STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

vs.

SUN PRAIRIE AREA SCHOOL DISTRICT, Respondent.

Case 105
No. 64076
MP-4097

Decision No. 31190-D

Appearances:

Aaron N. Halstead, Hawks, Quindel, Ehlke & Perry, Attorneys at Law, 232 West Washington Ave., Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Local 60, AFSCME, AFL-CIO (Sun Prairie School District Employees Union).

Michael J. Julka and **Richard F. Verstegen,** Lathrop & Clark, LLP, Attorneys at Law, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Sun Prairie School District.

ORDER ON REHEARING

On March 31, 2006, the Commission issued its Order on Review of Examiner's Decision, concluding that: (1) the Respondent Sun Prairie School District (District) unilaterally changed the status quo in violation of Sec. 111.70(3)(a)4, Stats., when it eliminated the "summer bump meeting" procedure that it had used for twenty years for determining assignments of Special Education Teaching Assistants (SETAs) for the upcoming school year; (2) the District did not violate the collective bargaining agreement, in violation of Sec. 111.70(3)(a)5, Stats., when it eliminated the summer bump meeting procedure; (3) the District unilaterally changed the status quo in violation of Sec. 111.70(3)(a)4, Stats., when, in August 2004, the District failed to provide three SETAs with layoff notices and bumping rights after their positions were discontinued; (4) the District's failure to provide those SETAs with layoff notices and bumping rights also violated Sec. 7.04 of the collective bargaining agreement, in violation of Sec. 111.70(3)(a)5, Stats.; and (5) the District did not violate the collective bargaining agreement in August 2004, by the manner in which the District notified SETA bargaining unit members and/or the Sun Prairie School District Employees Union (Union) about the SETA vacancies for the upcoming school year.

On April 20, 2006, the District filed a petition for rehearing, pursuant to Sec. 227.49, Stats., and the parties thereafter filed written argument in support of and in opposition to the petition. On May 18, 2006, the Commission issued its Order Granting Petition for Rehearing, in order to consider whether the Commission had committed any errors of fact or law in its March 31, 2006 Order. On June 12, 2006, the District submitted additional argument to support its position that the Commission had committed errors of law and fact, at which time the record was closed.

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

ORDER

A. Paragraph 5 of the Commission's Conclusions of Law in its Order on Review of Examiner's Decision issued March 31, 2006, is set aside, and Paragraph 6 of the Commission's Conclusions of Law is renumbered Paragraph 5.

B. The Commission's March 31, 2006 Order is correct in all other respects.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of August, 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

Sun Prairie Area School District

MEMORANDUM ACCOMPANYING ORDER

On rehearing, the District contends that the Commission committed material errors of fact and law in three ways, each of which is addressed below.

1. The Commission's authority to decide the contractual issues regarding the Ott, Funnell, and Walsh positions that arose in August 2004.

The District challenges the Commission's authority to decide whether the District had violated the contractual layoff procedures by the way it handled the Ott, Funnell, and Walsh situations, and the SETA vacancies, in August 2004, on four grounds: first, the Commission lacked jurisdiction to rule upon a contract violation, because there was no contract in effect in August 2004; second, the District was not adequately on notice about the Union's interpretation of the bumping provisions of the contract and hence did not have an opportunity to present a complete factual record; third, no party asked the Commission to review the Examiner's decision on this issue and the Commission should have refrained from doing so; and fourth, the issue had become "moot" once Ott, Funnell, and Walsh accepted vacancies in the District for the upcoming school year, thus relieving the District of the need to decide whether or not to give them layoff notices or bumping rights.

As to the first issue, as recounted in the Commission's decision at pages 15 and 16, the Union had filed a grievance on August 24 specifically challenging the discontinuance of the Ott, Funnell, and Walsh positions and the manner in which the District handled the August 2004 SETA vacancies. The District refused to arbitrate, after which the Union filed the instant prohibited practice Complaint. While this Complaint was pending, the parties settled their 2004-2006 agreement and the Union renewed its request for arbitration of the August 2004 grievance. Arguing that "The underlying conduct forming the basis for the allegations in the Complaint is the same underlying conduct that was the subject of the Grievance," and "the contractual language that will be at issue in the grievance arbitration is the same contractual language that will be the central issue in the instant Complaint proceeding" (Respondent's Motion to Defer, Paragraphs 6 and 10), the District filed a motion to defer the Complaint to arbitration and withdrew its procedural arbitrability objections to the August 2004 grievance. After conferring with the Examiner, the Union amended its Complaint to add the Section (3)(a)5 allegation, and the parties stipulated that the Commission should decide the merits of both the breach of contract and unilateral change allegations. Therefore, the record reflects that the District stipulated to the Commission's jurisdiction to decide the contractual violations as well as the alleged violations of the status quo.

Second, in its post-hearing brief to the Examiner, the District argued that it did not have a full and fair opportunity to litigate the contractual issues as they relate to Ott, Funnell, and Walsh, because the District did not realize that the Union would be challenging the failure to provide those individuals with layoff notices. The Examiner reviewed the pleadings and

noted that the pleadings for both parties referred to the contractual provisions relating to layoff and bumping and to the facts regarding the District's actions in August 2004. Hence, the Examiner concluded that the District was sufficiently on notice about the Union's contractual arguments. On review, the District did not specifically challenge this aspect of the Examiner's ruling and we affirmed that ruling for the same reasons advanced by the Examiner, in footnote 4 of our March 31 decision. In addition to the factors cited by the Examiner and previously affirmed, we note that the Union's opening statement at the hearing included the statement that the District's actions "failed to recognize seniority in two important ways: Way No. 1, was a violation of Section 702, the filling of vacancies by seniority, and No. 704, the bumping and layoff language. It failed to give meaning to the contract's plain and unambiguous contract language at 704 as had been applied for many years." The Union also presented testimony about how discontinuances of SETA positions were handled during the 1980's, before the summer bump meeting, as well as how such discontinuances were handled when they occurred mid-year and therefore outside of the summer bump meeting context. Accordingly, as we read the pleadings, the procedural history of the case, and the evidentiary record, we are persuaded that the District was or should have been aware that the Union intended to ask the Commission to decide whether the District's actions in August 2004, regarding Ott, Funnell, and Walsh and the vacancies, violated the collective bargaining agreement, including the layoff language in Section 7.04.

Third, it is well established that the Commission has authority to review an Examiner's decision de novo, including matters beyond what the parties have specifically challenged. See BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03) and cases cited therein. As we explained in footnote 2 of our March 31 decision, we have exercised that well-established discretion in the instant case because, in our view, the contract interpretation issue had been sufficiently litigated on this record and its resolution would provide important guidance to the parties in their future relationship. Having re-examined the record and the arguments on this point, we continue to adhere to the conclusion reached in our March 31 decision.

Fourth, regarding mootness, the District contends that it was merely "thinking about" reassigning Ott, Funnell, and Walsh, but never had to confront that possibility because these employees availed themselves of "their rights under Section 7.03" to apply for vacancies. First, contrary to the District's assertion, the record is quite clear that the District had reached a final decision regarding the job status of these employees, whether that action is properly labeled a "reassignment" or an "elimination." The District itself contacted these employees to inform them of their situation and the existence of vacancies. While no one claims to know what the District would have done to these employees if they had not applied for and accepted vacancies, it is clear that the District had placed their status sufficiently in question to pose some risk to their livelihoods and thereby motivate them to apply for the vacancies. Given the District's interpretation of Section 7.04, it certainly would be disingenuous for the District to suggest that it would have given these employees layoff notices if they had not applied for the

vacancies; more likely, given the District's interpretation of the contract, the District simply would have involuntarily "reassigned" them. The Union's point, with which we have agreed, is that a "reassignment" of the type the District intended (as it announced to Ott, Funnell, and Walsh) requires a layoff notice under Section 7.04, which, in turn, would have given these employees an opportunity to bump less senior SETAs holding positions that these three more senior employees may have preferred over the vacancies to which they applied. By not providing the layoff notice and bumping rights, the District did not give Ott, Funnell, and Walsh the opportunity to decide whether they would prefer a position available by bumping rather than one of the vacancies. Even if Ott, Funnell, and Walsh preferred the vacancies (and a layoff notice would not have prevented them from applying for those vacancies), the Union would still have an interest in grieving the District's failure to follow the proper procedures in order to protect its members' rights in future situations. Accordingly, we continue to adhere to our decision that the Union's grievance regarding Section 7.04 was not rendered moot by the decision of Ott, Funnell, and Walsh to apply for vacancies after being told their positions were discontinued.

We therefore reaffirm our decision to decide the contractual claims regarding the August 2004 events.

2. The Layoff and Bumping provisions of Section 7.04 as part of the Status Quo

In the Commission's March 31 decision, we concluded that Ott, Funnell, and Walsh were entitled to notice of layoff and opportunity to exercise bumping rights as a matter of both contract (Section 7.04) and status quo. Hence, we concluded that, by failing to provide those individuals with layoff notices and bumping rights, the District violated both Secs. 111.70(3)(a)4 and (3)(a)5, Stats.

The underlying factual premise for both holdings was our belief that, under the prevailing practice and the textual language of Section 7.04, "SETAs whose assignments are being discontinued are entitled to layoff notice and the right to bump less senior employees." Dec. No. 31190-B at 25. As the District notes, we asserted that the contract and the status quo regarding layoff and bumping rights for SETAs were "consistent with each other." On rehearing, the District points out that, in fact, the practices in the summer bump meeting were not entirely consistent with SETA rights under Section 7.04, as we interpreted that Section.

The District's point is well taken and we have set aside the pertinent conclusion of law, which had held that the District unilaterally changed the status quo in violation of Sec. 111.70(3)(a)4, Stats., by failing to provide Ott, Funnell, and Walsh with the layoff and bumping rights that are incorporated into Section 7.04 of the agreement. To clarify, under both the prevailing practice (status quo) and Section 7.04 (as interpreted in light of past practice), SETAs whose positions are being discontinued are treated as being "laid off." However, in the summer bump meeting procedure, while such positions were identified as

"layoff," the individuals did not exercise bumping rights as a matter of first course, and certainly were not given the contractual five days to exercise their bumping rights. Rather, bumping rights were exercised in the summer bump meeting only after vacancies had been filled by seniority, including those vacancies that were created by more senior SETAs applying for other vacancies.

Accordingly, we are satisfied that it is unnecessary, redundant, and partially inaccurate to state that the August SETA discontinuances (positions of Ott, Funnell, and Walsh) would have been treated the same under both the summer bump meeting status quo and Section 7.04 of the agreement. We have modified our Order in that respect.

3. The claimed violation of Section 7.04 of the contract in handling the Ott, Funnell, and Walsh situation in August 2004.

In our March 31 decision, the Commission concluded that Section 7.04 requires a layoff notice whenever the District decides to eliminate a position to which a SETA has been assigned. In reaching this conclusion, we rejected the District's argument that a layoff notice would only be required when the District was reducing the overall complement of SETAs district-wide. Our conclusion was based upon two prongs: first, the practice of the parties supported the Union's interpretation; second, the contract language itself could not be reconciled with the District's proposed interpretation.

As to the contract language, we note that the District continues to advance as its primary interpretation the view that, only if the overall number of SETA positions is reduced, would any SETA receive a layoff notice. Noting that the contract provides a laid off employee the right to bump a less senior person in the same classification, and that SETAs are all in the same classification, we concluded that the right to bump would have no meaning under the District's proposed interpretation. The District now adds the nuance that it might not always be the least senior SETA who is laid off, as it is possible that none of the more senior SETAs is qualified to perform the work of the least senior SETA. The District further complicates matters by positing that the former categorical distinctions among the SETAs "would have been unique job categor[ies] within the overall SETA job classification." If, as it appears, the District is now arguing that SETA is not a "job classification" within the meaning of Section 7.04, this argument is directly at odds with the undisputed evidence of record. Furthermore, the District itself took pains to establish in this record that all SETAs are generally considered qualified and available for all SETA assignments, and that the old sub-categories relating to the types of special needs students (which were never referred to as separate classifications) had been eliminated. Given this evidence, the possibility that no more senior SETA would be qualified to perform the job of the least senior SETA is so remote as to have no reasonable bearing on interpreting the contract language.

As to practice, the District contends that the record is insufficient to support our conclusion that the parties have treated discontinuances of SETA "assignments" as layoffs that should be accompanied by notice and bumping opportunities. First, the District argues that we erred in relying upon how the parties treated assignment/position discontinuances during the summer bump meetings. The District contends that the bump meeting "was never based on an interpretation of Section 7.04 and in fact violated Section 7.04 in multiple ways." (Dist. Br. at 14). We agree that the bump meeting violated the contract in the specific ways set forth in our March 31 decision. However, as we also stated in that decision, not everything in the bump meeting was either counter-contractual or extra-contractual. As explained there, some of the practices followed in the bump meeting, including the practice of treating the discontinuance of a SETA assignment as a layoff, were consistent with Section 7.04. In fact, it was precisely the complications and delay caused by the numerous and frequent SETA "layoffs" precipitated under the contract language that motivated the District to inaugurate the bump meeting 20 years ago. It is also clear from the bump meeting packets that SETAs whose assignments were being discontinued were referred to as being laid off. If the parties had viewed the contract language to mean what the District argues here, it is hard to image what purpose the bump meeting served or why the District initiated it in the first place. Accordingly, we continue to view the record as sufficient to establish that the parties acted in accordance with the mutual view that the discontinuance of a position to which a SETA had been assigned was a layoff under Section 7.04.

However, the District seems to view our interpretation of Section 7.04 more broadly than necessary or intended. The District characterizes our decision on page 15 of its brief as holding that "whenever a SETA is assigned new tasks, his or her position has been 'discontinued' within the meaning of Section 7.04." This is not an accurate statement of our holding. It is not all reassignments that trigger the layoff provisions, but only *discontinuances* of SETA assignments. For example, the Commission's decision would not have addressed a District decision to switch Ott, Funnell, and Walsh into other assignments, while at the same time transferring other SETAs into Ott's, Funnell's, or Walsh's previous assignment. What, if anything, the contract may require in that situation – where no position has been discontinued and SETAs are simply being reassigned – is simply not at issue in the instant case.

The District also argues that a SETA position would better be construed to mean an assignment to a building rather than an individual SETA assignment, which may be dependent in turn upon an individual education plan. The District argues that job postings in the record (most if not all post-dating August 2004) show that SETAs are hired, assigned, and deployed on a building-wide basis. Hence, according to the District, a SETA position/assignment is not discontinued for layoff purposes unless the District reduces the number of SETA positions within a building. The District notes that Ott, Funnell, and Walsh were each the least senior SETA in their respective buildings at the time the District notified them that their positions were being eliminated. The District further notes that the record does not reveal whether or not their individual assignments from the previous year were being discontinued. Further,

according to the District, the record is also unrevealing as to whether any of the SETAs who had received layoff notices in the past were so notified because their individual assignment was being eliminated, as opposed to the overall number of SETAs in their buildings. Hence, according to the District, the Commission has no basis for expanding the notion of position discontinuance for purposes of Sec. 7.04 beyond a building-wide reduction.

In response we first note that the SETAs identified as laid off in the bump meeting packets over the past several years appear to be labeled as such by losing their previous year's individual assignment rather than because their particular school building was losing a position. The record also suggests that this was true for the admittedly few specific SETA layoff notices outside the bump meeting, an impression that is also conveyed by the testimony of Union witnesses. Nonetheless, we acknowledge that the record is not completely clear on this point. This may be explained largely by the fact that the District did not advance this "building-based" interpretation at hearing, in its brief to the Examiner, or in its briefs to the Commission prior to the Commission's March 31 decision. Hence neither party focused their evidence on that point.

We take the occasion, therefore, to restate the Commission's holding regarding the Section 7.04 violation. The Commission's holding is simply that Ott's, Funnell's, and Walsh's SETA assignments/positions were being discontinued (as the District itself stated to these employees) and, therefore, each of them should have received layoff notices and bumping rights under Section 7.04. As such, the Commission's decision in the instant case does not foreclose the District from arguing in a future case that the concept of a SETA position is generic to a building rather than specific to an individual, if that is consistent with the evidence. As the District's newly-proposed interpretation would not change the Commission's legal conclusions or order in the instant case, there is no basis for altering our order.

We therefore reaffirm our March 31 decision in this respect.

4. The summer bump meeting practice as status quo during contract hiatus.

The core of the Commission's March 31 decision was its conclusion that, where contract language conflicts with a clear and longstanding practice spanning at least one set of successor contract negotiations, it is the practice rather than the conflicting contract language that forms the status quo after the contract expires and until a successor agreement is reached and implemented. In challenging this conclusion, the District relies on the fact that one prior Commission decision, OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94), contained language to the contrary, as did two examiner decisions that had not been substantively reviewed by the Commission but had been affirmed by operation of law. To the District, these were "clear precedent" to which the Commission must adhere.

As explained at length in the March 31 decision, the Commission continues to agree with the outcome of OUTAGAMIE COUNTY, and views the sweeping language in that decision as unnecessarily broad dicta that the circumstances of the instant case have demonstrated to have been unwise. As to unreviewed examiner decisions, it is a well established principle, crucial to the efficient administrative functioning of the agency, that the Commission is not precedentially bound by such decisions. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). As explained in footnote 7 of the Commission's March 31 decision in the instant case, the Commission does not find it appropriate to be guided by the reasoning in either of the two unreviewed examiner decisions that the District cites.

Neither the District nor our dissenting colleague has offered any policy argument that would support adopting the broad OUTAGAMIE COUNTY dicta regarding the nature of the status quo, rather than the practice-based concept the Commission adopted its March 31 decision. Accordingly, the Commission continues to adhere to the policy reasons it elaborated in its earlier decision and holds that the 20-year practice of holding a summer bump meeting was the status quo to be maintained until the successor agreement was reached.

Dated at Madison, Wisconsin, this 7th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Sun Prairie Area School District

CONCURRING AND DISSENTING OPINION OF COMMISSIONER PAUL GORDON

For the reasons expressed in my dissent from the March 31, 2006 decision, I dissent from the Commission's reaffirmation of its status quo analysis where there is a conflict between language and practice. In all other respects, I concur.

Dated at Madison, Wisconsin this 7th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

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