exhaust before invoking the Commission's jurisdiction. Having reached that conclusion, there is no need to address the Association's contention that it had adequately exhausted the grievance procedure by submitting the matter to the Board at Step 3.

Remedy

More than 20 years ago, in GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84), the Commission set forth the controlling remedial principles in unilateral change cases:

> The conventional remedy for a unilateral change refusal to bargain includes an order to reinstate the status quo existing prior to the change and to make whole affected employes for losses they experienced by reason of the unlawful conduct. The purposes of reinstatement of the status quo ante is to restore parties to the extent possible to the pre-change conditions in order that they may proceed free of the influences of the unlawful change. In our view the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from that wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations.

This remains the standard remedy. See discussion in WESTERN RACINE SPECIAL EDUCATION ASSOCIATION, DEC. NOS. 31377-C, 31378-C (WERC, 6/06).

The District urges the Commission to impose a limited or solely prospective remedy in this case, because of "the incredibly large financial impact to the District of any remedy requiring one-sixth of a teacher's salary to each teacher in the District beyond the date on which the successor to the 2001-2003 contract was ratified." (Dist. Post-Oral Argument Response Brief at 8). The District also argues that the normal remedy would be "absolutely impractical and fundamentally unfair" because the District "relied in good faith on OUTAGAMIE COUNTY, DEC. NO. 17861-B (WERC, 8/94), previous Examiner decisions, and arbitration authority in terminating any past practice and expressly invited the Association to propose language on the impact of the District's decision." (Dist. Post-Oral Argument Brief at 8). The examiner decisions to which the District refers are GILMAN SCHOOL DISTRICT, DEC. NO. 30442-A (MILLOT 4/03), AFF'D BY OPERATION OF LAW, DEC. NO. 30442-B (WERC,

5/03); and CITY OF MADISON, DEC. NO. 23967-A (CROWLEY, 12/87).

We are not unmoved by the District's financial situation. Ultimately, however, we see no principled basis, one that would not apply to many respondents in similar cases, for departing from the standard remedy. The respondent in BROWN COUNTY, SUPRA, raised a similar protest when faced with substantial back pay as part of the restoration of the status quo ante. The Commission and the Court of Appeals rejected the county's plea, noting that, absent the make whole relief, the order would not "meaningfully restore the conditions in which the parties would have bargained about the decision to subcontract ... ." ID. at 17. As in BROWN COUNTY, while the amount of make-whole liability in the instant case is large, by definition it simply corresponds to the out-of-pocket losses suffered by the bargaining unit members who were affected by the District's unlawful action. Should an employer's liability be relaxed if it terminates a highly-paid individual rather than a minimum wage earner and therefore owes more back pay? The fact that a respondent's unlawful action affects the whole bargaining unit rather than one or two individuals, or that the respondent is relatively impecunious, is an incidental and contingent, not a principled and universal, basis for determining make-whole relief.

As to the District's ostensible reliance on prior Commission case law, we are not persuaded. The District points to the recent decision in SUN PRAIRIE, SUPRA, where the Commission exercised its discretion to limit the relief in a unilateral change case so as to be prospective only. The Commission stated in relevant part:

> In this case, as the Union acknowledged at hearing, it would be difficult to determine what, if any, make-whole relief would be appropriate to remedy the unilateral departure from the summer bump meeting procedures. Moreover, given the state of the Commission's prior case law, and in particular the broad dicta in OUTAGAMIE COUNTY, the District in this case had a substantial basis for concluding that it would be lawful to renounce prior inconsistent practices and implement that renunciation at the conclusion of the predecessor collective bargaining agreement, rather than waiting until the successor negotiations had concluded. For these reasons, we think it appropriate and sufficient to limit the relief in this case to that which is prospective in nature, i.e., a cease and desist order.

Neither of the two grounds on which the Commission relied in SUN PRAIRIE apply to the instant matter. The make-whole relief is relatively easy to calculate here, and, contrary to the District's assertion, no prior Commission case law held or contained language suggesting that the District could unilaterally cancel an existing, unwritten practice on a mandatory subject of bargaining during a hiatus period.

As discussed in footnote 15, above, OUTAGAMIE COUNTY, like SUN PRAIRIE, involved the considerably more difficult question of whether contract language in an expired contract should constitute the status quo after expiration, as opposed to a clear – and clearly conflicting – practice. As explained in SUN PRAIRIE, OUTAGAMIE COUNTY contained language

that, on its face, appeared to state a general rule that the contract language should prevail over the conflicting practice. Thus the respondent in SUN PRAIRIE reasonably could have relied on specific language in a fairly recent case. This unusual factor, *coupled with* the difficulty of restoring the status quo ante, led the Commission in SUN PRAIRIE to order an equitable departure from the standard remedy.

