STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**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-B

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**Appearances:**

**Laurence S. Rodenstein**, Staff Representative, AFSCME Council 40, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appearing on behalf of Local 60, AFSCME, AFL-CIO (Sun Prairie School District Employees Union).

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

## ORDER ON REVIEW OF EXAMINER'S DECISION

On September 15, 2005, Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law and Order in the captioned matter, concluding that the Respondent Sun Prairie School District (District) had not violated Secs. 111.70(3)(a)4 or 5, Stats., when the District failed to utilize a "summer bump meeting" in 2004 to fill vacancies or otherwise distribute available positions for special education teaching assistants (SETAs). Accordingly, the Examiner dismissed all allegations in the Complaint filed by Complainant Local 60, AFSCME, AFL-CIO (Sun Prairie School District Employees Union) (Union).

On September 27, 2005, the Union filed a timely petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was filed on November 22, 2005, at which time the record was closed.

As explained in the Memorandum that follows, we hold that the Examiner correctly concluded that the District did not violate the collective bargaining agreement and hence did not violate Sec. 111.70(3)(a)5, Stats., by failing to conduct a "summer bump meeting" in 2004. We also agree with the Examiner that, once the District informed the Union that it intended to adhere to the contractual vacancy and layoff language and renounced practices in conflict with its view of the language, and once the parties thereafter reached a successor agreement incorporating the same vacancy and layoff language as existed in the predecessor agreement, the District was under no obligation to continue practices that were directly at odds with the contractual language. We also agree that the practices that occurred during the summer bump meetings as regarding notice and distribution of vacancies and execution of bumping rights were directly at odds with the contractual language in the ways specified by the Examiner. Accordingly, we affirm the Examiner's decision in these respects.

However, contrary to the Examiner, we conclude that the twenty-year practice of holding summer bump meetings, including the manner in which the Union and its SETA members were notified about vacancies and layoffs and given opportunities to bid for assignments by seniority, was part of the status quo which the District could not lawfully change during negotiations for a successor contract. Further we conclude that the manner in which the District handled the elimination of the Ott, Funnell, and Walsh positions/assignments in August 2004 deviated not only from the summer bump meeting procedures but also from the contractual bumping procedures interpreted in light of the parties' longstanding practices. Accordingly, even apart from the summer bump meeting, the District unilaterally altered the status quo regarding SETA bumping rights and breached the collective bargaining agreement, in violation of Secs. 111.70(3)(a)4, 5, and 1, Stats.[1] In these respects we reverse the Examiner's decision.

Since, in terminating the summer bump meeting, the District acted in good faith reliance upon prior Commission precedent suggesting that, during a contract hiatus, an employer could unilaterally cease an existing practice that is at odds with language in the expired agreement, and since Ott, Funnell, and Walsh lost no wages or benefits as a result of the District's actions, the Commission has taken the unusual step of providing only prospective relief.

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[1] As the District points out, the Union has not specifically sought review of the Examiner's conclusion that the District's conduct did not violate the Agreement and thus did not violate Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). Instead, the Union's petition focuses exclusively upon the Examiner's conclusions regarding the unilateral change allegations pursuant to Sec. 111.70(3)(a)4 of MERA. Normally, where the parties have not sought review of an issue, such as this, that is rooted in their local agreement, the Commission would hesitate to revisit the matter. However, as the District itself points out, resolving the contract claims could be important in guiding the parties' future conduct; hence we reached and decided the allegations regarding Sec. 111.70(3)(a)5 of MERA. We affirm the Examiner's conclusion that the District did not violate the Agreement in terminating the summer bump meeting practice, but we reverse the Examiner's conclusion that the District did not violate the Agreement in failing to provide Ott, Funnell, and Walsh layoff notices and bumping rights.

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

## ORDER

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

2. The Examiner's Finding of Fact 8 is modified so that the first sentence reads as follows and the provision below beginning with "The following" is added, and as modified is affirmed:

> 8. The SETA summer bump meeting procedure deviated from the procedures set forth in Sections 7.02-7.04 of the 2002-04 Agreement in the following respects:
>
> . . .
>
> The following elements of the summer bump meeting procedure were neither inconsistent with, nor required by, the language set forth in Sections 7.02-7.04 of the 2002-04 Agreement:
>
> a. Providing written notice of SETA vacancies to the Union and its SETA members in a packet along with notice of layoffs and/or position discontinuances, provided such vacancies were also posted pursuant to Section 7.02 of the Agreement and provided that SETAs who bid for vacancies were not entitled to obtain those vacancies regardless of their own or other applicants' qualifications and the other criteria set forth in Section 7.03 of the Agreement.
>
> b. Holding a meeting during which SETAs could bid on SETA vacancies and SETAs whose positions were being discontinued could exercise their contractual bumping rights, if they chose to forego the 5 day notice otherwise allowed pursuant to Section 7.04 of the Agreement.

3. The Examiner's Finding of Fact 9 is modified to add the following language after "(tr.219)," and as modified is affirmed:

> 9. . . .
>
> However, during at least some of these discussions, District representatives indicated to Union representatives that a bumping meeting would be unnecessary in 2004 because the District expected SETA positions to be stable for the following year. The District did not discuss with the Union how the District intended to handle vacancies if such arose prior to the beginning of the upcoming (2004-05) school year.

4. The Examiner's Findings of Fact 10, 11, and 12 are affirmed.

5. The Examiner's Finding of Fact 13 is set aside and the following Finding of Fact is made:

> 13. Although some of the practices regarding SETA vacancies and layoffs that were implemented as part of the summer bump meeting were inconsistent with the language of the collective bargaining agreement, as set forth in Finding of Fact 8, the parties had utilized those practices in essentially the same form since 1985 and hence those practices were part of the status quo regarding wages, hours, and working conditions that the District was required to maintain while it negotiated with the Union over the terms of a successor agreement.

6. The Examiner's Finding of Fact 14 is affirmed.

7. The Examiner's Findings of Fact 15 and 16 are set aside and the following Findings of Fact are made:

> 15. The language of Section 7.04 of the Agreement, as the parties have implemented that language regarding SETA positions/assignments, requires the District to provide a layoff notice and bumping rights to SETAs whose previous classroom assignment (position) is being discontinued.

16. In mid-August of 2004, the District determined that the SETA positions/assignments held during the previous school year by Ott, Funnell, and Walsh would be discontinued and that there were eight SETA positions 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 elimination of positions/assignments. 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 at their respective school buildings in 2003-04. The District also telephoned Ott, Funnell, and Walsh to inform them about the elimination of their previous position/assignments and about the availability of the vacancies. 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 Section 7.02. 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 non-SETA bargaining unit playground instructional aide position at the school where she had been employed as a SETA in 2003-04.

17. The manner in which the District notified the Union and its SETA bargaining unit members about the eight vacancies, as set forth in Finding of Fact 16, above, was inconsistent with the status quo regarding such practices.

18. The manner in which the District notified Ott, Funnell, and Walsh that their previous assignments/positions were being discontinued as set forth in Finding of Fact 16, above, was inconsistent with both Section 7.04 of the Agreement and the status quo regarding such practices.

8. The Examiner's Conclusion of Law 1 is affirmed.

9. The Examiner's Conclusions of Law 2, 4, and 5 are reversed.

10. The Examiner's Conclusion of Law 3 is renumbered Conclusion of Law 2 and is affirmed.

11. The following Conclusions of Law are made:

3. The District's failure to utilize the SETA summer bump meeting procedures in 2004 for filling SETA vacancies and exercising bumping rights, was a unilateral change in the status quo and as such a refusal to bargain collectively with the Union in violation of Secs. 111.70(3)(a)4 and 1, Stats.

4. The District's conduct as set forth in Finding of Fact 16, above, regarding notification to SETA bargaining unit members and the Union about available SETA positions did not violate the Agreement and therefore did not constitute a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats.

5. By failing to provide Ott, Funnell, and Walsh with layoff notices and bumping rights in August 2004, as set forth in Finding of Fact 16, above, the District acted inconsistently with Section 7.04 of the Agreement as that language has been implemented in practice, which constitutes a unilateral change in the status quo and a refusal to bargain collectively with the Union in violation of Secs. 111.70(3)(a)4 and 1, Stats.

6. By failing to provide Ott, Funnell, and Walsh with layoff notices and bumping rights in August 2004, as set forth in Finding of Fact 16, above, the District violated Section 7.04 of the Agreement as that language has been interpreted and applied in practice, which constitutes a prohibited practice in violation of Secs. 111.70(3)(a)5 and 1, Stats.

12. The Examiner's Order is set aside and the following Order is made:

1. The allegation that the District's failure to utilize a SETA summer bump meeting procedure in 2004 violated the terms of a collective bargaining agreement and constituted a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., is dismissed.

2. The allegation that the District's conduct as set forth in Finding of Fact 16, above, regarding notification to SETA bargaining unit members and the Union about available SETA positions, violated the terms of a collective bargaining agreement and constituted a

prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., is dismissed.

3. The District is ordered to cease and desist from changing the status quo regarding mandatory subjects of bargaining, including practices that have been renounced as in conflict with the terms of the expired collective bargaining agreement, during the hiatus between collective bargaining agreements.

4. The District is ordered to cease and desist from violating the terms of a collective bargaining agreement, by failing to provide layoff notices and bumping rights, in accordance with Section 7.04 of the collective bargaining agreement, when discontinuing SETA assignments, whether or not the discontinuances result in an overall reduction in aggregate SETA hours District-wide.

5. Post the notice attached hereto as "Appendix A" in conspicuous places in the District's buildings where notices to District employees represented by the Union are posted. The Notice shall be signed by a representative of the District and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

6. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order what steps have been taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 31st day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

I concur in part and dissent in part.

Paul Gordon /s/
Paul Gordon, Commissioner

**APPENDIX "A"**

**NOTICE TO ALL EMPLOYEES**

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees represented by Local 60, AFSCME, AFL-CIO (Sun Prairie School District Employees Union) that:

WE WILL NOT violate Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act by changing the status quo regarding mandatory subjects of bargaining during the hiatus between collective bargaining agreements.

WE WILL NOT violate Sections 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act by failing to provide layoff notices and bumping rights in accordance with Section 7.04 of the collective bargaining agreement, when discontinuing SETA assignments.

Dated this _____ day of _____, 2006.

By: _____
SUN PRAIRIE AREA SCHOOL DISTRICT

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

**SUN PRAIRIE AREA SCHOOL DISTRICT**

## MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

### Summary of the Facts

Most of the Examiner's Findings of Fact have been adopted by the Commission except where expressly modified or supplemented in the foregoing Order. The most salient of the factual findings are summarized as follows.

Special Education Teaching Assistants (SETAs)[2] fill one of several job classifications included in the bargaining unit of District employees represented by the Union. SETAs assist teachers in providing various educational services to special education students, generally pursuant to the requirements of the student's Individual Education Plan (IEP). The bargaining unit also includes, among other classifications, cook, regular instructional aide, playground aide, custodian, and clerical employees. The District's need for special education services is considerably more fluid than many of its other services, since special education is more often affected by changes in the student population and alterations in the number and content of IEPs. Hence, the District has historically experienced considerably more flux in the deployment of SETAs than in many other job classifications. However, the contractual vacancy and layoff language contained in Sections 7.02 through 7.05 are the same for all classifications included within the bargaining unit. Because the specific language figures prominently in the outcome of this case, we set forth the relevant contract language in full as follows:

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

[2] We note that the Union prefers the terminology Special Education Assistant and the corresponding acronym "SEA," contending that such is consistent with the prevailing usage in the District. This issue does not affect the disposition of this matter and we have elected to adhere to the Examiner's terminology in this regard.

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

. . .

B. Summer School Secretary

. . .

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 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.

. . .

This language has remained essentially unchanged in material respects since at least 1985.

Beginning in 1985, District management initiated and the Union acquiesced in a system for handling the relatively numerous changes in number and location of SETA positions that accompanied the beginning of a new school year by holding an annual "summer bump meeting." Prior to the meeting, the District prepared and distributed to Union officials and to all members of the bargaining unit currently holding SETA positions a packet of materials, including a list of the previous year's SETA assignments, a list of "Changes in Staffing" for the upcoming school year, specifically identifying as "layoff" the individual SETAs whose positions were being discontinued or reduced in hours, a list of "New/Open Positions" identified by teacher, building, and number of hours, and a copy of Section 7.04 (the layoff provision) of the collective bargaining agreement. At the outset of the meeting, which was held in early August until 2002 and in late June during 2003 and 2004, SETAs in attendance had an opportunity to bid on the "New/Open" positions and were awarded those positions on the basis of seniority. If a SETA whose position was not listed as a "layoff" successfully bid on a new/open position, then his/her previous position would be listed as "new/open." After filling as many as possible of the new/open positions through the seniority bidding process, SETAs whose positions were listed as "layoff" and who had not successfully bid on a new/open position were allowed to bump a less senior SETA, who could then bump another less senior SETA, and so forth, during the meeting. Vacancies that remained unfilled at the conclusion of the meeting were posted and filled pursuant to Sections 7.02 and 7.03 of the Agreement. If, at the conclusion of the meeting, a SETA remained without a position as a

result of layoff or bumping, he or she could exercise bumping rights pursuant to Section 7.04 of the Agreement. These meetings were held and the packets prepared in the same manner whether the aggregate number of SETA positions was expected to increase, decrease, or remain the same.

This consistent twenty-year "summer bump meeting" practice carried obvious practical benefits for both the District and the Union. The District could complete its annual staffing process more efficiently (in terms of time and effort) since SETA vacancies did not require a posting period, the District did not have to accept and consider inside or outside applications for most SETA vacancies, the District did not have to provide individual layoff notices to SETAs whose positions were being discontinued or reduced in hours or wait five days to learn whether a laid off SETA would bump another employee, did not have to wait for that employee to exercise bumping rights in turn, and so forth. The Union and its SETA members gained the significant advantage of selecting open positions strictly by seniority.

The practice also carried obvious disadvantages. As to those SETA vacancies subject to the annual meeting (perhaps the majority of all SETA vacancies over the course of a year), District managers surrendered the contractual measure of discretion to compare skills and ability among interested applicants that is contained in Section 7.03. Given the variety of special education needs and services and the potential variety of applicant backgrounds, this could have affected significantly the District's ability to meet its students' needs. Further, although there is no evidence in this record that any bargaining unit member complained, it is apparent that employees in other classifications within the bargaining unit lost opportunities to apply for the SETA vacancies that were filled in the annual bump meeting. It is also possible that SETAs being laid off or bumped during this annual process may have preferred to have the contractual five day period to consider their bumping options.

Whatever the relative merits of this process, both parties to the collective bargaining relationship (on this record at least) were largely content with it until the spring of 2004 when the parties began negotiations for the successor (2004-06) agreement.[3] On or about March 30, 2004, at the outset of bargaining, the District gave the Union written notice that "The District renounces the current practice as it relates to the assignment of special education assistants including having a yearly Local 60 bumping meeting." District officials also informed the Union orally on at least two occasions that it would not be holding a summer bump meeting in 2004. However, District officials accompanied that information with assertions that they anticipated stability in the SETA work force. Perhaps because of that expressed anticipation, no specific discussions occurred about how the District intended to handle SETA vacancies or position discontinuances that occurred prior to the outset of the upcoming (2004-05) school year.

[3] The record indicates that on one occasion a Union vice-president, in a conversation with a District manager, expressed his (the Union official's) disapproval of the bump meeting process as inconsistent with the collective bargaining agreement.

During those successor negotiations, the District also proposed an alternative "bumping process," in which SETAs would be assigned "on a building level basis" and deployed "at the discretion of the building principal. . . ." After initially reaching an agreement regarding the issue during negotiations, the Union withdrew its acceptance and the parties ultimately (in February 2005) reached a successor agreement (retroactive by its terms to July 1, 2004) that carried forward the language from the predecessor agreement in all material respects.

The 2002-04 Agreement expired on June 30, 2004. In August 2004, while negotiations for a successor agreement were ongoing but before agreement had been reached, the District determined that it had eight SETA vacancies. It also determined that the SETA positions/assignments held during the previous school year by SETAs Ott, Burnell, and Walsh were no longer needed. Consonant with the District's view of its rights under the language of the expired agreement, the District handled the situation as follows. The District sent paper copies of the eight position postings to Union building representatives at the school buildings where the positions would be located for posting. The District also sent the postings through the District e-mail system to two Union vice-presidents and sent hard copies of the postings to Ott, Burnell, and Walsh, each of whom the District had determined to be the least senior SETA at their previously-assigned building, along with a letter informing them that their previous assignments/positions were being eliminated. Finally the District telephoned Ott, Burnell, and Walsh to let them know about the elimination of their previous assignment and to invite them to apply for one or more of the vacancies. Burnell and Walsh each applied for one or more of the vacancies and each was offered and accepted one of those positions. Ott applied for and was offered a bargaining unit position in a different classification, i.e., playground assistant.

## Procedural History

On August 24, 2004, the Union filed a grievance challenging the manner in which the District handled the eight SETA vacancies and the discontinuance of the Ott, Burnell, and Walsh positions as violations of Secs. 7.02, 7.03, and 7.04 of the Agreement. The grievance was not resolved and in or about October 2004, the Union attempted to submit it to grievance arbitration. The District refused to arbitrate the grievance on the ground that the 2002-04 agreement had expired and the parties had not yet completed negotiations for a successor agreement; there being no agreement in effect, the District contended it had no duty to arbitrate. On October 15, 2004, the Union filed the instant prohibited practice Complaint, alleging that essentially the same conduct alleged in its grievance was also an unlawful unilateral change in the status quo during a contract hiatus, in violation of Sec. 111.70(3)(a)4, Stats. While the Complaint was pending before the Commission, the parties resolved their successor (2004-06) Agreement. The Union then renewed its demand for arbitration of the August 24 grievance. On February 28, 2005, the District filed a motion to defer the Complaint to arbitration and, for that purpose, withdrew its procedural objections to arbitrating the grievance. The Union subsequently amended the instant Complaint to add an allegation

that the complained of conduct breached the collective bargaining agreement, in violation of Sec. 111.70(3)(a)5, Stats. Ultimately the parties stipulated that the Commission should decide the merits of both the breach of contract and unilateral change allegations.[4]

## The Examiner's Decision and the Issues on Review

As to whether the District violated the collective bargaining agreement by discontinuing the summer bump meeting, the Examiner found no violation for two reasons: first, the practices at that meeting conflicted in three specific ways with the vacancy and layoff provisions in the contract; second, the agreement itself, in Section 17.01 (quoted in the factual summary above), explicitly precludes practices that are inconsistent with the contract from becoming binding on either party absent an executed written amendment. The Union has not sought review of this conclusion and we have affirmed it. Accordingly, this claim is not addressed as a separate violation in the discussion below, although discussion of how the bump meeting intersected with the collective bargaining agreement is relevant to the Union's argument that the District unilaterally altered the status quo in discontinuing the meeting and is addressed in that context.

As to whether the summer bump meeting practice formed part of the dynamic status quo that the District was required to maintain after the old contract had expired and while the parties were negotiating a new contract, the Examiner concluded that it was not. The Examiner relied upon a prior Commission decision, suggesting that, where a practice conflicted with language in the expired contract, the contract language rather than the practice constituted the status quo. Since the summer bump meeting conflicted with the expired contract in certain ways, the Examiner held that the District acted lawfully in discontinuing the practice. While the Examiner's conclusion was a reasonable application of the prior Commission decision, we have construed that decision narrowly and have reversed his conclusion on this issue. By the same token, since the District reasonably attempted to conform its conduct in this respect to this prior Commission decision, our Order addresses this violation only prospectively. Our determination of this difficult issue is addressed more fully below.

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[4] The stipulated issues submitted to the Examiner referred only to the failure to hold a "summer bump meeting" in 2004 and whether that failure violated the Agreement and/or the status quo. However, the Union ultimately argued that the evidence showed that, even apart from the bump meeting itself, the District's actions in August 2004 had violated the vacancy and layoff language of the Agreement. Before the Examiner, the District contended that this allegation was not properly placed in issue, because it had not been alleged as such in the pleadings nor identified as such at the hearing. The Examiner concluded that the issue was sufficiently integrated with the summer bump meeting issue in the pleadings as to have given the District an adequate opportunity to litigate the matter. Except for a blanket assertion that the District intended to incorporate all of the arguments it made to the Examiner, the District did not specifically address or challenge the Examiner's conclusion on this issue. in either its 24-page initial brief or its six-page reply brief opposing the Union's petition for review. As indicated in our Order, above, we concur in the Examiner's conclusion for the reasons he articulated.

The Examiner also held that the District did not unlawfully change the status quo or violate the agreement by the manner in which the District notified the Union about the eight SETA vacancies in August 2004. We agree that the District's notification complied with the collective bargaining agreement, especially in light of the language in Section 17.01 of that agreement. However, as no agreement was in effect at the time the District took this action, and as this manner of handling SETA vacancies was a departure from the long and consistent practice prevailing in the District, we hold, contrary to the Examiner, that the District did alter the dynamic status quo in this respect.

Finally, the Examiner declined to rule on the Union's allegation that the District had changed the status quo and/or violated the contract by failing to give Ott, Funnel, and Walsh notices of layoff and opportunities to bump less senior SETAs, when the District decided to eliminate the positions those individuals had held in the previous school year. The Examiner believed that the issue of their bumping rights was "mooted" when they chose to apply for and accept other open bargaining unit positions. The District concurs in the Examiner's conclusion about mootness, and also argues that the provision, if construed as the Union construes it, would interfere with the District's managerial prerogatives regarding assignments of job duties and thus be a non-mandatory subject of bargaining. We disagree with the Examiner that the issue is moot and we disagree with the District that the provision is non-mandatory; instead we hold that the District's conduct in this respect violated both the agreement (as interpreted in light of the parties' past practices) and the status quo.

**The Summer Bump Meeting Procedures as Part of the Status Quo**

As noted in the Commission's findings and conclusions, the District had knowingly engaged in a lengthy, mutually acceptable practice of determining SETA assignments for the upcoming school year during a "summer bump meeting," and those practices were in conflict with the language of the contract in certain specific ways. The District unilaterally "renounced" the inconsistent practices and held no summer bump meeting in 2004. The question is whether the District violated the law by so doing. The Examiner held that it did not.

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. The duty to maintain the status quo continues until a successor contract has been finalized, even if the parties have tentatively agreed that certain changes will be included in the successor contract. OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04); GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84).

The duty prevails 1) in a new collective bargaining relationship while the parties negotiate their initial contract, 2) during the term of a collective bargaining agreement, unless the parties have already exhausted their bargaining obligation as shown by language covering the subject or by bargaining history, and 3) after a contract has expired and until a successor agreement is finalized. The instant case presents an example of the last situation, often called a "hiatus" between contracts.

The purpose of this venerable doctrine is to protect the bargaining process from disruption, and the union's representative status from the derogation, that accompanies an employer's preemptive changes in working conditions before negotiations are complete:

> 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 NLRB V. KATZ, 396 U. S. 736 (1962), CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), and GREEN COUNTY, *Supra*. Given this purpose, determining what is the "status quo" and what is a "change" should take into account not only how the union and employer perceive the situation, but also the perceptions and expectations of the "reasonable employee" in the bargaining unit. With these policies in mind, the 20-year mutually-conceived practice at issue becomes a particularly compelling example of a "status quo" that should not be subject to termination by unilateral employer action while bargaining is still proceeding.

Usually, it is relatively easy to determine what the "status quo" is at a given point in time, since, as the Latin phrase itself implies, the question is simply, what is presently true? What are employees currently paid? What schedules do they work? Do they currently have paid holidays? Are they able to transfer into other jobs by seniority? Sometimes the current practice includes regular or automatic changes, as is true, for example, if a salary schedule provides an automatic increase with an additional period of service. In resolving those situations, the Commission has adopted a "dynamic" conception of the status quo, so that regular/periodic changes that have been incorporated into the existing practices are not viewed as "changes" at all. SCHOOL DISTRICT OF WISCONSIN RAPIDS, *Supra*.[5]

If, as here, the question arises during a contract hiatus, the expired contract is often the best source of information regarding the existing working conditions, because, generally, parties' practices have been governed by the contract. However, it is crucial in the instant situation 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. Thus, while the contract often provides a good indication of what the status quo is, the language in the expired contract is not necessarily dispositive on that issue. Hence the Commission has historically observed, "the proper mode of analysis for determining the status quo must take

[5] While the dissent has recounted the Commission's dynamic status quo doctrine at some length, it appears that this is simply to set the stage regarding the prevailing legal standards, rather than to suggest that the dissent believes the Commission is departing from these traditional standards in the instant case.

into account not only the terms of the expired collective bargaining agreement bearing on the subject, but also the history of bargaining and history of administration of the language in question." SCHOOL DISTRICT OF WISCONSIN RAPIDS, *Supra*, at 12. Indeed, both prior Commission decisions and case law in analogous jurisdictions recognize that the status quo during a contract hiatus *cannot* include some contractual provisions, because those provisions are quintessentially contractual in nature.[6]

Determining what the status quo is can be particularly difficult in cases like the instant one, where the terms of the contract are directly in conflict with a longstanding and consistent practice. The Commission has confronted a similar issue on one previous occasion,[7] in OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94). As discussed more extensively below, we find the outcome of that case consistent with the principles we articulate here. However, because the circumstances in OUTAGAMIE COUNTY are substantially dissimilar to those present here, and because the Commission did not have an opportunity in that case to consider fully the implication of some of its dicta, we decline to follow that broad dicta here.[8]

Having set forth the foregoing principles, we turn to the parties' positions on the discontinuance of the summer bump meeting. The Union takes exception to the Examiner's conclusion that the summer bump meeting conflicted with portions of the contractual vacancy and bumping language, arguing that the practice instead was a mutually agreed-upon interpretation of the contract language. According to the Union, the parties explicitly agreed

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[6] See, e. g., SAUK COUNTY, DEC. NO. 22552-B (WERC, 6/87) (holding that union security provisions are enforceable only when an agreement is in effect); BEVERLY HEALTH AND REHABILITATION V. NLRB, 297 F.3D 468 (6TH CIR. 2002) (a general managements rights clause does not survive the expiration of a contract and therefore does not permit unilateral changes during a hiatus in subjects generally referred to therein); PROFESSIONAL STAFF CONGRESS V. NEW YORK STATE PERB, 21 A.D.3D 10 (1ST DEPT. 2005), 178 LRRM 3065 (2005) (a contractual provision waiving a union's right to negotiate changes in the college's intellectual property policy does not survive expiration of the contract and hence does not permit the college to make such changes during the hiatus period).

[7] The dissent cites two examiner decisions that have relied on language in the expired contract rather than an existing practice in determining the "status quo." GILMAN SCHOOL DISTRICT, DEC. NO. 30442-A (MILLOT, 4/03) and ROCK COUNTY, DEC. NO. 29281-A (BURNS, 8/98). As the dissent notes, it is well-settled that the Commission is not bound precedentially by examiner decisions, such as these, that are not appealed to the Commission. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). Moreover, in both cases, the examiners (like the Examiner in the instant case) understandably followed the broad rationale set forth in the Commission's prior decision in OUTAGAMIE COUNTY. Finally, the examiner decision in GILMAN SCHOOL DISTRICT, which relied upon general language in a management rights clause along with a zipper clause to overcome a very long and consistent practice during a hiatus, would be unlikely to pass muster on the analysis we have adopted in the instant case. See also BEVERLY HEALTH AND REHABILITATION V. NLRB, S*upra* NOTE 7, and cases discussed therein.

[8] The dissent finds "the precedent of OUTAGAMIE COUNTY to be more sweeping than does the Majority and . . . controlling here." As stated in the text above, we agree that the rationale of OUTAGAMIE COUNTY was "sweeping." However, without disturbing the holding of that case, we expressly reject the breadth of its reasoning, for policy reasons discussed at length later in this section. The dissent does not articulate any countervailing policy reasons for following the broad dicta in OUTAGAMIE COUNTY.

for mutually beneficial reasons to construe the criteria in Section 7.03 for filling vacancies, viz., "If the skill and ability of two or more employees is relatively equal, the employee with the greatest district-wide seniority shall be chosen," to mean that all SETAs had relatively equal skill and ability and that vacancies could be filled by seniority. Similarly, according to the Union, the parties mutually agreed for mutually beneficial reasons to collapse the five-day waiting period for exercising bumping rights, contained in Section 7.04, and hence interpreted their agreement to permit bumping decisions during the bumping meeting. Acknowledging that Section 17.01 of the agreement would require such an interpretive agreement to be in writing, the Union points to the "bump meeting packets" that the District prepared every year for twenty years, containing lists of SETA vacancies and SETA position discontinuances and stating how SETAs would be able to change positions by seniority during the bump meeting, as fulfilling the necessary written expression of mutual agreement.

In short, the Union argues that the prevailing practice did not conflict with the contract but rather constituted a binding interpretation of the contract and hence part of the status quo. The Union cites certain contract arbitration decisions to support the notion that contracts can be amended by longstanding and mutually understood practices.

The District vigorously disagrees that even twenty years of knowing acquiescence in a practice can bind the District contractually, where the practice clearly conflicts with contract language and has not been reduced to a written memorandum of agreement as required by the clear language of Section 17.01 of the agreement. The District argues that the arbitral authority cited by the Union act does not support the Union's theory, but at most suggests that a conflicting practice will not create retrospective obligations, as, for example, in GIBSON REFRIGERATOR CO., 17 LA 313 (PLATT, 1951). The District also notes that the parties have had a long history of executing written side letters and other memoranda of understanding, where they intend to bind themselves contractually on subjects that otherwise would not conform to the agreement. No such written instrument having been executed here, according to the District, it follows that there was no binding agreement to amend the contract as required by Section 17.01. Further, the District cites CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85), for the proposition that the District, with appropriate notice to the Union, is permitted to renounce practices that conflict with contract language. Finally, according to the District, such conflicting practices, once renounced, are not part of the status quo that the District must maintain during a contract hiatus, citing OUTAGAMIE COUNTY, *Supra*.

We agree with the Union that some arbitral authority would support binding an employer to continue longstanding, mutually agreed-upon practices, even those that conflict with contract language. However, we agree with the District that Section 17.01 of the contract, which states that unwritten practices do not constitute a waiver of contract provisions,

preserves both parties' prerogatives to renounce such unwritten practices.[9] In the absence of a provision such as Section 17.01, a longstanding, clear, and mutually agreeable practice might be construed by a grievance arbitrator as a permanent modification of the agreement. But, given the presence of Section 17.01, the District was *contractually* permitted to renounce the summer bump meeting practices that conflicted with the contract language.

However, unlike the District, we view the Commission's decision in CITY OF STEVENS POINT as reconciling the exercise of any such contractually-authorized renunciation with the overarching duty to bargain set forth in MERA. As we read STEVENS POINT, it was premised upon the party wishing to revert to its clear contractual rights giving the other party clear notice of how the language would be applied in the future and, just as important, an opportunity to try to preserve the practice by negotiating a change in the language. Hence, as discussed more fully below, we conclude that CITY OF STEVENS POINT gives the District a *contractual* right, in light of Section 17.01 of its contract, to renounce practices that conflict with the express terms of the agreement. However, STEVENS POINT also contains a concomitant premise, consistent with the duty to bargain, that the renunciation cannot take effect until negotiations over the successor collective bargaining agreement have ended without a change in the pertinent language.

STEVENS POINT involved a situation that arose while a collective bargaining agreement was in effect. In that case, the longstanding contractual provision governing promotions of fire fighting personnel, by its clear terms, permitted the employer to consider nine factors, one of which was seniority. Nonetheless, for many years, the employer had promoted bargaining unit members strictly on the basis of seniority, without considering the other contractual criteria. During negotiations for the 1983-84 collective bargaining agreement, the employer advised the firefighters' union that the employer intended to revert to the contractual criteria for promotions and that seniority would no longer be the sole standard. The parties thereafter reached agreement on a successor contract without changing the promotional language. During the term of that successor agreement, the employer made one promotion by seniority and then implemented a promotional system in which the nine contractual criteria were weighted according to a scale. The firefighters' union filed a complaint contending that the parties' prior practice of strict seniority for promotions should be viewed as a binding interpretation of the contract, and that the employer therefore had breached *the contract* (and thus Sec. 111.70(3)(a)5, Stats.), by considering other criteria.

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[9] The Union has also argued that the summer bump meeting practices were supported by written agreements, in that the District prepared and distributed a summer bump meeting packet of materials to the Union and its SETA members at the outset of each bump meeting. While creative, this argument ultimately is not persuasive. As the District argues, the purpose of Section 17.01 is to ensure that contractually binding commitments are stated expressly as such (for example, via side letters). It would defeat the purpose of such a provision to infer a contractual commitment where it is not expressly stated, even if the inference is based upon some form of writing.

In STEVENS POINT, the Commission held that the employer had lawfully reverted to the multi-criteria standards set forth in the express contract language. The Commission's reasoning makes it clear that this conclusion was premised on the fact that the employer had clearly renounced the prior inconsistent practice at a time and in a manner that gave the union notice and a prior opportunity to negotiate a change in the language in the successor agreement. When, thereafter, the union in STEVENS POINT entered a new contract containing the same multi-criteria promotional provision, the Commission held the union to the contract language.

Accordingly, STEVENS POINT establishes the principle that a party to an agreement may renounce its acquiescence in practices inconsistent with express contract language and thereby relieve itself from those practices contractually.[10] By the same token, STEVENS POINT also stands for the principle that longstanding acquiescence in a practice, spanning at least one set of successor contract negotiations, places an onus on the party who seeks to revert to the rights set forth in the contract language to notify the other party and provide a meaningful opportunity to change the language. As discussed more fully below, that meaningful opportunity generally would occur during negotiations for the successor agreement. Thus, in the instant case, the District apprised the Union during successor contract negotiations that the District would not continue its previous practices regarding the assignment of SETAs, including the summer bump meeting. Under STEVENS POINT, therefore, once the District and the Union entered into a new agreement continuing the same language, the District did not breach the agreement by reverting to the contractual vacancy and bumping mechanisms rather than maintaining those prior practices that conflicted.

STEVENS POINT does not directly address the question in the instant case, viz., whether an employer could renounce and then depart from longstanding practices and rely instead upon contract language during a hiatus between contracts. It seems to us that the appropriate resolution must accommodate MERA's purposes regarding both contract principles and collective bargaining principles. In a case such as this, where the parties have clearly agreed to depart from the contract language for a period of time that has included at least one set of successor negotiations, STEVENS POINT places some parameters around a party's right to renounce the conflicting practice. STEVENS POINT rests on the principle that the renouncing party has a corresponding duty to provide notice to the other party and an opportunity to

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[10] The STEVENS POINT case also involved a refusal to bargain/unilateral change allegation, premised upon Sec. 111.70(3)(a)4, Stats., in addition to the breach of contract claim under Sec 111.70(3)(a)5, Stats., that is discussed in the text above. The alleged unilateral change violation occurred during the term of an existing contract. The Commission rejected that portion of the complaint, because the union had been given an opportunity to negotiate over the promotional provision during the negotiations leading up to the successor agreement, and, by again agreeing to the contract language establishing the multi-criteria policy, had waived any mid-term bargaining obligation. It is apparent that the Commission's determination on the unilateral change allegation in STEVENS POINT does not guide the disposition of the unilateral change allegation in the instant case, because the alleged change in this case did not occur during a contract term but instead during a hiatus between contracts.

negotiate a change in the language. Implicitly, such notice should clearly indicate how the renouncing party intends to operate in the future, so the other party can make a meaningful decision about its negotiation strategy. Moreover, because the renunciation is accompanied by a bargaining obligation, the normal rules that govern good faith bargaining apply, including a duty on the renouncing party not to implement the renunciation (i.e., the change) until negotiations have culminated in a new agreement.[11]

As noted at the outset of this section, we are mindful that the above principle is at odds with dicta (although not the outcome) in OUTAGAMIE COUNTY. In that case, a collective bargaining agreement clearly provided that police department employees who worked a "5-2" schedule received time off with straight pay for various enumerated holidays and one floating holiday. The contract further provided that employees who worked a 5-2, 5-2, 6-4, 4-2 schedule were required to work on holidays that fell during their schedules, but received two-and-one-half times their regular pay for those hours, and also received two floating holidays. At the beginning of the contract, Investigators in the department worked the varying schedule and received the holiday pay and floating holidays as provided in the contract for that schedule. About half way through the agreement, the parties agreed that Investigators would work a straight 5-2 schedule. No one discussed the holiday pay issues that might accompany the change in schedule, and, for the next year and half or so, the Investigators continued to work on the holidays that fell within their 5-2 schedule, continued to receive two-and-half-time pay for those hours, and continued to have two floating holidays. About one month after the contract expired, while the parties were still in the negotiations process, the employer informed the union that Investigators henceforth would receive the holiday benefits applicable to a 5-2 schedule under the terms of the expired contract. The union filed a complaint alleging that the employer had unilaterally changed the status quo. The Commission rejected the union's claim, stating, "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.

We believe the foregoing language in OUTAGAMIE COUNTY is unnecessarily sweeping and that the decision is properly limited to the factual situation involved in the case. In OUTAGAMIE COUNTY, the practice that was contrary to the express contract language was of very recent vintage and possibly a product of inattention or neglect. It is questionable that a practice of such brief duration and dubious intentionality would be construed in any forum (including grievance arbitration) as sufficient to overcome explicit contract language. Moreover, in stark contrast to the instant situation, the employer in OUTAGAMIE COUNTY had not permitted the practice to continue over a period of successor contract negotiations, but

[11] We acknowledge the District's argument that the practice regarding the summer bump meeting had changed in 2002 such that the meeting took place in late June rather than mid August. Thus, according to the District, the elimination of the meeting took place before the contract had expired on June 30 rather than during the hiatus between contracts. Given our interpretation and application of the STEVENS POINT renunciation doctrine, this distinction does not aid the District in this case, since, whether the practice was a June meeting or an August meeting, the District could not lawfully implement its renunciation until bargaining was completed and the successor agreement took effect.

informed the union at nearly the beginning of the hiatus that the practice would not be continued. Accordingly, while the language in OUTAGAMIE COUNTY is broad enough to encompass the instant situation, and it is understandable that the District and the Examiner would so construe it, we do not see that case as providing relevant precedent in the present situation.

We note that the dissent has relied on OUTAGAMIE COUNTY based in part upon what may be an implicit conceptual underpinning in that decision, i.e., that it cannot offend an employer's duty to bargain in good faith for the employer to adhere to a status quo that is delineated in contract language, since that language itself is a product of collective bargaining. This rationale seems compelling on the surface, but, closely examined, does not comport with basic collective bargaining principles. First and foremost, whatever the contract may say or mean, it is no longer in effect. The duration of a contract is itself one of the quid pro quos incorporated into the agreement. Accordingly, the mere fact that a defunct contract contains a provision cannot be sufficient in and of itself to define the existing practice on any particular subject. As noted earlier, the contract of course has considerable utility in determining what the status quo is, because usually the practice and the contract language coincide. Once the contract has expired, however, the parties' mutual commitments are a function of the duty to bargain, not the contract. The duty to bargain, in turn, carries with it a duty to carry on the existing practices unless the other party agrees to change them, so as to respect the other party's co-equal role in determining those working conditions. As noted earlier in this discussion, a 20-year consistent and mutual practice has given both the Union and its members a reasonable expectation about how SETA assignments will be distributed in an upcoming school year. The District's precipitate announcement that the practice was over (even assuming the announcement was clear about how the District intended to replace the practice),[12] under these circumstances, would tend to make the union look inept and futile in the eyes of its membership, and would tend to engender labor relations discord in the midst of the bargaining process. In this situation relying, as the dissent would do, on contract language that had been inoperative for a generation is inconsistent with the purposes and policies that underlie the duty to maintain the status quo.

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[12] Although it does not affect the outcome of the instant case, the District's notice to the Union about its intention to renounce its practices may not have been sufficiently clear to put the Union on notice as to how the District intended to apply the contractual vacancy posting, filling, and layoff language. The District's renunciation notice at the outset of negotiations indicated that it would no longer adhere to its previous practices "as it relates to the assignment of special education assistants including having a yearly Local 60 bumping meeting." It is apparent from the instant decision that not all of the practices at the summer bump meeting were actually in conflict with the agreement. Leaving that aside, the District's renunciation was accompanied by some contemporaneous comments suggesting that the District did not anticipate vacancies or other changes in the deployment of SETAs. It is undisputed that no specific discussion occurred about how the District would provide notice to SETAs or to the Union in the (apparently unanticipated) event that vacancies did arise. It appears that this lack of clarity contributed to the Union apparently being taken by surprise by the manner in which it and its members learned about the eight vacancies in August.

In sum, in the instant case, unlike OUTAGAMIE COUNTY, the parties maintained for 20 years a clear, consistent, mutually beneficial and mutually agreeable procedure regarding the annual deployment of SETAs, in the form of the summer bump meeting. As the Examiner held, some elements of that procedure were inconsistent with the contract, specifically (1) the anticipated SETA vacancies for the upcoming school year were not posted in accordance with Section 7.02 of the contract, hence limiting opportunities for other bargaining unit members to bid for the jobs; (2) SETAs who bid for vacancies were awarded those jobs based strictly upon seniority, rather than the "skill, ability, and seniority" as set forth in Section 7.03 of the contract; and (3) SETAs whose positions were being eliminated exercised bumping rights without submitting a written notice of intent to bump and without the bumped SETA having the five work days notice to consider their own bumping options, as set forth in Section 7.04 of the contract. The District was entitled to renounce these procedural components of the longstanding summer bump meeting practice, so long as it clearly notified the Union of this intention in a manner that permitted the Union an opportunity to negotiate over the proposed changes for purposes of the successor agreement. However, until negotiations were concluded and a successor agreement reached, consistent with traditional bargaining principles, the District was required to maintain those procedures. Since it did not do so, the District unilaterally changed the status quo in violation of Sec. 111.70(3)(a)4 and 1, Stats.[13]

**Notice of the Eight SETA Vacancies in August 2004**

The Union has argued that the District violated MERA in two ways by the manner in which the District notified the Union and its SETA bargaining unit members about the eight SETA vacancies that became available in late August 2004. First, according to the Union, as to vacancies that are anticipated in an upcoming school year, the District was required to continue its 20-year practice of holding a SETA meeting where such vacancies are posted for seniority-based bidding, as part of the status quo that must prevail during a contract hiatus. We agree with the Union on this point, for the reasons set forth in the preceding section.

Second, according to the Union, the District also violated the collective bargaining agreement by posting notice of the eight vacancies at individual schools during a period of time when SETAs could not be expected to be at work, and by providing only District intra-net

[13] The dissent contends that the District complied sufficiently with its bargaining obligation in this case because 1) the contract language on which the District relied was itself a product of collective bargaining, and 2) the parties did engage in some discussion of the issue at the bargaining table in 2003. We have addressed the first point in the text, above. Regarding the second point, it is important to note that, if the District had a bargaining obligation before eliminating the summer bump meeting, as we have found, then the inconclusive discussion that occurred at the table would be completely insufficient to satisfy the District's duty. It is well settled that a duty to bargain requires that the status quo be maintained throughout negotiations and until successor agreement is reached, even if the negotiations culminate in interest arbitration and even if both parties have tentatively agreed that the change will occur in the new contract. SEE OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), and cases discussed therein.

notice to the Union regarding those vacancies, while at the same time providing special direct mail and telephone notice to Ott, Funnel, and Walsh, whose assignments from the previous year were being discontinued. Section 7.02 of the contract requires the District:

> [w]ithin five (5) working days [to] 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 . . . a copy of the notice will be sent to all Union Stewards.

The Union argues that the longstanding practice of providing notice to all SETAs when a vacancy arose constitutes an "interpretation agreement" such that the parties have mutually agreed that the vacancy language requires this form of vacancy notification. We agree with the Examiner, however, that the language clearly sets forth a posting and notification procedure and that the District complied with the contractual provision. Accordingly, we have affirmed the Examiner's conclusion that the District did not violate Secs. 111.70(3)(a)5 and 1, Stats., in this regard.

**Layoff Notices and Bumping Rights for Ott, Funnel, and Walsh**

The Union also challenges the manner in which the District handled the discontinuance of the SETA assignments Ott, Funnel, and Walsh had held the previous school year. According to the Union, under both the contract and the prevailing practice (which, in this case, are consistent with each other), SETAs whose assignments are being discontinued are entitled to layoff notice and the right to bump less senior employees. Here the District provided neither layoff notice nor bumping rights, but instead contacted the three individuals to advise them about the eight vacancies and allow them an opportunity to apply. This, according to the Union, violated both Secs. 111.70(3)(a)4 and 5, Stats. Noting that all three individuals in fact successfully applied for District vacancies, the Examiner concluded that he "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 believed it would be "inappropriate to render a determination of the parties' rights on so important a matter without a non-hypothetical set of facts." Examiner's Decision at 22. The District agrees with the Examiner that this issue is not ripe for decision. In addition, the District argues that a "layoff" for purposes of Section 7.04 of the contract presupposes a reduction in the total complement of SETAs, which did not occur in the instant situation. Finally, according to the District, the Union's interpretation would render the contract language a permissive subject of bargaining, because it would interfere with the District's managerial prerogative to assign duties to its staff as the District deems appropriate. As a permissive subject of bargaining, the District would have no duty to maintain the provision as part of the status quo during contract hiatus, which in itself would obviate the alleged unilateral change violation under Sec. 111.70(3)(a)4, Stats.

The Examiner's reticence regarding hypothetical fact situations is understandable. However, as we understand the Union's argument, it does not rely upon hypothetical facts. The Union claims that the contract language itself and past practice indicate that a SETA whose assignment is being discontinued is losing her "position" within the meaning of Section 7.04 of the contract and is entitled to a layoff notice and bumping rights. It is undisputed – and not hypothetical – that none of these three SETAs was provided such notice and rights. Hence, Section7.04 (and the status quo) were violated. For remedy purposes, it might require some speculation to unravel what would or might have occurred had the District implemented the contract language consistent with the Union's interpretation, a remedial problem of that nature is not unusual in such situations nor does it defeat the possibility of providing meaningful relief.[14]

We turn, then, to whether Section 7.04 of the contract required Ott, Funnel, and Walsh to be given layoff notices and bumping rights. That provision is set forth in full on pages 10 and 11 above. The portion of the text most pertinent to our analysis states,

> 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) . . . 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. . . ."

It seems apparent that the term "position" is at least somewhat ambiguous in this provision. It could have the meaning the Union advances, e.g., the assignment to assist Teacher A at X School or the assignment to work one-on-one with student Y. By the same token, the District's construction of the term "layoff" as requiring a reduction in the full complement of SETAs is not inherently illogical and is likely the operative interpretation in some contracts. Where contract language is susceptible of more than one plausible interpretation, the Commission, like most arbitrators, will look to how a proposed interpretation meshes with other contractual language and/or how the parties have applied the language in practice. SEE GENERALLY, ELKOURI & ELKOURI, HOW ARBITRATION WORKS (6TH ED., BNA 2003), at 623-626.

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[14] We agree with the Union that the individuals in question did not have to reject the District's offer of alternative employment (by applying for the vacancies) in order for the Union to maintain a live grievance regarding their layoff and bumping rights. In addition to placing an unfair onus on the individuals, the Union might never be able to prevent or remedy the District's failure to comply with the contract provision if individual employees had to sacrifice their real-time livelihoods so the Union could enforce its contract. In addition, it is at least arguable that employees in this situation have a duty to mitigate their damages by accepting alternative employment, notwithstanding their assertion that the contract was violated. For all these reasons, we disagree with the District and the Examiner that the layoff/bumping grievance became moot merely because the employees, having been denied those rights, accepted alternative employment.

We conclude that the District's proposed interpretation does not comport with the parties' longstanding practices regarding SETAs and also does not fit conceptually with the language of Section 7.04 as a whole. As to the language as a whole, both parties agree that SETAs comprise a distinct job classification. Under the District's interpretation, a SETA position is not discontinued unless the District implements an overall reduction in the number of SETAs. The District also holds the parallel belief that all SETAs are subject to reassignment or "shifting" in accordance with District needs and without any contractual impediment. To the District, a SETA assignment is not the equivalent of a SETA position. Presumably, therefore, if a reduction in the aggregate complement of SETAs occurred, the District would provide layoff notices only to the least senior SETA(s). This is a plausible scenario but it does not make sense in context with the remaining language. The first portion of the bumping provision, requiring a laid off employee to bump first within her own classification, would be void and meaningless if the parties intended the District's interpretation of "position": under that scenario, no junior employee within a SETA's job classification could be available to be bumped. Therefore the District's proposed interpretation is not textually consistent with Section 7.04 as a whole.

