COPY

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

SUN PRARIE AREA SCHOOL DISTRICT,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 2006CV3013

[Dec. No. 31190-C]

DECISION AND ORDER

This is a review of a Wisconsin Employment Relations Commission (WERC or Commission) decision concerning petitioner Sun Prairie Area School District (District) and Local 60, American Federation of State, County and Municipal Employees, AFL-CIO (Union). The parties dispute whether the District violated the Municipal Employment Relations Act (MERA) when it unilaterally ended the summer "bump" meeting practice for Special Education Teaching Assistant (SETA) employees in 2004. The Commission concluded that the District violated two statutes under MERA, Wis. Stat. §§ 111.70(3)(a)4 and 5. For reasons stated below, I partially affirm and partially reverse the Commission's decision.

I. BACKGROUND

The District and Union have utilized collective bargaining agreements for many years to govern the employment relationship between the two parties. These agreements have contained specific provisions explaining the procedures to be applied with respect to seniority, job posting, filling vacancies, layoffs, and rehires.

Despite these provisions, in or around 1985 the Union and the District began holding special "bump" meetings for SETA employees each summer. These "bump" meetings invited all SETA employees in the district and provided written notice about which SETA positions would not be continued the following school year, as well as which SETA positions would be available for the following school year. From there, the most senior SETA employee was allowed to choose from the available positions, followed by the next most senior SETA employee, and so on. Employees whose positions had been eliminated or restructured were allowed to "bump" into any SETA position occupied by a less senior SETA employee, with some limitations. These summer bump meetings took place every summer through 2003.

In the summer of 2004, the District did not hold a bump meeting for SETA employees. The District gave the Union notice that it intended to end the practice of holding summer bump meetings on at least two occasions that spring during the initial negotiations of a successor CBA. The active CBA expired on June 30, 2004. In August of 2004, while negotiations for a successor CBA were still ongoing, the District notified three SETA employees (Ott, Funnel, and Walsh) that their positions were not needed for the upcoming school year. The District then followed a new procedure in notifying the laid-off SETA employees, and other members of the Union, of eight vacant SETA positions. Upon receiving notice of the vacancies, the three SETA employees successfully obtained employment elsewhere with the District.

The Union filed a grievance on August 24, 2004, challenging the way the District dealt with the discontinued SETA positions and the eight vacant SETA positions. In October of 2004, the Union made an attempt to arbitrate the issues, but the District refused on the ground that the 2002-04 CBA had expired and the parties had not yet completed negotiations for a successor agreement. On October 15, the Union filed a complaint with WERC alleging prohibited practice

by the District in unilaterally changing the status quo during a contract hiatus, in violation of Wis. Stat. § 111.70(3)(a)4. Also, the Union alleged that the District violated the collective bargaining agreement, thereby violating Wis. Stat. § 111.70(3)(a)5. While this complaint was before the Commission, the Union and the District agreed to their successor Collective Bargaining Agreement for 2004-06. Eventually, the Union and the District agreed to petition WERC to decide on the unilateral change in the status quo and the breach of contract issues.

The Hearing Examiner concluded that the District did not violate either statute and dismissed the complaint entirely. The Examiner held that the job vacancy and layoff practices at the bump meetings ran contrary to the relevant provisions of the CBA, that Section 17.01 of the CBA (quoted and discussed more thoroughly below) specifically barred unwritten practices not addressed in the contract from becoming binding on either party, therefore, ending the bump meetings did not violate the collective bargaining agreement. The Examiner also decided that the summer bump meeting practice was not part of the dynamic status quo that the District was required to maintain at the expiration of the old CBA. The Examiner followed the past Commission interpretation of the dynamic status quo in *Outagamie County*, Dec. No. 27861-B (WERC, 8/94), to conclude that a party's rights while maintaining the dynamic status quo include all rights and privileges established by the contract. Finally, the Examiner decided that any violation of statutory or contractual rights by the District's actions in notifying Ott, Funnel, and Walsh of the discontinuation of their positions and bumping rights was mooted because each employee successfully attained employment positions elsewhere in the District.

The Union appealed the Examiner's decision to WERC on September 27, 2005. On March 31, 2006, the Commission reversed the Examiner's decision and concluded that the District violated Wis. Stat. § 111.70(3)(a)4 and 5. In its decision, the Commission determined

that the District had the contractual right to end the bump meetings under the collective bargaining agreement, but maintained that the dynamic status quo doctrine with respect to Wis. Stat. § 111.70(3)(a)4 prevented the District from unilaterally renouncing this practice due to its long-standing occurrence. Also, the Commission concluded that the District inadequately gave layoff notice and bumping rights to Ott, Funnel, and Walsh, thereby violating section 7.04 of the CBA and Wis. Stat. § 111.70(3)(a)5. The Commission limited remedies to prospective relief, ordering the District to comply with MERA as it was interpreted by the Commission in this case. On August 7, 2006, upon rehearing, the Commission clarified its decision but affirmed the main result.

On September 6, 2006, the District petitioned for judicial review, and the case is presently before this court.

II. STANDARD OF REVIEW

This case requires the court to review the Commission's interpretation of two Wisconsin statutes under MERA and the Collective Bargaining Agreement between the Union and the District.

The court may apply one of three standards of review when examining an agency's interpretation of a statute. These are great weight, due weight, and *de novo*. *Jicha v. State Dep't of Industry, Labor & Human Rights Div.*, 169 Wis. 2d 284, 290-291, 485 N.W.2d 256 (1992). An administrative agency is given great weight deference where "1) the agency was charged by the legislature with the duty of administering the statute; 2) the interpretation of the agency is one of long-standing; 3) the agency employed its specialized knowledge or expertise in forming the interpretation; and 4) the agency's interpretation will provide consistency and uniformity in the application of the statute." *Dodgeland Educ. Ass'n v. Wis. Empl. Rels. Comm'n*, 2002 WI 22,

¶25, 250 Wis.2d 357, 639 N.W.2d 733. The court may apply due weight deference when an agency has had opportunities to interpret the statute in the past, but then takes a position different from the preceding decisions. *Stoughton Trailers v. Labor & Indus. Review Comm'n*, 2006 WI App 157, ¶21, 295 Wis.2d 750, 721 N.W.2d 102. The due deference standard allows the court to replace the agency's decision if the court finds a different interpretation of the statute to be more reasonable than the agency's interpretation. *Id.* at ¶17. *De novo* review is where the court gives no deference to the agency's interpretation of the statute and it is used when an agency is dealing with an issue that is clearly one of first impression, or where the agency's position on an issue has been so inconsistent that it provides no real guidance. *Clean Wis., Inc. v. PSC of Wis.*, 2005 WI 93, ¶43, 282 Wis.2d 250, 700 N.W.2d 768.

The Union argues that this court should apply great weight deference. The Union asserts that there is no dispute regarding the first, third, and fourth prongs of the great weight deference test listed above. The Union argues that the Commission has been charged with administering MERA, it has specialized knowledge and expertise in making determinations in cases involving alleged prohibited practices by an employer or violation of collective bargaining agreement, and that its decision in the instant case will make more uniform and consistent the application of MERA to cases involving unilateral employer actions. Regarding the second requirement for great weight deference, the Union argues that the Commission's decision actually harmonizes the instant case and apparent inconsistencies with past interpretations by the Commission. Therefore, the Union believes that the four requirements for great weight deference have been met.

The District argues that this court should review the Commission's interpretation *de novo*, or at most, with due weight deference. The District does not argue that this is a case of

first impression. The District does, however, argue that the Commission's view of what circumstances permit an employer to unilaterally change a past practice that is contrary to the language in a collective bargaining agreement has been applied inconsistently, without sufficient explanation. If this court finds this to be the case, the District asserts that *de novo* review is required. The District also notes that due weight deference is applicable when an agency's decision takes a different approach from previous interpretations. Therefore, the District argues that due weight deference might be appropriate in this case.

In its brief, the Commission argues that this court should apply due weight deference to its interpretation of the statute. While the Commission's interpretations of MERA are generally entitled to great weight deference, the Commission concedes that great weight deference is not appropriate in this case because its interpretation is not a longstanding one and might appear to deviate from its previous decision in *Outagamie County*. Therefore, the Commission asserts that this court should apply the due weight standard when reviewing the Commission's decision.

I conclude due weight deference is the appropriate standard of review in this case. Here, the Commission concluded that the District violated Wis. Stat. § 111.70(3)(a)4 by unilaterally ending the SETA "summer bump" meetings, despite the fact that this practice ran contrary to the contractual language of the Collective Bargaining Agreement and a clause in the CBA preventing unwritten practices from becoming binding commitments. However, this determination is a different interpretation from Commission decisions in the past. In its decision, the Commission cited favorably to cases such as *City of Stevens Point*, Dec. No. 21646-B (WERC, 8/85) and *Outagamie County*, and implicitly reasoned that it was following *Outagamie County* in issuing its decision. However, as I discuss in further detail below, I conclude that the Commission's interpretation of this issue is different from that articulated in *Outagamie County*

and other past Commission decisions. Therefore, this court will apply the standard of due weight deference to the Commission in this case.

In reviewing the Commission's interpretation of Wis. Stat. § 111.70(3)(a)5, this court is asked to interpret the language of the CBA. This court reviews the agency's interpretation of a contract *de novo*, because contract interpretation is an area that the court has at least as much expertise in as an agency. *Wisconsin End-User Gas Ass'n v. PSC*, 218 Wis. 2d 558, 565-66, 581 N.W.2d 556 (Ct. App. 1998).

III. DISCUSSION

A. The Commission's Interpretation of Wis. Stat. § 111.70(3)(a)4 and the Dynamic Status Quo Doctrine.

MERA is legislation designed to protect fair practices between parties and their collective bargaining representatives. In order to protect and encourage fair collective bargaining, the statutes contain provisions that include prohibited practices. Wis. Stat. § 111.70(3) lists these prohibited practices. In the instant case, the Commission concluded that the District violated Wis. Stat. § 111.70(3)(a)4, which prohibits a party from "[refusing] to collectively bargain with a representative of the majority of its employees in an appropriate collective bargaining unit." The Commission concluded that the District violated the statute by unilaterally altering the "status quo." The dynamic status quo doctrine exists to help protect and encourage fair collective bargaining and requires employers to avoid unilateral changes by imposing a duty to bargain. It also exists to maintain the rights and privileges for each party established by previous collective bargaining agreements. As the Commission notes in its decision, the duty to maintain the status quo manifests in three particular situations: (1) while parties collectively bargain their initial agreement; (2) during the term of a collective bargaining agreement, unless the parties have

already exhausted their bargaining obligation as shown by the language covering the subject or by bargaining history; and (3) after a contract has expired and until a successor agreement is finalized. *Sun Prairie*, Dec. No. 31190-B at 16.

The collective bargaining agreements between District and the Union have contained very specific provisions explaining the procedures to be applied with respect to seniority, job posting, filling vacancies, layoffs, and rehires. Article VII contains the language addressing these procedures. Specifically, in relevant part, article VII states:

> 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 bulletin boards used by employees, notify employees who may be absent from the School District because of summer vacation or scheduled vacation periods, if such employee requests notification and provides the District with the appropriate self-addressed, stamped envelope(s), or notify the Union officers in writing that the job is being discontinued. The posting notice shall be dated and list the classification and salary of the position and a general outline of qualifications required of applicants and duties to be performed. The vacancy notice shall be posted five (5) working days and applications are due by 4:30 p.m. 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 ... 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 ...
>
> 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 ... 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.

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.

The CBA also includes Article XVII, which addresses amendments and the duration of the agreement. Specifically, section 17.01 states:

"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."

Despite these provisions, in 1985 the Union and the District began holding special bump meetings for SETA employees each summer. The practices at these bump meetings ran contrary to the specific language in the CBA pertaining to layoff notice, hiring, and bumping. Both the Union and the District willingly engaged in these meetings until 2004, when the District decided to end the meetings. In March of 2004, as part of its initial bargaining proposal for a successor CBA, the District notified the Union that it renounced the SETA bump meeting practice. In May

2004, the District reaffirmed its intention of stopping the bump meeting practice and ultimately did not hold such a meeting that summer. The collective bargaining agreement in place at the time that the District began to renounce the SETA bump meetings was set to expire on June 30, 2004.

The Commission decided that the District violated Wis. Stat. § 111.70(3)(a)4 by refusing to collectively bargain with the Union by unilaterally altering the status quo when it failed to utilize the summer bump meeting procedure in 2004.[1] Although the practices at the SETA summer bump meetings were contrary to the provisions in the CBA with respect to layoffs, job posting, and rehires, the Commission concluded the "consistent twenty-year" meeting practice to be part of the status quo "that should not be subject to termination by unilateral employer action while bargaining is still proceeding." *Sun Prairie*, 17. The Commission conceded that Section 17.01 of the CBA gave the District a contractual right to renounce the unwritten, mutually agreeable practice of the summer bump meetings. The Commission also concluded that this contractual right to renounce the bump meetings was subject to a duty to bargain with the Union. The Commission based this conclusion entirely on its interpretation of a prior Commission's decision in *City of Stevens Point*, which contrary to the Commission's conclusion in the present case, actually held that where the employer has a clear contractual right, it may exercise that

[1] The Union and the Commission invoke the status quo in the instant case under the third prong listed above, suggesting that the unfair bargaining action by the District occurred after the CBA had expired. This is also known as a contract hiatus situation. I disagree that this is a hiatus situation because the District gave clear notice several months before the CBA expired that the bump meetings would be ending. Also, the renounced bump meeting was expected to occur by the middle of June, which was also prior to the expiration of the CBA. Instead, the facts of this case more closely resemble the second prong listed above regarding the status quo doctrine. The District renounced the bump meetings in its initial proposal to the Union submitted in March for a successor agreement to the 2002-2004 CBA. In a later proposal that May, the District renounced the bump meetings again and indicated that there would be no bump meeting that June. Since the existing CBA expired on June 30, I cannot characterize the situation as a contract hiatus. It does, however, meet the recognized status quo situation where the parties are negotiating a successor CBA prior to the expiration of the current agreement. Therefore, both parties were obligated to act within their rights set forth by status quo.

right to change a past practice that violates the agreement. The Commission also addressed the previous decision of *Outagamie County*, which confirms the *Stevens Point* holding that where an employer has a clear contractual right, it may renounce a practice in conflict with the agreement. The Commission distinguished *Outagamie County* from its interpretation in the instant case by the fact that the *Outagamie County* contract hiatus followed an initial CBA and there had not been any successor agreements. The Commission concluded this was significantly different from the present case, where the bump meeting practice has occurred for 20 years amidst many successor collective bargaining agreements.

The District argues that the Commission erroneously interpreted Wis. Stat. § 111.70(3)(a)4 and dramatically changed its application of the dynamic status quo doctrine. The District claims that the Commission's decision creates obligations by an employer under the dynamic status quo doctrine that are inconsistent with the long recognized boundaries set forth in previous Commission decisions. Also, the District asserts that the "fundamental principles" of Wisconsin labor law established in the Commission's *Village of Saukville* decision and the status quo principles confirmed in *Stevens Point* and *Outagamie County* will no longer hold given the Commission's decision.

The Union argues that the *Sun Prairie* Commission's decision is entirely reasonable and that even under the due weight standard of review, should be affirmed unless the court finds the District's position to be more reasonable. The Union argues that the Commission's decision draws on decades of Commission and Wisconsin and federal labor law authorities, consciously seeks to maintain the delicate balance of interests that exist between employer and unions/employees (promoting the overall purposes of the statute), and articulates a persuasive

proposition that an employer may not disavow a long-standing inconsistent past practice during a contractual hiatus that has occurred over a series of successor contracts.

Past decisions by the Commission have indicated a general rule that the dynamic status quo doctrine protected a party's rights already achieved through collective bargaining. The Commission's decision in *Village of Saukville* states the following:

> We think it well understood that the status quo doctrine generally entitles the parties to retain those rights and privileges in existence when the old contract expired which are primarily related to wages, hours and conditions of employment while they bargain over what rights they will have under the next contract. ...
>
> When parties bargain a contract, they agree that for the duration of that contract their rights and privileges are established by the terms of that agreement. Thus, it is well settled that during the term of a contract, neither party has the obligation to bargain with the other over matters addressed by that contract. Inevitably, opportunities or circumstances may arise during the term of a contract which can cause either party to regret the terms of the agreement into which they have entered. However, that regret does not provide a valid basis for compelling the other party to reopen the terms of a contract. Instead, it is commonly understood by all parties that when bargaining a contract, they must try to anticipate potential opportunities and changed circumstances which arise during the term of their contract and then to seek contract provisions which may allow them to take advantage of these opportunities or changed circumstances. ...
>
> 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. ... Thus, rather than being unfair and at odds with collective bargaining, our result recognizes the fundamental fairness of giving both parties an opportunity to bargain a contract which allocates rights and privileges and then requiring them to live by that allocation until a subsequent contract is reached. Put another way, the duty to bargain presents parties with opportunities to establish the terms of their relationship and then provides them with a period of stability during which they live with the bargain they have struck.

Village of Saukville, Dec. No. 28032-B at 21-22 (WERC, 3/22/96) (footnotes omitted).

The standard set forth in *Saukville* regarding rights under the status quo with respect to the collective bargaining process is that parties are entitled "to retain those rights and privileges in existence when the old contract expired which are primarily related to wages, hours and

conditions of employment." *Id.* at 22. Further, "the dynamic status quo allows parties to exercise the rights which they have acquired through the collective bargaining process." *Id.* One of these rights is that "neither party has the obligation to bargain over matters addressed by that contract." *Id.* The reasoning behind this standard is that parties collectively bargain an agreement that should last until the successor agreement is reached. If one party comes to "regret" a condition of that agreement, the party must live with it until the parties successfully negotiate a new agreement or come to an impasse.

The status quo doctrine and past contrary practice versus contractual rights were specifically addressed in *City of Stevens Point.* There, the Commission was presented with a situation where an employer (the City of Stevens Point) had been promoting employees (firefighters) based solely on seniority. This practice was clearly in conflict of the CBA which required the employer to consider several criteria, including seniority, when promoting employees. During the negotiations of the successor contract, the employer unilaterally altered its practice of giving promotions based solely on seniority, and instead implemented a new process that was more consistent with the language in the CBA. The Commission concluded that this was not a violation of the status quo because the past practice was in clear violation of the specific language of the CBA and the employer had the right to implement a practice that was more in line with the conditions that had been collectively bargained. *Id.* at 7. In other words, *Stevens Point* holds that where the employer has a clear contractual right, it may exercise that right to change a past practice that violates the agreement.

In *Stevens Point*, the Commission mentioned that the Union had waived on several occasions any right it may have had to collectively bargain the new promotional process. However, the Commission did not declare that this sort of bargaining was required when altering

a past practice that was contrary to the CBA. Instead, the Commission indicated that if there was a duty to bargain out of such a behavior, then the employer had met this duty and the union had waived it. Specifically, the Commission wrote, "[A]ssuming arguendo, that the City had a duty to bargain the details of a promotional policy consistent with the parties specific contract language on that subject, the duty was fulfilled when the City offered, and the Union refused, to bargain about such details in October of 1983." *Id.* at 8. The Commission in the instant case interpreted this language to set forth specific criteria for altering the contrary practice under the status quo when the parties have a long-standing acquiescence in such a practice, spanning at least one set of successor contract negotiations. The two criteria are (1) the party wishing to change the practice must give clear notice; and (2) the party wishing to change the practice must provide a meaningful opportunity to change the language in the contract. I do not agree that *Stevens Point* sets forth these criteria, as the Commission in that case did not actually rule that such a duty to bargain existed, but rather discussed the duty hypothetically.

In *Outagamie County*, the Commission addressed a situation where the county and its employees were in a hiatus situation and the county renounced its past practice to conform to the language of the CBA. The Commission rejected the union's argument that the county had unilaterally changed the status quo. Instead, the Commission declared, "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. In the instant case, the Commission has interpreted this language from *Outagamie County* to be "dicta" and "unnecessarily sweeping." *Sun Prairie*, 22. The Commission then tried to distance its decision in *Sun Prairie* from *Outagamie* further by stressing the fact that *Outagamie's* hiatus was following an initial CBA, where there had been no

successor agreements. This, they argued, is considerably different from *Sun Prairie* where there have been numerous successor agreements. *Sun Prairie*, 22. Neither of these arguments is persuasive. The so-called "dicta" of *Outagamie County* is actually the major premise of the decision and holding. Also, the "status quo" doctrine has not been construed in past decisions by the Commission to afford different rights according to how they attained "status quo" standing.

The Commission has addressed the dynamic status quo doctrine in the past and established several relevant principles when determining parties' rights with regard to past practice and contractual provisions. In *Village of Saukville*, the Commission clearly articulated that "[t]he 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." *Id.* at 22. The Commission reasoned that this interpretation protects and encourages fair collective bargaining by holding the parties to their agreement and preserves the rights that the parties have collectively bargained. *Id.* In *Outagamie County*, the Commission concluded that an employer could revert to a practice consistent with the CBA during a hiatus situation. Specifically, the Commission wrote, "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." *Outagamie County*, 9.

Given this history, it is more reasonable to conclude that the District did not violate Wis. Stat. § 111.70(3)(a)4 and the status quo by ending the summer bump meetings. The CBA and the Commission's decision clearly illustrate that the District had the contractual right to end the bump meetings, where practices occurred that were contrary to the CBA. The District renounced

these meetings in its initial proposal for a successor agreement, creating a status quo situation. Past Commission decisions have consistently concluded that in a status quo situation, parties are entitled to the rights that they obtained through collective bargaining. In this situation, the District had collectively bargained the right to end this contrary practice, and did so legally. Therefore, I reverse the Commission's decision to the extent it concluded the District violated Wis. Stat. § 111.70(3)(a)4 and the dynamic status quo by unilaterally ending the SETA summer bump meetings.

B. The Commission's Interpretation of Wis. Stat. § 111.70(3)(a)5 and section 7.04 of the Collective Bargaining Agreement.

The Commission also concluded that the District violated Wis. Stat. § 111.70(3)(a)5 by failing to provide three SETA employees (Ott, Funnel, and Walsh) with adequate layoff notice and bumping rights within the meaning of section 7.04 of the Collective Bargaining Agreement. While I conclude above that the District did not violate Wis. Stat. § 111.70(3)(a)4, it is clear that once the District renounced the summer bump meeting practice, it then had to comply with the bumping provisions of the CBA in order to comply with Wis. Stat. § 111.70(3)(a)5. Specifically, § 111.70(3)(a)5 declares that it is a prohibited practice under MERA:

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

Since the three SETA employees were arguably laid off in August of 2004, and the active CBA expired on June 30 of 2004, the parties were in a status quo situation invoked by contract hiatus. Therefore, the three employees were entitled to their rights under the expired CBA with respect to wages, hours, and conditions of employment. In coming to this conclusion, the

Commission decided that Ott, Funnel, and Walsh were effectively laid-off despite apparent ambiguities within the terms of the contract and despite the assertion by the District that it merely offered Ott, Funnel, and Walsh new job opportunities. The Commission also concluded that the duty to provide layoff notice and bumping rights remained under the *status quo* as relating to conditions of employment.

The District disagrees with the Commission and asserts that the court should reverse the decision that it violated section 7.04 of the CBA. The District makes the following arguments: 1) The District argues that it did not actually lay off Ott, Funnel, and Walsh, but actually provided them with an opportunity to transfer into new positions; 2) the District also asserts that the Commission erred in concluding that a "one-position" job classification would be textually inconsistent with the intra-classification bumping rights described in section 7.04; 3) the District argues that one cannot interpret the language of a contract by referring to past practices regarding what occurred at the summer bump meetings, which were not in compliance with the CBA; and 4) the District argues that since the Union does not cite to the record with respect to findings of fact, this court must accept the facts as the District asserts.

The District's argument that it did not lay off Ott, Funnel, and Walsh, but instead provided them opportunities to transfer is not persuasive. The District directly got in touch with these three SETA employees and informed them that the status of their current positions was in serious doubt and provided them with eight vacant positions. The Commission, in its Order on Rehearing, asserted that "the record is quite clear that the District had reached a final decision regarding the job status of these employees... [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." *Sun Prairie*, at 4. This behavior suggests that the District had no intention of

continuing the positions for Ott, Funnel, and Walsh, therefore I am not persuaded that the District merely offered new positions to these three SETA employees. The District further argues that the 14-day layoff notice is not "self-executing" and that it took a "wait and see" approach to the SETA vacancies. However, this argument fails because it is clear the District took positive action rather than a "wait and see approach" by alerting the three SETA employees that their specific positions would not be available in the coming year. I conclude the three SETA employees were laid off and deserved their collectively bargained right to choose from not only the eight vacant positions, but also any other position into which they had the right to bump.

Regarding the argument concerning intra-classification bumping rights, I agree with the District that a "one-position" job classification would not be textually inconsistent with the section 7.04, because as long as there are classifications enveloping more than one employee, the CBA language retains meaning. Therefore, I reverse that conclusion by the Commission. However, this reversal does not affect the present case because I affirm the Commission's conclusion that all SETA employees fall under one classification together. The fact that the CBA includes language allowing equally qualified SETA employees to bump less senior (nonexempt) SETA employees indicates the existence of this classification, as do the parties' actions in the past; the parties seem to have agreed that all SETA employees were in one classification as they were invited to summer bump meetings for the express purpose of determining the next year's assignments within the SETA group.

The District's argument that the past practice of the summer bump meetings should not be considered when determining ambiguous contractual language is not persuasive. While the bump meetings contained procedures that were contrary to the CBA, this does not mean that the court is precluded from determining the intentions of parties with respect to ambiguities in the

CBA. At the bump meetings, the parties were not following the proper procedural method of bumping under section 7.04 of the CBA. However, as stated above it was clear from the parties' actions that they considered all SETA employees to be part of one classification regardless of the procedural defects with the summer bump meetings. Therefore, it was not erroneous for the Commission to examine the past practice of the bump meetings, as the District asserts.

Finally, the District argues that if a party fails to cite to the record, that an appellate court is "improperly burdened." Therefore, the District asserts that said party may be held to the facts set forth in the opposing party's brief. This is based entirely on a footnote in *Sulzer v. Diedrich*, 2002 WI App 278, ¶2, 258 Wis. 2d 684, 654 N.W.2d 67. The District suggests that the Union's deferral to the Commission's Findings of Fact creates a situation where this court should rely only on the District's assertion of the facts. I do not find *Sulzer* to be controlling or relevant here because the Union's citations to the Commission's Findings of Fact are appropriate. Under well-settled administrative agency law it is up to the District to show that the commission's decision depends on any findings of fact not supported by substantial evidence in the record. It has not done so.

Therefore I partially affirm and partially reverse the Commission's decision with respect to the District's violation of Wis. Stat. § 111.70(3)(a)5 and section 7.04 of the Collective Bargaining Agreement. I affirm the Commission's conclusion that the District violated Wis. Stat. § 111.70(3)(a)5 by failing to provide Ott, Funnel, and Walsh with the appropriate layoff notice and bumping rights afforded to them under section 7.04 of the CBA, and affirm the prospective relief ordered pursuant to that conclusion.[2] I reverse the Commission's overarching

[2] As part of its order, the Commission ordered the District to post notices indicating that it would no longer violate Wis. Stat. §§ 111.70(3)(a)4 and 5. Because I conclude that the District has not violated subparagraph 4 but has violated subparagraph 5, these notices should eliminate reference to subparagraph 4.

interpretation of the contract that there cannot be one-person subcategories of the SETA classification.

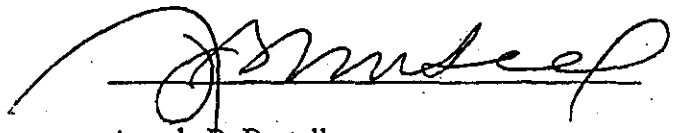
IV. CONCLUSION

For the reasons stated above, I reverse the Commission's decision to the extent it concluded the District violated Wis. Stat. § 111.70(3)(a)4 and the dynamic status quo by unilaterally ending the SETA summer bump meetings. I also reverse the Commission's overarching interpretation of the CBA that there cannot be one-person subcategories of the SETA classification. However, I affirm the Commission's conclusion that the District violated Wis. Stat. § 111.70(3)(a)5 by failing to provide Ott, Funnel, and Walsh with the appropriate layoff notice and bumping rights afforded to them under section 7.04 of the CBA, and also affirm the prospective relief ordered pursuant to that conclusion.

* * *

Dated: July 27, 2007

By the Court:



Angela B. Bartell
Circuit Court Judge

cc:

David C. Rice
P.O. Box 7857
Madison, WI 53707

Michael J. Julka
P.O. Box 1507
Madison, WI 53701

Aaron N. Halstead
P.O. Box 2155
Madison, WI 53701