The District has cited no Commission decisions, but rather two unreviewed examiner decisions, that purportedly contain language or holdings analogous to what OUTAGAMIE COUNTY provided in the SUN PRAIRIE situation. These decisions are also unavailing. First, contrary to the District's assertion, it is well-settled that the Commission is not bound by examiner decisions that have not been reviewed, but merely affirmed by operation of Sec. 111.07(5), Stats. See, e.g., CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). This rule is crucial to the effective operation of the Commission and to the parties within its jurisdiction, as well. The Commission's resources would be overwhelmed if the Commission were bound precedentially by every examiner decision, whether or not review was sought. A large portion of examiner decisions are not appealed. If the District's interpretation of Sec. 111.07(5) were correct, the agency would have to review in depth every record and the rationale of every decision within twenty days after an examiner issued it. Just as importantly, where even minor disagreements exist between the Commission's views and the examiner's, the agency would have to prepare and issue decisions that would affect all of the agency's constituents, although the parties to the particular case were satisfied with the outcome. In addition to hampering the agency's service to all its customers, such a rule would compel parties to continue litigating cases they found satisfactorily resolved, and then to apply the results of such potentially tepid litigation to all parties within the agency's jurisdiction. This seems unwise and unwarranted.

Second, and perhaps more to the point, neither examiner decision reasonably supports the District's position here. Like OUTAGAMIE COUNTY, both examiner decisions involved a practice that ostensibly conflicted with contract language; indeed, in the GILMAN SCHOOL DISTRICT case, the examiner cited OUTAGAMIE COUNTY in support of her conclusion. Since OUTAGAMIE COUNTY – a Commission decision – does not avail the District here, then neither, perforce, does the examiner decision in GILMAN that relied upon OUTAGAMIE COUNTY.

The CITY OF MADISON decision is even less supportive of the District's argument. In that case, the contract contained clear language regarding how time off should be scheduled, but a long practice had developed that conflicted with the clear language. The public employer renounced the conflicting practice at the conclusion of one contract and instead in the successor contract reverted to the existing contract language. The union brought a unilateral change complaint to the Commission, contending that the practice had become part of the contract and that it was up to the employer, rather than the union, to obtain a change in language. Since the issue arose under a successor agreement, not during a hiatus, it is simply not on point in the

instant situation. The conclusion we have reached in the instant case is actually consistent with the conclusion the examiner reached in CITY OF MADISON – i.e., the employer may renounce a practice that is not addressed in the contract or in conflict with the contract, effective with the successor agreement.

We do not doubt that the District may have believed its actions were lawful. However, that does not distinguish the District from the vast majority of respondents who are held liable for prohibited practices. Like the District's financial situation and the amount of make-whole relief, the District's good faith but mistaken beliefs about its rights do not afford a principled basis on which to depart from the Commission's standard remedy.

We also recognize that, if the District had proceeded lawfully and negotiated with the Association before unilaterally implementing these changes, the Association may well have been persuaded to treat study halls differently than instructional assignments for purposes of overload pay, or otherwise to accommodate the District's practical concerns. Such concerns may still be addressed to the Association in light of the bargaining order that accompanies the make-whole relief. To facilitate any such bilateral efforts, we have included a caveat in the make whole portion of the Order that expressly recognizes that the parties may mutually agree to modify the monetary relief afforded.

Dated at Madison, Wisconsin, this 14th day of February, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Dissent and Concurrence of Commissioner Paul Gordon

I dissent from that portion of the majority opinion which finds the District violated the status quo by making changes to the way the part-time teachers were paid during the contract hiatus. There indeed was a practice whereby part-time teachers were paid based on the fractional proportion a full-time teacher six period workload. However, in my opinion, this practice was in conflict with clear contract language in Article III. B. 2 and Article VIII requiring that part-time teachers be paid based on minutes worked per day as compared to minutes worked by full-time teachers. It is further my view that the District properly repudiated that conflicting practice with clear notice to the DEA15 and that the repudiation took effect upon the giving of such notice. Thus, the status quo the District was thereafter obligated to maintain was defined by the language of the expired contract. Because the District paid part-time teachers thereafter in conformance with the expired contract language, the District did not violate its obligation to maintain the dynamic status quo during the contract hiatus.

Because I view the part-time teacher pay issue as presenting a conflict between clear contract language and a long-standing practice, my difference with the Majority opinion as to when the repudiation of a practice takes effect is the same as in SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-B (WERC, 3/06). The policy differences underlying this difference of opinion are more fully set out in SUN PRAIRIE, but, reduced to their essence, compare stability of the bargaining relationship with reliance on bargained for contract language. Our decision in SUN PRAIRIE is on review in the Wisconsin Court system as of this writing and the point is, thus, unsettled law. For that reason I dissent in this case.

As noted above, the practice had been for part-time teachers to be paid proportionately to full-time teachers with six teaching or supervision assignments being considered full-time. For example, a part-time teacher with three such assignments would be paid half, or 50%, of a full-time teacher's base salary. When the District repudiated the practice there is no question that a part-time teacher was then, like full-time teachers, paid less, as full-time teachers were then assigned seven such periods for the same pay. This is more work for the same or even

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15 This ability to repudiate a practice during a hiatus with proper notice prior to reaching agreement on a successor agreement brings into issue whether the notice from the District was sufficient when it advised the DEA that it was repudiating any practice of paying for an overload assignment for full-time teachers, and, as to part-time teachers would follow the contract language found in Article III. B. 2. The Examiner found the notice was defective because did not make it clear that the method of calculating pay would be changed. The Majority opinion determines that resolution of this repudiation issue is not necessary because any such repudiation cannot take effect during a hiatus. Because I view repudiation as taking effect during a contract hiatus, a finding of the effectiveness or clarity of notice to so repudiate is relevant. Contrary to the Examiner, given the nature of the correspondence and memoranda between the parties over a period of several years, including specific reference to not paying for an overload and following the contract language when compensating part-time teachers ,I find that there was sufficient notice from the District to the Association that a past practice of paying a part –time teacher based on six contact periods for a full-time teacher was being repudiated.

less pay for full-time and part-time teachers. For full-time teachers, this reduction in pay violates the status quo because the status quo was defined only by the past practice. There was no applicable contract language. For part-time teachers, I conclude this reduction in pay does not violate the status quo because there is clear contract language which requires the pay reduction once the practice was properly repudiated.

The applicable contract language has been in the collective bargaining agreements since the 1992-995 contract in substantially the same form, and consists of several pertinent subsections, as follows:

. . .

III. SALARY SCHEDULES FOR TEACHING EMPLOYEES

B. Teaching Personnel

2. Part-time teachers shall be paid an amount based on the percentage of teaching time and supervision time assigned compared to the teaching time and supervision time assigned to a full-time teacher at the same teaching level and at the same building. Part-time teachers shall also be assigned to a proportionate share of preparation time and time teachers are to be present before and after the regular school day. Minutes worked per day will be the basis for calculating the full-time equivalency of part-time teachers.

. . .

VIII. SCHOOL DAY, TERM, AND HOURS

. . .

B. The length of the regularly scheduled work day shall not exceed eight (8) consecutive hours, inclusive of a duty-free lunch. This provision is not intended to discontinue any practices in effect December 10, 1992, which extend the work day beyond eight (8) hours. Teachers are to be present at their respective buildings 30 minutes prior to the first class of the regular school day, and will be available in their respective buildings 30 minutes after student dismissal at the end of the day, except that teachers may leave immediately after the last class on days preceding a non-student contact day. Adjustments/variations to the above time(s) before and after school may be made with the mutual consent of the administration and the building faculty.

. . .

F. Half Days

Any reference to "half day" in the Master Contract shall mean four (4) periods of an eight (8) period day.

G. School Hours
Any reference to "hours" in the Master Contract shall mean sixty (60) minutes.

The above contract provisions existed in a context of an eight period day at the middle and high school, with full-time teachers at their respective buildings for eight hours from 7:30 a.m. to 3:30 p.m.

When the practice of paying an overload payment to full-time teachers for more that six teaching or supervisory assignments was discontinued by the District, I conclude that part-time teachers were thereafter paid in accordance with the above contract provisions. In my view, the contract provisions required part-time teacher pay to be calculated using the eight hour work day of a full-time teacher without regard to the number of teaching or supervision periods. After repudiating the practice, the District calculated the number of "contact minutes" for a full-time teacher using eight hours per day, five days per week (Friday after school 30 minutes excepted per Article III. B. 2., above), and total minutes per week, given 60 minutes per hour. The District then calculated the percentage of a full-time day worked by a part-time teacher and then determined the part-time teacher's pay using the full-time teacher salary.

The DEA argued, without specific example, that the above quoted contract provisions are ambiguous. I disagree. Indeed, after the District changed the assignments, the DEA used a very similar computation (Transcript, pp. 52 – 58, District Exhibit 24, p. 4), to garner an increase in payment for a part-time teacher to settle a grievance. This is evidence that the DEA understood the contract language in the same manner as did the District. Further, it is noted that Article VIII F. uses a half day to mean four periods of an eight period day. This is entirely consistent with my interpretation of the contract language as requiring part-time pay calculations to be based on a percentage of the entire eight period day rather than using six periods as the measure of a full-time workload. In my view, Article VIII. F. would be rendered meaningless if 50% pay were based on a six period rather than of an eight period day. The contract language in Article III. B. 2. is not ambiguous. It is clear. The last sentence specifically requires using minutes - as opposed to number of teaching/supervisory assignments - as the basis for determining the percentage of work time, and the first sentence is also expressed in terms of time – again, as opposed to number of teaching/supervisory assignments. These are specific uses of time and minutes to determine percentage. Whether interpreting contract language under arbitral principles, or statutory provisions (in this case for purposes of determining the dynamic status quo) the principle of the specific controlling the general applies. Article III. B. 2. is a clear contract provision clearly in conflict with the prior past practice.

Because the practice of paying part-time teachers on the basis of a six contact period assignment was contrary to the clear contact language, the District could, in my view, repudiate the past practice effective prior to the parties reaching agreement on a successor agreement. The District may then rely on and follow the status quo as defined by the contract language, as it did here for part-time teacher pay, without violating the dynamic status quo and committing a prohibited practice.

It follows that because there is no status quo violation as to pay for part-time teachers, there should be no remedy ordered as to them.

I concur with the remainder of the Majority opinion.

Dated at Madison, Wisconsin, this 14th day of February, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner