STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 60, AFSCME, AFL-CIO
(SUN PRAIRIE SCHOOL DISTRICT EMPLOYEES UNION), Complainant,

vs.

SUN PRAIRIE AREA SCHOOL DISTRICT, Respondent.

Case 105
No. 64076
MP-4097

Decision No. 31190-A

Appearances:

Laurence S. Rodenstein, Staff Representative, AFSCME Council 40, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appearing on behalf of the Complainant.

Daniel J. Mallin, Staff Counsel, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin 53703 appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 15, 2004, Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC), alleging that the Respondent violated Sec. 111.70(3)(a)4 and 1, Stats., by unilaterally changing a longstanding practice regarding utilization of a summer bump meeting for Special Education Teacher Assistants.

On December 20, 2004, the WERC issued an order designating the undersigned Marshall L. Gratz to serve as examiner in the matter. On the same date the Examiner noticed the matter for hearing on February 24, 2005. The hearing was postponed at the Union's request and rescheduled for March 10, 2005. On March 1, 2005, Respondent filed a motion to defer the dispute pending disposition of a related pending grievance. By ruling issued on March 3, 2005, the Examiner canceled the March 10 hearing to allow the Union sufficient time to respond to the Respondent's motion to defer. The parties thereafter agreed to adjudicate the grievance as a part of the instant complaint case, with Respondent withdrawing its deferral

motion and Complainant withdrawing the grievance. On March 15, 2005, Complainant filed an unsigned and unverified amended complaint. The hearing was ultimately rescheduled to April 18, 2005. On March 30, 2005, Respondent filed its amended answer.

Pursuant to notice, the Examiner conducted hearing in the matter on April 18, 2005, at the WERC office in Madison, Wisconsin. At the hearing, Complainant signed, dated and verified the amended complaint to obviate procedural objections in those regards raised by the Respondent. Following distribution of a transcript of the hearing, the parties submitted briefs and reply briefs the last of which was received by the Examiner on June 18, 2005, marking the close of the hearing.

Based on the record, the Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Local 60, AFSCME, AFL-CIO (Sun Prairie School District Employees Union) (Complainant or Union) is a labor organization with a mailing address of 8033 Excelsior Drive, Madison, WI 53717-1903. At all material times, Laurence Rodenstein has been and is the AFSCME Council 40 Staff Representative serving as chief spokesperson for the Union.

2. The Respondent, Sun Prairie Area School District (Respondent or District), is a municipal employer with a mailing address of 501 South Bird Street, Sun Prairie, Wisconsin 53590. At all material times, the following individuals have been agents of the District: Wisconsin Association of School Boards Staff Counsel Robert Butler, Director of Human Resources Annette Mikula and Executive Director of Student Services Lisa Dawes.

3. For many years, the Union has been the exclusive collective bargaining representative of a bargaining unit of District employees consisting of

> all regular full-time and regular part-time clerical, buildings and grounds employees, assistants: clerical, instructional, playground, special education, health and school nutrition employees . . . but excluding supervisory, professional and confidential employees.

That bargaining unit includes employees employed in the Special Education Teacher Assistant (SETA) classification and several other classifications of teacher assistants, clerical, food service and custodial employees. Julie Ott, Cami Funnell and Leslie Walsh were members of the bargaining unit holding SETA positions during the 2003-04 school year.

4. The Union and District have been parties to a series of collective bargaining agreements covering the bargaining unit noted in Finding of Fact 3, above, including one for which the nominal term was July 1, 2002-June 30, 2004 (2002-04 Agreement). The 2002-04 Agreement provided, in part, as follows:

ARTICLE III

Management Rights

The Board possesses the right to operate the school system and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include but are not limited to, the following:

. . .

B. To hire, promote, transfer, schedule and assign employees in positions with the school system.

. . .

D. To relieve employees from their duties because of lack of work or any other legitimate reason;

E. To maintain efficiency of school system operations;

. . .

H. To determine the kinds and amounts of services to be performed as pertains to school system operations, and the kind of positions and job classifications to perform such services;

. . .

J. To determine the methods, means and personnel by which school system operations are to be conducted;

. . .

ARTICLE VII

Seniority - Job Posting - Filing Vacancies - Layoff - Rehire

. . .

7.01 Seniority . . . .

7.02 Job Posting

Whenever there is a job opening within the bargaining unit caused by a termination, promotion, transfer or creation of new position, the Employer shall within five (5) working days post the vacancy on all bulletin boards used by employees, notify employees who may be absent from the School District because of summer vacation or scheduled vacation periods, if such employee requests notification and provides the District with the appropriate self-addressed, stamped envelope(s), or notify the Union officers in writing that the job is being discontinued. The posting notice shall be dated and list the classification and salary of the position and a general outline of qualifications required of applicants and duties to be performed. The vacancy notice shall be posted five (5) working days and applications are due by 4:30 pm on the fifth day.

A bulletin board (or bulletin boards) will be designated by the Union in each building where all employees would normally see the posting notices. Any notices will be posted on all designated bulletin boards and a copy of the notice will be sent to all Union Stewards. During summer or vacation periods an employee will receive notice of posting by mail if employee furnishes the District Office with a stamped self-addressed envelope.

The District will provide a copy of all job descriptions in effect as of that date to Local 60 Vice Presidents. Local 60 Vice Presidents will be provided with a copy of the updated job description when a job description changes.

7.03 Filling Vacancies

An employee interested in such position shall file a written request by 4:30 p.m. of the fifth day of the posting with the Director of Human Resources. The selection of any applicant to fill the job vacancy shall be made on the basis of skill, ability, and seniority. If the skill and ability of two or more employees is relatively equal, the employee with the greatest district-wide seniority shall be chosen. The qualified senior employee shall be (health assistants are required to have a current active LPN or RN license) given the position within thirty (30) working days of the date of posting. The employee shall have a forty-five (45) working day probationary period in which to prove his/her qualifications for the job. If during such forty-five (45) working day probationary period the selected employee fails to make satisfactory progress to qualify for the new position, he/she shall be returned to his/her former position and selection will be made from the remaining employees who signed the job posting according to the criteria set forth above. The employee at his/her discretion may return to his/her former position, without penalty, within fifteen (15) working days of placement in the new position.

A. Summer School Positions

All summer school positions shall be first offered to the person holding said position during the previous summer. If the employee declines, the job will be posted. The candidate will be selected using the existing criteria in Section 7.03.

B. Summer School Secretary

The Summer School Secretary position shall first be offered to the current summer school administrator's secretary, then shall be offered to the home school secretary, where the summer school programs will be held, then posted district-wide and filled in accordance with Article 7.03.

7.04 Layoff

In the event that it is necessary to discontinue a bargaining unit position, the first employee laid off shall be the last employee hired (least senior) provided that the senior employees are qualified to perform the required work, except that all seasonal and temporary employees in the same employee group (as defined in 6.02 [D]) set for a layoff shall be laid off pursuant to this article prior to any full-time or regular part-time employees being laid off.

Notice - The District will give at least fourteen (14) calendar days notice of layoff. The layoff notice shall specify the effective date of layoff. A copy of this notice will be sent to the vice presidents of the Union. Any employee laid off shall receive such notice in writing.

If an employee whose position is being discontinued or bumped, or is being reduced in hours by at least twenty (20) percent, decides to bump another bargaining unit employee, said employee must first exercise his/her option to bump a junior employee within his/her job classification, provided said employee must first exercise his/her option to bump a junior employee within his/her job classification, provided said bumping employee is qualified to perform the required work. An employee may bump based on the following schedule:

> If the employee is a 1.0 FTE based on a regular schedule of hours, the employee may bump a junior employee in the same classification and assume the employee's position regardless of the number of hours worked by the bumped employee.
>
> If the employee is a .5 to less than 1.0 FTE based on a regular schedule of hours, the employee may bump a junior employee in the same classification and assume the employee's position if that position is less than 1.0 FTE.

If the employee is less than a .5 FTE based on a regular schedule of hours, the employee may bump a junior employee in the same classification and assume the employee's position if that position is .49 FTE or less.

Upon exhaustion of all bumping opportunities within the bumping employee's job classification, then said bumping employee can bump into another job classification following the above procedure, provided he/she is qualified to perform the required work. Any employee bumped shall be sent a written note within twenty-four (24) hours.

Any employee who wishes to bump another employee must notify the Director of Human Resources in writing within five (5) work days of his/her receiving his/her written layoff or bump notice of the position he/she would bump into. Failure to give the aforesaid notice shall be deemed a waiver of all bumping rights. Employees laid off shall retain their seniority with the employer for eighteen (18) months from date of layoff.

From time to time there exist special education students who need one-on-one assistance by specified individuals within the classification of special education assistant. These positions will be considered "exempt" positions. Exempt positions will not be able to bump or to be bumped. The exemption shall expire when the need creating the exemption no longer exists. Following the expiration of the exemption, the employee will be accorded all seniority rights that he/she has accrued.

7.05 Rehire

Employees on layoff with seniority shall be recalled after the exhaustion of all possible job postings in the order of their seniority to vacant positions for which they are qualified prior to the hiring of any new employees. Any recalled employee shall return to work within ten (10) days of recall notice or lose recall status.

. . .

ARTICLE XVII

Amendments and Duration of Agreement

17.01 This agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

> The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

. . .

5. Beginning in or about 1985, and at all times thereafter until the summer of 2004, regardless of whether the number of SETA positions was increasing or decreasing overall, the parties have utilized a special annual bump meeting procedure in the summer whereby employees in the SETA classification as a group were provided with bump meeting packets by which they were invited to the bump meeting, informed about which SETA assignments from the prior school year were being "discontinued or restructured" so as not to be available for the coming school year at all or to be available but reduced in hours, and about which SETA positions were available for the following school year. The employees in the SETA classification were then convened in a meeting and, in inverse seniority order, were offered the opportunity to select any of the available assignments initially listed and any other assignments that became available as a result of the exercise of an employee's exercise of seniority earlier in the meeting. Employees whose positions the District had decided to discontinue or restructure for the following year were also allowed to bump less senior employees during the meeting, subject to limitations based on the number of hours of the assignments involved.

6. The bump meeting procedure originated pursuant to a request by the District that was agreed to by the Union. The procedure has been used every summer until 2004 without any grievance or formal objection being raised by anyone. At no time have the Union and District entered into a written agreement concerning the SETA bump meeting process.

7. At all material times, the filling of non-SETA vacancies in the Union bargaining unit and the filling of SETA vacancies that were not known to exist at the time of the SETA summer bump meeting have been administered in accordance with the posting language in the applicable agreement.

8. The SETA summer bump meeting procedure deviated from the procedures set forth in Secs. 7.02-7.04 of the 2002-04 Agreement in various respects including, but not limited to, the following:

> a. SETA employees attending bump meetings were offered opportunities to obtain SETA assignments that were not posted and hence not made available to non-SETA members of the Union bargaining unit, contrary to the posting requirements of Sec. 7.02.
>
> b. SETA employees attending bump meetings obtained SETA assignments based solely on their seniority without any consideration of skill and ability relative to other members of the Union bargaining unit interested in the assignment, contrary to the requirements of Sec. 7.03.

c. SETA employees whose positions were eliminated or restructured by the District were permitted during the bump meeting to bump other employees without an assessment of the bumping employee's qualifications to perform the work and without the bumping employee submitting a written notice of intent to bump, and SETA employees who were bumped during the bump meeting were not given 5 work days to investigate and consider their bumping options, all contrary to the requirements of Sec. 7.04.

9. In bargaining about a successor to the 2002-04 Agreement, the District put the Union on notice in its initial bargaining proposals exchanged on or about March 30, 2004, as follows: "The District renounces the current practice as it relates to the assignment of special education assistants including having a yearly Local 60 bumping meeting." Later in bargaining, the District revised its position on the subject to propose:

> The District renounces the current practice as it relates to the assignment of special education assistants including having a regular bumping meeting when layoffs/reductions in hours are necessary. The District would propose the following bumping process in its place when layoffs/reductions in hours are to occur:
>
> 1. Special education assistants are assigned to work in a cross-categorical capacity, i.e., any special education assistant can be required to assist with students with cognitive disabilities, learning disabilities and emotional/behavioral disabilities.
>
> 2. The assignment of special education assistants will be on a building level basis.
>
> 3. The deployment of special education assistants will be at the discretion of the building principal once building assignments have been ascertained.

The parties later reached a tentative agreement on the subject, but Rodenstein subsequently advised the District that the tentatively agreed changes were no longer acceptable to the Union. Later, the District offered to delete the third numbered paragraph from the above-quoted language, but the matter remained unresolved. However, the District variously advised the Union during bargaining that, if a voluntary agreement was not reached on the subject, the District intended to conform its conduct in all respects to the requirements of the language of the 2002-04 Agreement. The District also variously advised the Union both in bargaining sessions and at two or more monthly labor-management meetings that it would not be conducting a SETA summer bump meeting in the summer of 2004. (tr.219).

10. The parties ultimately reached a tentative agreement for a 2004-06 agreement (2004-06 Agreement) in December of 2004. That agreement was ratified by the Union

membership on January 26, 2005, and by the District School Board on February 14, 2005. The parties' 2004-06 Agreement carried forward unchanged the 2002-04 Agreement language quoted in Finding of Fact 4, above, and the Union did not ultimately agree to any aspect of any of the District's earlier proposals referenced in Finding of Fact 9, above.

11. The District did not utilize a SETA summer bump meeting procedure in 2004.

12. The District's failure to utilize a SETA summer bump meeting procedure in 2004 did not violate the terms of the 2002-04 Agreement or of the 2004-06 Agreement.

13. Because the parties' SETA summer bump practice violated the terms of the parties' 2002-04 and 2004-06 Agreements in various respects including those noted in Finding of Fact 8, the District's failure to utilize that SETA summer bump meeting procedure in 2004 had the effect of conforming the District's treatment of SETA personnel in various respects to the requirements of the language of the parties' 2002-04 and 2004-06 Agreements. Therefore, although the District's failure to utilize a SETA summer bump procedure in 2004 constituted a unilateral change in the practice that the parties had been following since 1985, that change was consistent with the District's rights under the dynamic status quo and did not constitute a change in the dynamic status quo.

14. The District had fair notice that the matters in issue in this case included not only the District's failure to utilize the bump meeting procedure during the summer of 2004, but also both the adequacy of the District's notice to the Union and bargaining unit of available SETA positions on or about August 15, 2004 and the District's failure, on or about August 15, 2004, to issue to the Union and the affected employees notices of layoff of Ott, Funnell and Walsh.

15. In mid-August of 2004, the District determined that the SETA hours worked by Ott, Funnell and Walsh would be reallocated to other work locations within the District and that there were eight SETA positions (four at 1.0 FTE or more, one at 0.8 FTE, and two at 0.5 FTE) available to be filled for the 2004-05 school year. Contrary to its historical practice under the bump meeting procedure, the District did not distribute to each SETA and to the Union a hard-copy packet of information listing the available positions and the positions that would be affected by the reallocations of hours to other work locations within the District. Rather, the District caused hard copy listings of the eight available SETA positions to be distributed for posting at the individual schools by Union bargaining unit members customarily responsible for posting such documents during the summer. The District also caused hard copies of that listing of available positions to be mailed to Ott, Funnell and Walsh, each of whom was the least senior SETA working in 2003-04 in the schools from which SETA hours were being reallocated to different work locations. The District also caused electronic copies of the listing of available SETA positions to be sent to the three Union Vice Presidents, which copies were retrievable only from District computer equipment. The record does not establish that the District failed to provide a copy of the list of available 2004-05 SETA positions to any member of the Union bargaining unit who had submitted a request and stamped self-addressed

envelope in the manner described in Agreement Sec. 7.02. The Union has not proven by a clear and satisfactory preponderance of the evidence that the District's conduct noted in this Finding of Fact 15 violated its obligations under Sec. 7.02 of the 2002-04 Agreement as regards notifications to bargaining unit members and the Union regarding available SETA positions.

16. In mid-August of 2004, the District initiated telephone communications with Ott, Funnell and Walsh, each of whom was the least senior SETA at her work location, during the course of which those employees were informed that SETA hours would not be available for them at their 2003-04 work location and that they had a right to apply for the eight available SETA positions on the lists that had been mailed to each of the three employees. As a result of the District's telephone communications with those employees, Funnell and Walsh applied for and were granted SETA positions at different work locations, and Ott applied for and was granted a bargaining unit non-SETA playground instructional aide position at the school where she had been employed as a SETA in 2003-04. The District did not issue to the Union or to the affected employees notices of layoff of Ott, Funnell or Walsh, and did not offer those employees an opportunity to exercise bumping rights to which employees receiving a notice of layoff would be entitled under Sec. 7.04 of the 2002-04 and 2004-06 Agreements. Ott's, Funnell's and Walsh's applications for and acceptance of the above-noted available positions render hypothetical and moot the questions of whether the District would have been required by the MERA duty to bargain or by the parties' 2004-06 Agreement to issue layoff notices regarding those employees had they not applied for and been awarded available positions.

CONCLUSIONS OF LAW

1. The District's failure to utilize a SETA summer bump meeting procedure in 2004 did not violate the terms of a collective bargaining agreement and did not constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)5., Stats.

2. The District's failure to utilize a SETA summer bump meeting procedure in 2004 did not constitute a change in the dynamic status quo and did not constitute either a refusal to bargain collectively with the Union or a prohibited practice within the meaning of Secs. 111.70(3)(a)4. or 1., Stats.

3. Neither the principles of fair play nor Commission rule ERC 22.02(2)(c), WIS. ADM CODE, make it inappropriate to determine in this case whether the District violated MERA as regards the adequacy of the District's notice to the Union and bargaining unit of available SETA positions in or about August 15, 2004, or as regards the District's failure to issue to the Union and the affected employees notices of layoff of Ott, Funnell and Walsh in or about August 15, 2004.

4. The record does not establish by the requisite clear and satisfactory preponderance of the evidence that the District's conduct noted in Finding of Fact 15 as

regards notifications to bargaining unit members and the Union about available SETA positions violated the terms of a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats., or constituted a unilateral change refusal to bargain within the meanings of Secs. 111.70(3)(a)4 and 1, Stats.

5. Under MERA, it is not appropriate for the Examiner to address the hypothetical question of whether the District would have been required, by the MERA duty to bargain or the terms of the parties' 2004-06 Agreement, to issue layoff notices to Ott, Funnell and Walsh had those employees not applied for and been awarded available positions in August of 2004.

ORDER

The instant complaint, as amended, is hereby dismissed.

Dated at Shorewood, Wisconsin, this 15th day of September, 2005.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

SUN PRAIRIE AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS

The Union's amended complaint asserts that

> Since, at least, 1985, the Special Education department has conducted, on an annual basis, what the parties call the "Special Ed bumping meeting." Normally, the meeting was conducted at the beginning of the school year. The purpose of this meeting was to expedite the annual bumping process caused by position eliminations and layoffs, as a result of changes in the special education population and their changing and ongoing needs, as well as the filling of new positions and vacancies. These position changes were based on a seniority based selection system.

The amended complaint further alleges that the District, "on or about August 14, 2004, unilaterally implemented its bargaining proposal [quoted in Finding of Fact 9], failing to follow the longstanding practice for filling vacant positions" and thereby committed an unlawful unilateral change refusal to bargain during the contract hiatus and violated Secs 7.02 and 7.04 of the parties' 2004-06 agreement that was settled in December of 2004. For those alleged violations of Secs. 111.70(3)(a)4, 5, and 1 Stats., the amended complaint requests restoration of the status quo ante along with declaratory, cease and desist and make whole relief.

In its amended answer, the District denied committing any of the alleged prohibited practices and requested dismissal of the amended complaint in all respects.

POSITIONS OF THE PARTIES

Union Opening Statement

In its opening statement at the hearing, the Union argued as follows. Beginning in the summer of 2004, after having made the proposals noted in Finding of Fact 9, the District deviated from its longstanding practice of conducting a summer bump meeting involving employees in the SETA classification and replaced it with a procedure that not only violated the longstanding practice, but also variously defeated rights and protections provided by Agreement Secs. 7.02, 7.03 and 7.04.

The new procedure involved leaving telephone messages and electronic messages on District computers the week or two before school began for the affected SETAs, indicating

which jobs the affected SETAs could apply for, and thereby failing to recognize seniority as required by both Agreement Secs. 7.02 and 7.04. The District also changed the substantive meaning of the core job mobility processes and replaced it with a non-reviewable standard in which a building principal only has to consider seniority, along with other factors. With regard to employees whose positions became unavailable, the District failed in 2004 to provide layoff notices as it had done in the past; failed to give the affected employees 14 days notice, and "failed to notify the leadership of Local 60 of what was going on." (tr.14).

As a remedy, the District should be ordered to return to the previous situation where senior employees could post for positions as they became available based on their seniority, with the effect of Secs. 7.02 and 7.03 restored and the bumping and layoff procedure restored. In that regard, the Union added, "We don't need the meeting, but that the same procedure that was utilized for many years be restored to the status quo ante." (tr.14). When asked by the Examiner to clarify whether the Union was requesting make whole relief, the Union responded, "Since make whole relief doesn't cover emotional damage, then the answer is probably no." (tr.15).

Union Initial Brief

In its initial post-hearing brief, the Union argued as follows. The District's elimination of the summer bump meeting procedure constituted both an unlawful unilateral change in mandatory subjects of bargaining during the contract hiatus and violations of the 2004-06 Agreement once it was agreed upon. None of the traditionally-recognized defenses to a unilateral change apply: waiver, necessity, extreme unlawful abusive Union delay of the statutory dispute resolution process. Neither the zipper clause nor the management rights provisions of the Agreement provides a defense, either. The MERA duty to bargain extends to past practices concerning mandatory subjects of bargaining and it prohibits an employer from unilaterally changing a practice that explicates the language of the agreement.

The bump meeting procedure was consistent with and gave effect to essential characteristics of Agreement Secs. 7.02, 7.03 and 7.04. The procedure's use of straight seniority for job assignments was not inconsistent with the relatively equal standard for selection in 7.03 because the parties have historically considered the qualifications of all SETAs to be relatively equal, making seniority alone the applicable Sec. 7.03 standard. Because the bump meeting procedure was utilized in response to the special and frequently changing needs of the District's disabled student population, the procedure's establishment of different procedures for SETAs than for other employees did not improperly or unlawfully discriminate against non-SETA members; and even if it did, the District would not have been entitled to act unilaterally as it did in this case.

Even if the District had the right to discontinue convening a summer bump meeting, it was nonetheless obligated under the status quo and 2004-06 Agreement to fill positions by seniority and to administer bumping by seniority when a position is eliminated. Instead, the District has unilaterally changed the historic definition of position eliminations which triggered

seniority-based bumping; as a result, employees Ott, Funnell and Walsh, whose jobs were no longer available, were not provided the opportunity to bump less senior SETAS, but were limited, instead, to selecting from a list of available positions.

Because none of the affected employees suffered any loss of pay in this case, the traditional remedies for a unilateral change are not sufficient to remedy the emotional trauma imposed on the employees by the District's unlawful actions. The Examiner and Commission should therefore also order enhanced sanctions of a compensatory nature for the loss of job opportunities suffered by the 65 SETAs who were inappropriately denied the opportunity to bid for available positions, and to the three junior employees -- Ott, Walsh and Funnell -- who were denied the right to exercise their seniority to choose whether to bump a less senior employee.

Union Reply Brief

In its reply brief, the Union emphasized the following points. The record establishes that, during the contract hiatus, the District: failed to notify the Union before presenting the list of vacant positions for the 2004-05 school year to certain employees, whereas in the past the District had contacted Union officials prior to the District initiating any SETA position changes; failed to offer position vacancies to all SETAs at the same time, so that all SETAs could exercise their seniority; and failed to offer persons holding positions identified for elimination the right to bump a less senior SETA. By those actions, the District implemented its unilateral renunciation of the parties' longstanding agreed-upon procedure for administering SETAs' rights under Sec. 7.02-7.04 and implemented a procedure of its own, while bargaining continued at the table regarding the District's various proposals for specific alternatives to the established procedures. Such a self-help unilateral change in a mandatory subject, absent waiver or necessity, constitutes a per se refusal to bargain violative of the MERA duty to bargain. An employer's obligation to refrain from such unilateral changes in longstanding past practices has long been recognized.

If an unlawful termination of seniority rights is only addressed by a simple cease and desist order, there is no deterrent effect on other employers who may wish to truncate such non-economic rights during the contract hiatus. To remedy the material damage to the careers of 65 SETAs done by the District's unilateral termination of their seniority rights, the Examiner and Commission must adopt a meaningful remedy which will have the same deterrent effect as make-whole-with-interest remedies have with regard to unilateral changes causing employees to experience economic losses.

District Initial Brief

The District offered no opening statement at the hearing. In its initial brief, the District argued as follows. Fundamental fairness and Commission Rule ERC 22.02(2)(c), WIS. ADM CODE, preclude the Union from relying herein on any claims or proof not pled in the amended complaint. Any amendment of the amended complaint to include additional claims

would require additional hearing to allow the District to submit evidence addressing those additional claims. The only claims pled in the amended complaint are that the District violated the 2002-04 Agreement by failing to hold a June bump meeting for SETAs prior to the expiration of the Agreement on June 30, 2004; that the holding of a bump meeting for SETAs is at least contractually permissible and that an August bump meeting was part of the dynamic status quo following the expiration of the 2002-04 Agreement; or that the District unilaterally implemented the bargaining proposal identified in the amended complaint and that those terms of the proposal constituting mandatory subjects of bargaining were inconsistent with the District's "dynamic status quo" obligations following the expiration of the 2002-04 Agreement.

The amended complaint seeks to preserve what the Union refers to as "seniority rights" that originated in an entirely extra-contractual process: that violates the parties' agreements in several substantial respects, that would severely restrict bargained-for management rights, and that would improperly grant SETAs unbargained and unparalleled rights to the detriment of non-SETA bargaining unit members. It is true that for a period of years the parties implicitly acquiesced in a once-per-year violation of the applicable agreement through the SETA bump meeting procedure, and that as of the end of the summer of 2003, the existing unwritten practice in that regard was that the bump meeting was to be held in June. However, the parties never executed a written amendment to the Agreement creating an exception to the existing Agreement provisions that by their terms apply universally to all bargaining unit job classifications. Because the bump meeting procedure violated the parties written agreements and was never executed in the form of a written supplemental amendment to the Agreement, Agreement Sec. 17.01 clearly provides that the alleged practice was non-binding in all respects.

As of the expiration of the 2002-04 Agreement on June 30, 2004, the District had properly repudiated the practice of holding a SETA bump meeting. The evidence shows that the District posted and filled several August 2004 SETA vacancies according to its standard, contractually sound procedures. The Union has failed to meet its burden of proving by a clear and satisfactory preponderance of the evidence that the District altered the dynamic status quo during the contract hiatus by implementing the bargaining proposal identified in the amended complaint. It is well-settled under existing Commission precedent that, during either the term of an existing collective bargaining agreement or contract hiatus, an employer is entitled to renounce and abrogate a past practice that stands in conflict with its clear contractual rights and duties.

District Reply Brief

In its reply brief, the District emphasized the following points. Agreement Secs. 7.02, 7.03 and 7.04 are universally applicable to all Local 60 bargaining unit job classifications. Article VII created a vacancy filling process expressly premised on bargaining unit-wide access to all bargaining unit vacancies, whereas the bump meeting procedure denied such access to non-SETAs in the bargaining unit. Section 7.04 clearly grants bumping rights in layoff situations that cannot be squared with the contra-contractual bumping process used at the

SETA bump meetings. While SETAs did not receive the same right to self-assign their work in the summer of 2004 that they were granted in prior years, no reasonable interpretation of the Agreement could accommodate the exceptional, intra-classification SETA bump meeting procedure.

What the SETAs did receive in the summer of 2004 was the rights to which they were entitled under the Agreement. The Union's implication in its initial brief that SETAs were deprived of adequate notice of available SETA vacancies during August 2004 is unsubstantiated by the evidence. Contrary to Union contentions in its initial brief, the District had no obligation to provide Ott, Funnell and Walsh the "bumping" rights they would have enjoyed at a bumping meeting when the District determined in August 2004 that there was insufficient work available at their 2003-04 work location. Any Union claim that those three employees should have received standard layoff notices independent of the bump meeting process must also fail because the Union failed to adequately plead, prove and brief such a claim. The Union's request for "enhanced sanctions" beyond restoration of the status quo ante runs contrary to the law and contrary to the Union's opening statement expressly waiving any make-whole relief and compensatory sanctions.

DISCUSSION

Issues for Determination

A threshold question is what issues are ripe for determination in this case. The Union has advanced various arguments to the effect that -- even if the District was not required by agreement or statute to follow the bump meeting procedure, per se -- its various actions and inactions violated the agreements or statute because they were inconsistent with the requirements of Secs. 7.02, 7.03 and 7.04. The District asserts that fundamental fairness precludes consideration of any issues besides whether the District acted unlawfully when it renounced and deviated from the parties' longstanding SETA bump meeting practice. The District raised that issue concerning the scope of the amended complaint for the first time in its initial brief, but it did so prominently -- at pages 1-4 of that brief. The Union's reply brief offered no response on that issue.

Fair play principles require that the Commission avoid "making a finding with respect to a situation that is not in issue." GENERAL ELECTRIC V. WERB, 3 Wis.2d 277, 88 N.W.2d 691 (1958). From the beginning, the District's basic position in this case has been that it had the right to renounce the contra-contractual bump meeting procedure and to conform its conduct, instead, to the requirements of the parties' Agreements. In that regard, the District's amended answer, at para. 21, "Affirmatively asserts that the Respondent's actions conformed to section 7.02 and section 7.04 of the collective bargaining agreement." The question of whether the District conformed its conduct to the requirements of Sections 7.02 and 7.04 was therefore made a matter in issue by the pleadings filed by the parties in this case. The amended complaint specifically refers to District conduct "on or about August 15, 2004" which the record establishes as the time when the District took actions regarding both filling available

positions and dealing with employees whose SETA hours were being reallocated by the District to other work locations. In those contexts, the Examiner finds unpersuasive the District's assertion that it was not put on fair notice that the question of whether the District, in fact, conformed its conduct to the Agreement was in issue in this case. The Examiner therefore rejects the District's fundamental fairness argument.

The Examiner also finds unpersuasive the District's reliance on the requirement of Commission rule ERC 22.02(2)(c), WIS. ADM CODE, that a complaint include a "clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby." Various paragraphs of the amended complaint put the District on adequate notice that its conduct "on or about August 15, 2004" (para. C.8.) in relation to "position eliminations and layoffs" and "filling of vacancies" (para. C.1.) was alleged to have violated both the terms of a collective bargaining agreement (paras. C.9. and D.) and the statutory duty to bargain (para. D.). Especially so where, as here, the District's answer affirmatively asserted that the District had exercised its right to conform its conduct to the requirements of Agreement sections 7.02 and 7.04.

The Examiner therefore concludes that neither the principles of fair play nor Commission rule ERC 22.02(2)(c), WIS. ADM CODE, make it inappropriate to determine in this case whether the District violated MERA as regards the adequacy of the District's notice to the Union and bargaining unit of available SETA positions in or about August 15, 2004, or as regards the District's failure to issue to the Union and the affected employees notices of layoff of Ott, Funnell and Walsh in or about August 15, 2004.

Alleged Violation Of Agreement
By Failure To Follow Bump Meeting Procedure

The record clearly establishes that the disputed SETA summer bump meeting procedure was utilized by the District with the knowledge and acquiescence of the Union every summer from 1985 through 2003. However the record also establishes that by utilizing that procedure, the parties were, in the various respects listed in Finding of Fact 8, making exceptions contrary to the procedures provided for in 2002-04 and 2004-06 Agreement Secs. 7.02-04, without having entered into a written agreement to do so. Thus, the language of Secs. 7.02-04 constitutes a strong and persuasive basis on which to reject the Union's contention that the Agreements required the District to follow the bump meeting procedure in the summer of 2004.

In addition, in both the 2002-04 and 2004-06 Agreements, Sec. 17.01 (quoted in finding of Fact 4) clearly and unmistakably means that unwritten agreements cannot and do not "supersede any [Agreement] provisions."[1] Accordingly, viewing the longstanding practice as

[1] The Union cites Elkouri and Elkouri, *How Arbitration Works*, 646 (BNA, 5.ed, 1996) and FRUEHAUF TRAILER CO., 29 LA 372, 374-5 (Jones, 1957), for the proposition that arbitrators and labor relations agencies narrowly construe zipper clauses such as Sec. 17.01 of the parties' agreements. However, the FRUEHAUF award did not

the parties' unwritten agreement to utilize a SETA summer bump meeting procedure cannot and does not create an enforceable commitment binding on either party to continue to make exceptions violative of the requirements of Secs. 7.02-04 of the parties' Agreements.

It follows that the District's failure to utilize a SETA summer bump meeting procedure in the summer of 2004 could not and did not violate the terms of either of those Agreements.

Alleged Unilateral Change Refusal To Bargain
By Failure To Follow Bump Meeting Procedure

It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. ST. CROIX FALLS SCHOOL DISTRICT V. WERC, 186 WIS.2D 671 (CTAPP, 1994) AFF'G, DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 353 (CTAPP, 1997); VILLAGE OF SAUKVILLE, DEC NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92), AFF'D, MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (CTAPP, 1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (CTAPP, 1994), AFF'G DEC. NO. 26845-B (WERC, 7/94); AND CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84).

It is also well-settled that the language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC NO. 19084-C (WERC, 3/85); AND VILLAGE OF SAUKVILLE, SUPRA, at 5-6.

The record establishes that utilization of a SETA summer bump meeting procedure would have been violative of the language of 2002-04 Agreement Secs. 7.02-04 in the various respects listed in Finding of Fact 8. On that basis alone the District's failure to continue to follow the bump meeting practice in the summer of 2004 was consistent with the District's rights under the dynamic status quo. OUTAGAMIE COUNTY, DEC. NO. 27861-B AT 8-9 AND N.4 (WERC, 8/94)("Where a party has previously bargained a clear right, it is consistent with the dynamic nature of the status quo to conclude said party is entitled to exercise that right during a contract hiatus and repudiate a contrary practice." Id. at 9) citing, CITY OF STEVENS

involve a practice that was violative of specific and express agreement language, and the Elkouri text does not state that agreement language prohibiting unwritten agreements from superseding the express terms of the agreement involved is routinely given no effect. Indeed, the Elkouri text (at 646 and n.72) notes that "a weaker clause stating that 'this contract expresses the entire agreement between the parties' was held to eliminate automatically only those practices that conflicted with the contract's terms," Citing, AMERICAN SEATING CO., 16 LA 115, 116-7 (Whiting, 1951), among other cases.

POINT, DEC. NO. 21646-A (Rubin, 1/85) AFF'D, -B (WERC, 8/85). ACCORD, GILMAN SCHOOL DISTRICT, DEC. NO. 30442-A AT 12-13 (Millot, 4/03), AFF'D BY OPERATION OF LAW, -B (WERC 5/03).

In contrast to those cases, none of the unilateral change in past practice cases cited by the Union involved a practice that was violative of express agreement provisions. Rather, ST. CROIX FALLS SCHOOLS, DEC. NO. 27125-D (WERC, 7/89) involved a practice that filled in where the contract provision of a sick leave benefit was silent, regarding allowable sick leave increments. CITY OF GREEN BAY (POLICE), DEC. NO. 30130-A (Gallagher, 1/02) involved a practice that was not inconsistent with express contractual provisions for shift trading. And CITY OF STEVENS POINT, DEC. NO. 30911-A AT 16-17 (Shaw, 5/05) involved a practice that clarified ambiguous contract language regarding whether the parties are bound by unwritten past practices.

Although the District was deviating from the parties' 1985-2003 practice, it was justified in doing so by the fact that it was thereby conforming its conduct to the requirements of the language of the parties' 2002-04 Agreement. As the Union acknowledges in its initial brief (at 25), this is neither a case in which the parties' utilization of a SETA summer bump meeting procedure reflected their mutual understanding as to the meaning of ambiguous contract language, nor a case in which the parties' utilization of a SETA summer bump meeting procedure reflected their mutual understanding on one or more subjects not specifically addressed by the language of their Agreements.

Furthermore, the record also establishes that Sec. 17.01 of that agreement clearly and unequivocally precludes unwritten agreements from superseding the language of the parties' Agreements and that historical deviations from the agreement language "shall not constitute a precedent in the future enforcement of all its terms and conditions."

In addition, the record establishes that the District made it clear to the Union during the 2004-06 Agreement negotiations that it intended to renounce the bump meeting practice and to conform its conduct to the requirements of the language of Secs. 7.02-04 in the 2002-04 Agreement if the parties did not voluntarily agree to changes in that language.

In sum, when assessed in the above-noted contexts of the language of the parties' expired agreements and the evidence concerning past practice and bargaining history, the District's failure and refusal to utilize a SETA summer bump meeting procedure in the summer of 2004 was consistent with its rights under the dynamic status quo in effect during the hiatus between the June 30, 2004 expiration of the 2002-04 Agreement and the parties' eventual agreement several months later on the terms of a 2004-06 Agreement. The summer bump meeting practice violated the language of the parties' 2002-04 Agreement in various respects. The dynamic status quo therefore entitled the District to conform its conduct to the requirements of the Agreement rather than continue to honor an unwritten agreement reflected in a practice that was violative of the language of the Agreement in the various respects noted in Finding of Fact 8. Therefore, the District's failure to follow the bump meeting procedure in

2004 did not violate the dynamic status quo and did not commit a refusal to bargain violative of Sec. 111.70(3)(a)4, Stats.

Alleged Failure To Give The Union And The Bargaining Unit Employees Adequate Notice Of Available Positions

The evidence clearly establishes that the District did not provide the Union and the SETAs in the bargaining unit the same sort of notice that it had provided as a part of the bump meeting procedure. However, for reasons noted above, the District was not required by statute or agreement to follow that bump meeting procedure in the summer of 2004.

There remains the question of whether the District nonetheless violated the statute or the parties' 2004-06 Agreement by its actions or inactions on or about August 15, 2004, regarding notification to the Union and bargaining unit as to the SETA positions available.

The Union argues that since 1985 the District had been providing written bump meeting packets including notice of available SETA positions and notice of eliminated SETA positions to the Union and to the SETA members of the bargaining unit. In contrast, in August of 2004, the Union argues that the District violated its agreement and MERA duty to bargain obligations regarding notice of available SETA positions by merely leaving electronic messages identifying the available SETA positions for Union Vice Presidents on District computers the week or two before school began (i.e., when SETAs and many other bargaining unit employees would not have been at work) and by mailing notices and leaving phone messages concerning the available SETA positions only to Ott, Funnell and Walsh.

The District asserts that it fulfilled its obligations regarding notice of available SETA positions when it posted the eight SETA vacancies it identified for 2004-05 via the same longstanding bulletin-board posting procedure that it has used for all bargaining unit vacancies other than those historically addressed during the annual SETA bump meeting. The District further argues that it went above and beyond the normal posting procedures by sending an electronic notice of the posting to the Union vice presidents and by sending hard copies via mail to three individual employees (Ott, Funnell and Walsh) who were the least senior SETA at the three work locations from which SETA hours were being reallocated by the District to different locations in the District.

The Examiner is persuaded that the District fulfilled its obligations as regards notification to the Union and the bargaining unit of the eight available SETA positions. Specifically, the record establishes that the District's Human Resources Department created a written posting and sent copies to the individual buildings for physical posting by a member of the Union. The District informed the Union of the available SETA positions by sending an electronic notice of the posting to the Union vice presidents. While the physical postings were distributed during the summer period when school year employees are not ordinarily present at their work locations, the parties have anticipated that problem by means of the Sec. 7.02 provision whereby, "During summer or vacation periods an employee will receive notice of

posting by mail if employee furnishes the District Office with a stamped self-addressed envelope." The Union has not proven by a clear and satisfactory preponderance of the evidence that the District failed to distribute the SETA vacancies notice in the customary manner for posting on the customary bulletin boards used by employees or that the District failed to mail that notice to anyone in the Union bargaining unit who had requested notification and submitted the appropriate self-addressed, stamped envelop. On the contrary, the fact that two non-SETA employees applied for two of the listed SETA vacancies (Tr. 119-21, 227) suggests that at least some Union bargaining unit members had notice of and access to the posting information. Thus, the record supports the conclusion that the SETAs were provided with the notice to which they were entitled, to wit, the opportunity to check the bulletin boards or to submit self-addressed stamped envelopes to assure individualized notice. Finally, the District's various notifications to the Union (as noted in Finding of Fact 9) to the effect that the District was renouncing the bump meeting process and that the District would not be conducting a SETA summer bump meeting in 2004, put the Union on fair notice that no bump meeting packets would be mailed to SETAs or the Union in 2004.

Alleged Failure To Give Ott, Funnell and Walsh
Notice Of Layoff And The Opportunity To Bump Junior Employees

The evidence clearly establishes that the District did not provide Ott, Funnell and Walsh, whose work locations were losing SETA hours to other locations within the District in August of 2004, the same sort of opportunity to bump less senior SETA employees that they would have enjoyed had the District followed the parties' historical bump meeting procedure. However, for reasons noted above, the District was not required by statute or agreement to follow that bump meeting procedure in the summer of 2004.

There remains the question of whether the District violated its obligations under the statute or the parties' 2004-06 Agreement by its failure to give Ott, Funnell and Walsh notice of layoff and the associated right to bump junior employees in August of 2004.

The Union asserts that the District, after determining that the three employees' positions would not be available in 2004-05, directed those three employees to select from among the limited list of then-available positions, thereby violating those employees' Sec. 7.04 rights to formal notice of layoff and the associated right to bump less senior employees.

The District argues that the Sec. 7.04 layoff procedure does not apply where, as here, the overall staffing levels within the SETA classification were going up but three employees' work locations needed to be changed. The District further argues that, even if a change in the employees' work locations were enough "to discontinue a bargaining unit position" within the meaning of Sec. 7.04, the Union has failed to show that the hypothetical changes that would have been made in the three employees' duties would have gone beyond a change in duties fairly within the scope of their job responsibilities so as to constitute a change in a mandatory rather than permissive subject of bargaining. The District also asserts that it was fully within its rights to see how the Sec. 7.03 vacancy-filling process played out before forcing a confrontation on the layoff/reassignment issue.

The Examiner agrees with the District that the question of whether a "standard" layoff (i.e., a layoff not associated with a bump meeting) would have been appropriate for Ott, Funnell or Walsh was mooted when each of those employees applied for and was awarded an available position through the application of Secs. 7.02 and 7.03. Ott applied for and was awarded a non-SETA playground instructional aide position at her 2003-04 work location. Funnell and Walsh each applied for and were awarded SETA positions that had been listed on the SETA vacancies posting document. Those employees, in consultation with their Union representative, could have chosen not to apply for any of the vacancies which would have forced a confrontation on the question of their right to be treated as laid off in the circumstances. However, as the District argues, because each of the three applied for and accepted another available position, "the resolution of the line between layoffs and the District's right to transfer employees and assign duties must wait for another day." District reply brief at 20.

The Union asserts that the District directed the three affected SETAs to select a job from among available positions (citing Ott's testimony at tr.85); whereas the District argues (citing testimony of Mikula at tr.226 and Dawes at tr.118) that the District's communications with the three were merely intended to alert them that the SETA hours that they had been working at their buildings were going to be reallocated to other locations and "that there were eight options out there" that they may wish to apply for. The Examiner concludes that, if Ott's characterization is credited, it would remain true that the employees, with the benefit of advice from the Union, could have chosen not to apply for any of the available positions in order to force a confrontation regarding the layoff/reassignment issue. Because each applied for and was awarded another available position, the Examiner would have to speculate about whether, had they not done so, the District would have given them layoff notices, or involuntarily transferred them and to what duties, or taken some other personnel action. The Examiner finds it inappropriate to render a determination of the parties' rights on so important a matter without a non-hypothetical set of facts.

CONCLUSION

For those reasons, the Examiner has dismissed the amended complaint in its entirety.

Dated at Shorewood, Wisconsin, this 15th day of September, 2005.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

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