Just as importantly, the parties' consistent practice, both within and outside of the annual "bump meeting," reflects that a SETA's "assignment" has been viewed as coinciding with her "position" for purposes of layoff and bumping. With regard to the summer bump meeting, the evidence is clear that a SETA whose previous year's assignment was being discontinued was identified in the bump meeting packet as "laid off." It is also clear that this practice obtained whether or not the overall complement of SETAs was increasing, decreasing, or unaffected.[15] While, as discussed above, certain procedures in the summer bump meeting were at odds with clear contract language, it does not follow that every aspect of the summer bump meeting procedures were necessarily in conflict with the contract.[16] In this case,

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[15] The District points to the testimony of Human Resource Director Annette Mikula that, in her view, a loss of an assignment is not a layoff unless the overall complement of SETAs is reduced. Her opinion was based at least in part on her view of how layoffs are handled under the agreement that pertains to the teachers' bargaining unit. As noted above, Ms. Mikula and the District have articulated a plausible construction of the layoff language, but it is not the only plausible construction. In this case, the record reflects that the District has treated the discontinuance of a SETA position as a layoff, regardless of how the District may treat teachers or even other job categories in the support staff bargaining unit.

[16] We note the District's argument that the contractual zipper clause contained in Section 17.01 of the Agreement would preclude an unwritten practice from overriding the contract. However, the District does not appear to argue that Section 17.01 impedes the Commission's resort to past practice as an interpretive tool, consonant with standard arbitration principles, nor does the language of Section 17.01 itself suggest that the parties intended it to operate in that manner. Since, under standard contract interpretation principles, past practice is useful in ascertaining the meaning of ambiguous contract language, and since we believe the contract language is susceptible of more than one interpretation, we see nothing in Section 17.01 to undermine our analysis in the text, above.

identifying an employee's regular assignment as a "job" or "position," and treating the discontinuance of that assignment/job as a layoff, was consistent with the way the District handled SETA job/assignment discontinuances that occurred mid-year and hence outside of the context of the annual bump meeting.[17] As far as this record reflects, a SETA whose job/assignment was discontinued mid-year, perhaps because of a change in Special Education enrollment, was given a layoff notice and an opportunity to bump a less senior SETA.[18] Contrary to the District's assertion in its briefs, there is no evidence that the District provided layoff notices to SETAs only in those situations in which an aggregate loss of SETA hours accompanied the discontinuance of a SETA's assignment.

Based upon the foregoing, we conclude that Ott, Funnell, and Walsh should have been given notices that their assignments/positions were being discontinued and offered the contractual opportunity to bump less senior SETAs, if any, or less senior employees in other bargaining unit classifications, if any. By failing to do so, the District violated Section 7.04 of the collective bargaining agreement, in violation of Sec. 111.70(3)(a)5 and 1, Stats.

As noted, the Union also contends that the failure to provide layoff and bumping rights to Ott, Funnell, and Walsh also changed the status quo which should have prevailed in August 2004, when the transaction occurred. In addition to arguing that Section 7.04 and therefore the status quo did not require such notices, which we have addressed both previously in this section and in the "summer bump meeting" section, the District argues that interpreting "position" as coinciding with "assignment" for purposes of layoff of SETA employees would transform the language into a permissive subject of bargaining and hence relieve the District of a duty to adhere to it during a hiatus between contracts.

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[17] The District also argues that, since the record contains no evidence about how the parties have handled layoffs among classifications apart from SETAs, the Examiner is correct that the record is insufficient to determine the proper interpretation of the term "position" for purposes of Section 7.04 of the contract. This argument incorrectly presupposes that the layoff and bumping language inherently must have the same meaning across different classifications. Moreover, where, as here, the record contains consistent evidence of a practice of treating discontinuances of SETA assignments as layoffs, regardless of the effect on the aggregate number of SETAs, it would be the District's burden to present countervailing evidence if it wishes the Commission to reach a different conclusion regarding the interpretation of the contract language.

[18] As the District points out, the record is not replete with multiple examples of SETAs receiving mid-year layoff notices when their assignments have been discontinued. However, there are two firm examples from the mid-1980's as well as the general uncontroverted assertion by Union witnesses that this is how the system operated. In fact, Union official Lindberger testified that one of purposes of the bump meeting was to streamline the lengthy process that otherwise occurred from having "so many changes" in SETA assignments. (Tr. At 18-20). The District suggests that the actual examples from the 1980's should be accorded little weight because the contract language had changed since then. However, the record contains the agreements from 1984-85 and from 1988-89 and the pertinent language from Section 7.04 has not changed. Hence, the record adequately supports the inferences we have drawn that discontinuances of SETA assignments were treated as "layoffs" both mid-year and during the annual bump meeting, regardless of the aggregate number of SETA positions.

The District is correct that it has no obligation to adhere to the status quo during a hiatus insofar as the practice in question does not affect a mandatory subject of bargaining. GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84); RACINE SCHOOL DISTRICT, DEC. NO. 28859-B (WERC, 5/98). We do not agree with the District, however, that our interpretation of the layoff language renders it a permissive subject of bargaining. In the District's view, all SETA assignments are interchangeable and fungible. Hence, according to the District, a change in an individual SETA's assigned work location is merely a "shifting" or a "reassignment" of day to day duties, unless the reassignment is occasioned by an aggregate loss of SETA hours district-wide. To the District there is no meaningful difference among four such different scenarios as (1) a SETA being shifted to School B because her job at School A has been discontinued, (2) a SETA being assigned an additional student in her same classroom assignment, (3) a decision that two SETAs should swap assignments, or (4) a decision to have a SETA cover another SETA's assignment while the latter is out ill. On the contrary, however, as discussed in the preceding section, we believe the discontinuance of a SETA assignment is a conceptually distinct event that triggers contractual layoff and bumping rights.

More to the point, however, the District misconceives the Commission's precedent regarding the mandatory or permissive nature of issues relating to the assignment of job duties. The District has cited SEWERAGE COMMISSION OF MILWAUKEE, DEC. NO.17025 (WERC, 5/79), to support the contention that a contract provision purporting to limit the District's ability to reassign SETAs at will would be a permissive subject of bargaining. In that decision, the Commission examined a union proposal that would have required the employer to reach agreement with the union regarding "wage rates for full-time positions on any new equipment, operation, or jobs, and the manner in which they are assigned by management... ." The Commission noted that the union in that case viewed the disputed language as:

> merely requir[ing] management to negotiate with the [union] as to the make-up of the crew which will perform the new operation; or as to which employees by seniority, rotation, classification, etc. will run the new equipment; or as to which employees shall be assigned (transferred or promoted) to the new positions.

The Commission held that only a portion of the proposal was permissive, i.e., insofar as it would require the employer to negotiate about the assignment of a new duty to employees when the new duty "is fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved." ID. at 10. The Commission's discussion made clear that the proposal was mandatory to the extent it required the employer to bargain about which employees would be assigned to perform the new duties and whether that selection would be by seniority, by transfer, or by promotion. ID.

The MILWAUKEE SEWERAGE decision is well within mainstream precedent under both the Commission's law and in the private sector. Language regulating the circumstances in which layoff notices must be provided, or allowing laid off employees to bump less senior employees, are mandatory subjects of bargaining. BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976). Similarly, MILWAUKEE SEWERAGE is consistent with traditional precedent establishing that the assignment of particular duties to employees in a particular job category is a permissive subject of bargaining, where the duties are within the normal scope of responsibilities pertaining to that job category. Cf. SCHOOL DISTRICT NO. 5, FRANKLIN, DEC. NO. 21846 (WERC, 7/84) (requiring teachers to perform typing and/or duplicating classroom materials is a mandatory subject of bargaining, because such work is not "an integral part of" a teacher's duties); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20398-A (WERC, 12/83) (a proposal limiting the clerical work that accountants perform is a mandatory subject, because such duties were not directly related to the accounts' primary job responsibilities); CITY OF WAUWATOSA, DEC. NO. 13109-A (WERC, 6/75) (relieving firefighters of switchboard duties is a mandatory subject, because such duties are merely "supplemental" to the primary duties of firefighters).

These cases teach that an employer need not bargain before assigning a custodian to clean classrooms, but would have to bargain before assigning a teacher to do so. As such they are simply inapposite here. In concluding that Section 7.04 requires the District to give a layoff notice to a SETA whose assignment is being discontinued, we have not interfered with the District's prerogative to assign duties to that SETA that are within the traditional range of SETA duties. We simply conclude that the District has bound itself to permit a SETA in that situation the opportunity to bump a less senior SETA who holds another assignment. For that matter, nothing in our interpretation of Section 7.04 of the parties' agreement has any bearing on how the District deploys, transfers, or reassigns SETAs in situations where no one's assignment (position) has been discontinued.

In sum, we have interpreted the contract language as well as existing practice to require the employer to have given a layoff notice to the three SETAs whose previous job assignments were discontinued and to allow them to exercise bumping rights. The language as so interpreted is a mandatory subject of bargaining. It follows that the District unilaterally changed the status quo on a mandatory subject of bargaining during the hiatus between contracts, in violation of Sec. 111.70(3)(a)4, Stats.

## Remedy

Unilateral changes, like the instant ones, that take place during a hiatus but are consistent with language the parties ultimately include in a successor agreement that is retroactive to the period of time in which the change occurred, historically have presented remedial difficulties. While acknowledging those difficulties, the Commission has developed

remedial principles that are designed to protect the bargaining process during the hiatus period and deter unilateral changes. The Commission normally will accompany a cease and desist order with make-whole relief that is retrospective in nature, even where that relief might give a union financial gains that would not be available under the terms of the retroactively-implemented contract. For example, in CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), the Commission ordered the employer to compensate employees for certain hours they were compelled to work in violation of the status quo, even though under the successor contract, which retroactively covered the period of the hiatus, the employees would not have been entitled to extra wages for those hours. Similarly, in OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), the Commission ordered the employer to reimburse employees for certain out of pocket costs that resulted from the employer's unilateral implementation of a new health insurance plan during a hiatus, even though both parties had agreed that the successor contract would contain that health insurance plan and the contract, once determined by the interest arbitrator, retroactively put that plan into effect during the period covered by the unilateral change. In each case, the Commission has explained that make-whole relief is essential to serve the purposes of MERA, because, absent such relief, the employers would have little incentive to comply with their obligation to maintain the status quo. The Commission has suggested that parties who are concerned about the difficulties of retroactively implementing contractual provisions can propose specific language to deal with those difficulties and, if deemed appropriate, include such proposals in the final offers submitted to the interest arbitrator. SEE, E.G., GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84); CITY OF BROOKFIELD, *Supra*.

In this case, as the Union acknowledged at the 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.

This decision also holds that the District has violated the collective bargaining agreement by not providing Ott, Funnell, and Walsh layoff notices and bumping rights pursuant to Section 7.04 of the contract, in violation of Sec. 111.70(3)(a)5 and 1, Stats. However, as the Examiner noted and the Union does not dispute, each of these employees remained fully employed without loss of wages or benefits as a result of accepting the employer's invitation to apply for vacancies. While one or more of these individuals may have preferred to bump a less senior SETA, in accordance with our construction of the contract, it

would be impractical if not impossible to unravel the potentially complex sequence of subsequent events in order to offer that opportunity now, especially since the situation apparently has not affected any of them financially. Accordingly, we also decline to order a remedy for this violation other than an order to comply with the contract in the future.

Dated at Madison, Wisconsin, this 31st day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

**Concurring and Dissenting Opinion of Commissioner Paul Gordon**

I dissent from that part of the Majority opinion which concludes as a matter of collective bargaining law that the District's renunciation of the summer bump meeting practice which was at odds with clear contract language cannot take effect until negotiations over the successor collective bargaining agreement have ended without a change in the pertinent language. In my view, once the District has notified the Union that it renounces a practice which is contrary to clear contract language, the status quo which must be maintained during the contract hiatus is defined by the clear contract language.

The Commission has long recognized that the concept of the status quo is not static, but rather it is dynamic. RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 26816-C, 26817-C (WERC, 3/93); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. No. 19084-C (WERC, 3/85). Thus, the status quo can and does allow for change. The Commission, in VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), characterized the status quo doctrine thus:

> The status quo doctrine does no more than continue the allocation of rights and opportunities reflected by the terms of the expired contract while the parties bargain a successor agreement. . . . The dynamic status quo allows parties to exercise rights which they have acquired through the collective bargaining process.
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> Id. p. 18.

The Commission thus focuses its status quo analysis not on the nature of the changes made by an employer, but on whether those changes are among previously bargained rights. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28859-A (MCLAUGHLIN, 8/97). AFF'D DEC. NO. 28859-B (WERC, 3/98). I conclude that where, as here, a contrary practice has been renounced, the remaining contract language the parties previously bargained best defines the status quo the employer is obligated to maintain.

In determining just what the dynamic status quo is in any given hiatus, the Commission must take into account not only the terms of the expired collective bargaining agreement bearing on the subject, but also the history of bargaining and history of administration of the language in question. SCHOOL DISTRICT OF WISCONSIN RAPIDS, *Supra*. These three elements of the equation are used to determine what the actual dynamic status quo is. Once a practice is renounced, prior to a hiatus, I conclude it is no longer part of that equation in the face of controlling contrary language in the expired agreement.

The Majority concludes that the renounced practice defines the status quo which must be maintained and thus that a renunciation, as a matter of collective bargaining law, cannot take effect until negotiations over the successor collective bargaining agreement have ended without a change in the pertinent contract language. The Majority conclusion is based at least

in part on the importance of giving the parties an opportunity to bargain over the matter. I share the Majority concern for the overarching duty to bargain set forth in MERA. However, in a case such as this where there is specific contract language, the parties have already bargained the matter. In addition, given the longstanding nature of the summer bump meeting practice, there have been numerous contract negotiations which gave the parties the opportunity to put the summer bump meeting practice into the written agreement. Had they done so, there would have been no renunciation. Lastly, I note that there was bargaining between these parties on the issue, even though no agreement was reached prior to the actual discontinuance of the practice. Thus, I am satisfied that the duty to bargain has been honored here.

The renunciation of a past practice during a hiatus was considered by the Commission in OUTAGAMIE COUNTY, DEC. NO. 27861 (WERC, 8/94) and was found there not to be a violation of the status quo where there was clear contrary contract language. The Majority opinion distinguishes OUTAGAMIE COUNTY on the basis that the practice there was of short duration, possibly a product of inattention or neglect, and had not continued past the conclusion of a round of successor contract negotiations. Thus, the Majority would limit OUTAGAMIE COUNTY to its facts. However, the Commission's decision in OUTAGAMIE COUNTY is much broader in scope. The Commission stated:

> We find no persuasive basis for holding that the ability to renounce a past practice which is at odds with clear language can only be exercised during the term of a contract but not during a hiatus. As we have previously held, the status quo is a dynamic rather than a static concept and can allow or mandate change. 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. In reaching this result, we have considered and rejected the Complainant's argument that such an outcome is bad public policy at the bargaining table. The exercise of rights under the status quo is inherently consistent with the duty to bargain. After all, it is the duty to bargain from which the obligation to honor the status quo flows. Thus, exercise of status quo rights to influence bargaining is consistent with good faith bargaining itself. (citations omitted).
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> Id. at. p. 9.

Thus, I read the precedent of OUTAGAMIE COUNTY to be more sweeping than does the Majority and find it to be controlling here.

Although examiner decisions are not binding on the Commission, OUTAGAMIE COUNTY has been relied upon and applied by WERC examiners in other hiatus situations where a past practice and contract language clashed. A renounced practice of employees' use of an

employer's vehicle fell in the face of contract language in GILMAN SCHOOL DISTRICT, DEC. NO. 30442-A (MILLOT, 4/03) AFF'D BY OPERATION OF LAW (WERC, 5/03). In ROCK COUNTY, DEC. NO. 29281-A (BURNS, 8/98) (AFF'D BY OPERATION OF LAW (WERC 9/98), the employer violated the status quo by not adhering to the clear language of an expired agreement between the Union and the County after the Union had repudiated, during hiatus, an inconsistent practice of assigning hours of work.

In summary, because the District renounced the practice of the summer bump meeting in the face of contrary contract language, I conclude that it is the language of the expired agreement and not the practice which defines the dynamic status quo the District was obligated to maintain. Therefore, the District did not violate the dynamic status quo, did not refuse to bargain, and did not commit a prohibited practice when it did not maintain the summer bump meeting practice during hiatus. Thus, I would affirm the Examiner's decision.

I concur with the remainder of the Majority decision.

Dated at Madison, Wisconsin, this 31st day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner