STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PRAIRIE DU CHIEN EDUCATION ASSOCIATION,
Complainant,

vs.

PRAIRIE DU CHIEN SCHOOL DISTRICT,
Respondent.

Case 25
No. 66322
MP-4295

Decision No. 31942-A

Appearances:

Ms. Nancy Kaczmarek, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, WI 53708-8003, appearing on behalf of the Complainant.

Mr. Michael Cieslewicz, Kasdorf Lewis & Swietlik, Attorneys at Law, One Park Plaza, 11270 West Park Place, Milwaukee, WI 53224, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Prairie du Chien Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on September 21, 2006, alleging that the Prairie du Chien School District violated Sections 111.70(3)(a)1, 4, & 5, Wis. Stats., by its interpretation and implementation of the contractual salary schedule regarding graduate credits. The Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5), Wis. Stats. A hearing was held in Prairie du Chien, Wisconsin on January 17, 2007. The parties completed filing briefs on April 6, 2007.

Having considered the arguments and the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order

FINDINGS OF FACT

1. Complainant Prairie du Chien Education Association, herein called the Association, is a labor organization whose representative in this proceeding has a mailing address of 33 Nob Hill Drive, P.O. Box 8003, Madison, WI 53708.

2. Respondent Prairie du Chien School District, herein called the District or Employer, is a municipal employer whose representative in this proceeding has a mailing address of 11270 West Park Place, Fifth Floor, Milwaukee, WI 53224.

3. The parties do not have a 2005-2007 collective bargaining agreement, and their 2003-2005 collective bargaining agreement contains the following language:

ARTICLE IV: GRIEVANCE PROCEDURE

A. DEFINITIONS

1. A GRIEVANCE is defined as a controversy that arises during the term of this agreement involving the interpretations or application of any article of this agreement. Expressly excluded from arbitration is any grievance, which is based on events that occur after the collective bargaining agreement terminates which are subject to prohibited practice complaints.

ARTICLE XV: PROFESSIONAL GROWTH

It was agreed that approved courses that began after 5/12/80 would be paid and would count towards credit requirements.

A. All teachers placed on the BS Salary Schedule Lanes shall be required to earn six (6) additional credits, either undergraduate, graduate, continuing education credits, separately or in combination with prior approval by the District Administrator, every five (5) years or remain at the current salary schedule step placement until the requirement is met. This section refers to vertical movement on the salary schedule only.

B. All teachers placed on the MS Salary Schedule Lanes shall be required to earn three (3) additional credits, either undergraduate, graduate, continuing education credits, separately or in combination with prior approval by the District Administrator, every six (6) years or remain at the current salary schedule step placement until the requirement is met. This section refers to the vertical movement on the salary schedule only. On the salary schedule BS + 36 graduate credits will be compensated the same as the MS Lane.

C. To receive payment on the salary schedule for horizontal movement, the teachers must take graduate credits.

4. The salary schedule in Appendix I contains the lanes of BS, BS+12, BS+24, BS+36/MS, and MS+12. The dispute between the parties arises over the MS+12 lane – specifically, when teachers have to earn the 12 credits in order to qualify for the salary in that lane. The District is contending that the teachers must earn their masters degree and credits earned after the master's degree may be applied to the lane movement. The Association is contending that graduate credits earned before or after the attainment of a master's degree and that are outside of the master's degree may be applied to the lane movement.

5. Brian White is a social studies teacher in the District and was hired in 1989. At that time, he had a bachelor's degree, had begun working on a master's program and had 21 graduate credits. He completed a master's program in 2005. White has earned 27 graduate credits that were not applied to his master's degree, 12 of which were earned after he started working for the District. All of the credits were earned before White obtained his master's degree. White's additional credits were used to move both horizontally in lanes and vertically in steps. In July of 2005, White asked for a lane change to the MS+12 lane. James O'Meara, who became the District Administrator on July 1, 2001, denied the lane change request, and told White that his interpretation was that the hours had to be taken after the master's degree. He told White that the "plus" sign in front of the 12 meant "masters plus 12." White made a formal request for the lane change in August of 2005, which was denied by O'Meara. The Association filed a grievance over the failure to grant White's lane request for MS+12.

6. Nadine Wolf is a Title 1 teacher and was hired by the District in 1996. She received her master's degree on May 13, 2000. In December of 1999, she submitted a request for credit pre-approval which noted that the completion of the course would constitute a lane change. Wolf originally noted that it would be masters + 18, and the administration changed that to masters + 12 for May of 2000. In May of 2000, Wolf submitted a form for payment for credit request, asking that her lane be changed from the BS+36/MS lane to the MS+12 lane. It was approved by Victor Rossetti, the superintendent at that time, and the curriculum coordinator, Cindy Coele. Wolf was subsequently paid at the MS+12 salary from 2000-2001 year until the 2005-2006 school year. Of the 36 credits shown on Wolf's transcript for her master's program, the first 6 credits were earned in 1994 and 1995 in order to renew her teaching license. She started her masters program in the fall of 1998 and earned 30 credits. All of her credits were used to change lanes from a BS+12 to BS+24 to BS+36 or to renew her teaching license. After Wolf earned her masters degree, she earned another 7 credits. In February of 2005, Patti Schauf, the payroll supervisor, sent Wolf an e-mail asking her to send any credits or transcripts she received after May 13, 2000. Wolf wrote back, stating she had more credits after her BS, such as 12 credits before she started her master's program. Schauf wrote back stating that she did not have grades or transcripts taken after she received her master's degree. On October 12, 2005, O'Meara notified Wolf that she was put on the MS+12 lane in error because she had not completed the additional 12 hours of credit beyond her master's degree. Her salary was reduced on October 31, 2005. O'Meara asked her to sign a new contract for the year with a salary based on the MS lane, but she did not sign it. O'Meara believed that Rossetti made a mistake in Wolf's case, after Coele signed off on it. A grievance was filed over the District's decision to change Wolf's lane placement on the salary schedule.

7. Gary Nettesheim started working for the District in the 1998-1999 school year and is a technology education instructor. He was enrolled in a master's program when he was hired and had 18 graduate credits that would not be applied to his master's program. His graduate credits were used to move horizontally across lanes to the BS+36 lane. Nettesheim talked to Duane Bark, the principal, and asked if he could apply those graduate credits to his masters upon completing his master's degree. According to Nettesheim, Bark said he would discuss it with Rossetti, and Bark told him later that it would be approved. Nettesheim finished his master's degree on May 13, 2000. He was offered a teacher contract for 2000-2001 for the MS+12 lane, which he signed. He was paid at the MS+12 lane for more than four years when his salary was reduced to the BS+36/MS lane. O'Meara wrote him on October 12, 2005 and informed him that his placement on the salary schedule appeared to be an error, and that unless he could show 12 hours of credit since receiving his masters, he would be placed on the MS lane starting October 31, 2005. Schauf had raised the same issue of when credits were earned in October of 2004, and Nettesheim told Schauf that he had worked out a deal with Bark and Rossetti, and that Mike Coughlin, the business manager, would know more about it. Nettesheim call Coughlin who said he would write something for the file but did not do so. O'Meara told Nettesheim that Bark, as a principal, would not have the authority to make an arrangement on salary with him. O'Meara also called Rossetti, who did not recall the conversation. Nettesheim was offered a teacher contract for the 2005-2006 year with his salary at the MS+12 lane, which was replaced in October of 2005 with a contract showing his salary at the MS lane. A grievance was filed for the change in salary lanes. Bark e-mailed Nettesheim in November of 2005 and told him that he could not honestly say on the stand that he moved him to an MS+12 when he received his MS degree. His e-mail also stated that when he was with the District, it was normal to negotiate with new hires for movement in the vertical lanes but not in the horizontal lanes in his dealings. Nettesheim has 4 credits since attaining his master's degree.

8. Debra Durley is the school psychologist and a member of the Association's bargaining unit. She started working with the District part time through CESA in 1992 and was hired full time by the District in 1994. When she was hired, she was not a member of the collective bargaining unit but became a member around 1996. She had a master's degree plus 24 credits when she was hired by the District. Durley attained her master's degree in August of 1991. In March of 1995, she notified John Foster, the superintendent at that time, that she had earned 30 credits beyond her master's degree and asked for a salary at the MS+12 level. On March 21, 1995, Foster wrote that she would be moved from the master's lane to the MS+12 lane when the contract for 1995-96 was settled.

9. David Antoniewicz has been a teacher in the District for 25 years and served as chief negotiator for the Association between 1989 and 1991 and again from 1997 to 1999. He was involved in the negotiations for the 1992-1995 collective bargaining agreement, and the parties agreed to add language that referred to vertical movement on the salary schedule only. They also added the last sentence of Article XVII, Section B, that states that BS+36 graduate credits will be compensated the same as the MS lane. During that bargain, the parties also added paragraph C stating that teachers must take graduate credits to receive payment for

horizontal movement. Antoniewicz recalled that the Association proposed making the BS+36 the same as the MS lane, and both parties agreed that teachers should have graduate credits to move horizontally on the schedule. As to the vertical movement, teachers could not receive a step if they did not get six credits every five years if they held a bachelor's degree. According to Antoniewicz, there was no discussion of whether graduate credits had to be sequenced or taken in a particular order to move horizontally on the schedule. Brian White served as the chief negotiator for the Association for the 1998-2000 period. The salary schedule for 1998-1999 shows that the parties kept a separate lane for the BS+36 and MS salaries, but the salary amounts are identical. In the 1999-2000 schedule, they merged the lane as BS+36/MS.

10. Patti Schauf has been with the District for 15 or 16 years and has been the payroll supervisor for six years. She checks the credits for teachers when they change lanes or steps and sees that they are paid correctly. Schauf keeps a notebook that tracks credits for teachers and keeps the same information in their personnel files. She records the requests for pre-approval of credits and the lane changes. If teachers ask her about a lane change, she first looks for the documentation. She has told them that they have to have 12 credits after their master's degree to move to the last lane. Sometime in 2004, O'Meara became aware that there were teachers paid in the MS+12 lane who had not earned 12 credits after receiving their masters' degrees. He asked Schauf to investigate, and she found that Wolf and Nettesheim were in that position.

11. There are 20 teachers – including White, Wolf, and Nettesheim – that have credits outside of their masters' degrees. Twelve of them have more than 12 credits. None of them have 12 or more credits earned after earning the masters degrees. Of the nine teachers excluding White, Wolf and Nettesheim, all of them were on the MS lane.

Doug Rogers is one of those nine teachers with a master's degree and 36 credits that were not applied to his master's degree. Three of those credits were earned after he got his master's degree. In 2002, Rogers talked to O'Meara about a lane change to MS+12, but O'Meara told him that is not how he interpreted the contract. Rogers told O'Meara that he knew of staff members who had moved to the MS+12 lane and their credits were earned before they got their masters' degrees. O'Meara did not recall this conversation, and Rogers did not formally apply for a lane change. Rogers did not grieve the matter or bring it to the attention of the Association.

Lisa Ashbacher received her master's degree in the summer of 2005 and has 15 credits not applied to her master's degree. She talked to Schauf about moving to the MS+12 lane, and Schauf told her that credits taken prior to the master's degree did not count toward the MS+12 lane. Ashbacher did not mention this to the Association and did not pursue it any further.

Lisa Lewke also has a master's degree, which she earned in 2001, as well as 12 credits not used for that degree. She filled out the paperwork to make a lane change to the MS+12 lane, but it was denied by the business office. Someone in the business office told her that is the way it works, and she did not question it or notify the Association.

Leann Bollum was hired in 1998 and got her master's degree in 2000. She had 24 credits outside of her master's degree when she was hired. Bollum thought that she would be able to make a lane change after finishing her master's program, but Schauf told her it did not work that way. Bollum did not notify the Association or do anything about it.

12. Three former presidents of the Association - Susan McDonald, Randi Kleusner, and Cindy Atkinson – served terms in the years between 2000 and 2004. No bargaining unit members notified them that they had been denied horizontal advancement on the salary scale or that they had been denied lane movement for credits earned before receiving their masters' degrees.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Respondent has not violated a collective bargaining agreement where no collective bargaining agreement was in effect, and therefore, did not violate Sec. 111.70(3)(a)5, Stats., by denying Brian White's request to be placed on the MS+12 lane of the salary schedule, or by moving Nadine Wolf and Gary Nettesheim to the MS lane of the salary schedule.

2. Respondent has not violated Sec. 111.70(3)(a)4, Stats., by denying Brian White's request to be placed on the MS+12 lane of the salary schedule or by moving Nadine Wolf and Gary Nettesheim to the MS lane of the salary schedule.

3. Respondent has not violated Sec. 111.70(3)(a)1, Stats., by any conduct noted in Conclusions of Law #1 and #2.

On the basis of the above Findings of Fact and Conclusions of law, the Examiner makes and issues the following

ORDER

The Complaint is dismissed in its entirety.

Dated at Elkhorn, Wisconsin this 22nd day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

PRAIRIE DU CHIEN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Association

The Association asserts that Article XV, Professional Growth, has clear and unambiguous language regarding the type of credits which may be used to advance beyond the MS lane. The language has been in existence since 1992 and does not specify an element of time or specify that credits used for horizontal advancement to the MS+12 lane must be take after achieving a masters degree. The parties' use of the "plus" sign in MS+12 means that an employee must have 12 graduate credits in addition to those used to achieve a master's degree. O'Meara's interpretation that the "plus" sign means a teacher must earn those 12 credits after attaining a master's degree is not supported by the contract language, bargaining history or past practice. Furthermore, the parties' decision to equate the BS+36 with a master's degree in the 1992-1995 contract undermined the distinction between the two. The contract language only restricts the type of credits used for advancement, not their sequencing.

Even if the language is subject to more than one reasonable interpretation, the Association submits that the bargaining history, the District's past conduct, arbitral authority and notions of equity support its interpretation. The testimony of Antoniewicz established that the parties made two changes – (1) to compensate the BS+36 the same as the MS lane, and (2) to clarify the type of credits required for horizontal and vertical movement on the salary schedule. O'Meara did not bargain the 1992-1995 contract and had no direct knowledge of bargaining history. Antoniewicz testified that there was no discussion regarding the sequencing of graduate credits for horizontal movement, and the parties did not negotiate any additional requirements for lane advancement. The only requirement is that the credits used for horizontal advancement must be graduate credits. If the parties wanted to restrict the use of graduate credits for horizontal movement, they could have limited it as the parties did in WITTENBERG-BIRNAMWOOD SCHOOL DISTRICT, CASE A/P, M-99-198 (KRINSKY, 6/99) such that graduate credits must be "beyond" or "after" or "past" the master's lane of the salary schedule. Where the parties did not do so, no such condition can be implied. If the District wished to address the "sequencing" of graduate credits for horizontal movement, it should have bargained those changes. The District should not obtain now that which it did not obtain in negotiations.

Moreover, the Association argues that the bargaining history is augmented by the past practice. The District, under two previous superintendents, allowed staff to move to the MS+12 lane with credits earned outside of their MS programs. In 1995, Foster allowed

Durley to move from the MS lane to the MS+12 lane based on her note which did not reference the timing of her credits. In 2000, Rossetti moved Wolf and Nettesheim to the MS+12 lane upon completion of their masters' degrees and submission of their transcripts. The District's practice is of sufficient duration and was applied to three different employees. When the incidents giving rise to the issue occur infrequently, relatively few instances are required to establish a binding practice. Also, the Association had no knowledge that teachers were denied advancement to the MS+12 lane for graduate credits earned in advance of their masters degrees until the summer of 2005 when White was denied.

The Association points out that there is a series of arbitration awards addressing the issue of graduate credits and salary schedule placement. The WITTENBERG-BIRNAMWOOD SCHOOL DISTRICT is the case most similar to the instant case. In that case, the question was whether employees were entitled to placement above the MA lane for credits earned before their master's degree was awarded. In sustaining the grievance, the Arbitrator found the language to be ambiguous, that there was no evidence of a binding past practice, and he rejected the employer's claim that it approved credits because it had not had information that the credits were earned before the degrees. GIBRALTAR SCHOOL DISTRICT, CASE 35, NO. 51929, MA-8781 (GALLAGHER, 04/95) is distinguishable in that there was no evidence of past practice wherein teachers were given credit for advancement beyond the MA for credits taken prior to earning their masters' degrees. Also distinguishable is ROSHOLT SCHOOL DISTRICT, CASE 22, NO. 46692, MA-7046 (MCLAUGHLIN, 06/92), where there was no specific contract language dealing with horizontal advancement. In OWENDALE-GAGETOWN AREA SCHOOL DISTRICT, 95 LA 601 (BROWN, 1990), the contract stated that "….following completion of the required academic or professional courses for a degree the increments shall become effective." Unlike the instant case, the language of that contract defined the sequencing of credits. DEPERE SCHOOL DISTRICT, CASE NO. A/P M-98-394, (ENGMANN, 07/99) is also distinguishable where the agreement referred to "credits beyond the masters lane of the salary schedule."

The Association contends that the bargaining agreement should be interpreted to avoid a forfeiture. Nettesheim and Wolf forfeited approximately $1,000 and $1,200 per year respectively when the District rescinded their MS+12 lane placement. The placement of Wolf and Nettesheim at the MS+12 lane was not a mistake. They submitted their transcripts to the District. Wolf obviously intended to use credits earned prior to the receipt of her master's degree, earned just a few days earlier, to advance beyond the MS lane. Nettesheim had a conversation with Bark two years in advance of his placement on the MS+12 lane. It was the District, under the administration of Rossetti, that put them at the MS+12 lane. Rather than speculate that it was a mistake, the most reasonable conclusion is that the District's salary placement of Wolf and Nettesheim reflected the mutual understanding of the parties. Despite the District's knowledge of the "mistake" in 2004, it left Nettesheim at the higher rate for 14 months until October of 2005, shortly after White filed a grievance regarding his placement on the schedule. Wolf was left on the schedule for nine months after the District learned of its supposed mistake. The District did not call Rossetti, Bark or Coele as witnesses at the hearing, and any second hand account as to what they supposedly said should be discredited.

At the hearing, the District advanced the premise that Wolf and Nettesheim had consumed all their graduate credits while moving through the lanes on the schedule. Perhaps the District was relying upon WESTON TEACHERS' ASSOCIATION, CASE 27, NO. 50571, MA-8374 (BURNS, 12/94). However, the language in that case is not even remotely similar to the language in this case. Also, the masters' programs for Wolf and Nettesheim were 30 credit programs. An employee could use their first 12 credits to advance to the BS+12 lane, their second 12 credits to advance to the BS+24 lane, and with 6 more credits, go to the BS+36/MS lane. An employee could pass right by the BS+36 lane without having earned 36 credits. Graduate credits in a master's program carry across BS lanes, even though an employee may have used them as he or she earned a master's degree.

While the District presented a list of nine staff members who are at the MS lane and also have 12 credits outside their masters' degrees, there is no past practice of disallowing such credits for the MS+12 lane. Rogers requested a lane change but did not grieve it or notify the Association when it was denied. Ashbacher, Lewke and Bollum were told that they could not advance and none of them grieved it or notified the Association. Three past Association presidents did not know that teachers were being denied lane movement. The absence of grievances does not show that there was an accepted or acknowledged past practice or that the Association tacitly acquiesced to it. There was no mutuality between the parties.

The Association submits that the District violated Sec. 111.70(3)(a)5, Stats., when it rescinded the lane placements for Wolf and Nettesheim and denied White's lane advancement on the salary schedule. Also, the District violated Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally changing the status quo of a mandatory subject of bargaining during contract hiatus. The Association seeks a make whole award, including interest, for the three grievants.

The District

The District asserts that a reasonable and common interpretation of the contract language supports its position. There is no evidence of bargaining history to support the interpretation of the contract advanced by the Association. The ordinary meaning of the salary schedule comports with the past practices of the District – that is, a teacher must earn 12 or more graduate credits after obtaining the master's degree in order to move horizontally to the MS+12 lane.

The District notes that Antoniewicz testified that there was no discussion of sequencing of graduate credits needed to move horizontally, only a discussion about what type of credits would be necessary. The addition of the sentences in paragraph B of the Professional Growth article were to allow vertical movement down the schedule even if a teacher had not earned a master's degree or have graduate credits. The District points out that the contract language is contained within the article called "Professional Growth." It is reasonable to assume that the District intended to compensate teachers for undertaking a course of study that would advance their teaching skills, i.e., their professional growth. It is likewise unreasonable to assume that

if a teacher is attempting to advance his or her teaching skills, he or she would be able to reach back to graduate credits earned decades ago before attainment of the master's degree in order to move horizontally on the salary schedule and thereby be rewarded for their professional growth. The salary scheduled refers to "MS+12" and not "12+MS."

At the hearing, the Association presented the testimony of Durley in hopes of supporting its allegation that the District had previously moved teachers to the MS+12 lane without graduate credits earned after the master's degree. However, Durley had a master's degree plus 24 graduate credits when she was hired by the District in 1994. O'Meara agreed that she was correctly placed on the MS+12 lane, and her placement is evidence of the District's past practice of requiring 12 graduate credits to be earned after the master's degree in order to be placed at MS+12.

Moreover, the District asserts that there are 9 other teachers with a master's degree and additional graduate credits earned before attaining their master's degrees who are not on the MS+12 salary schedule lane. None of them have earned 12 or more graduate credits after their masters. O'Meara testified that 9 of these teachers have never requested to be placed on the MS+12 lane. Therefore, with the exception of the mistake made in regard to Nettesheim and Wolf, no other teacher has been placed on the MS+12 lane without having more than 12 post-master's degree graduate credits. While the Association called 4 of those teachers to rebut O'Meara's testimony, it was to no avail. Ashbacher never filed a written request to move to the MS+12 lane and simply had a conversation in passing with Schauf in the business office. Much of the same is true of Lewke, who stated that she was told by the business office that she could not use pre-master's degree graduate credits to move to the MS+12 lane. Bollum also discussed the matter informally with Schauf and did not speak to O'Meara about it. Rogers stated that he spoke to O'Meara, and he claimed to put in a slip about it, but he could not produce that slip. None of the documents in the District's files shows any request by Rogers to move to the MS+12 lane. The Association also called former officers or negotiators, and none of them recalled anyone complaining about a denial by the District of an application to move to the MS+12 lane. It is a fair inference that if teachers believed that they had a grievable issue, they would have voiced their complaints to the Association representatives. It is also a reasonable inference that none of those 9 teachers made a formal application to move to MS+12 and those who inquired about it informally were given the consistent explanation of the District's past practice of requiring graduate credits to be earned after the master's degree.

The District also contends that prior arbitration decisions support its position. In BOARD OF EDUCATION, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, ET AL, Arbitrator Hales found that the "plus" sign referred to credits earned subsequent to the degrees, based on policy and practice. Likewise, in NEENAH JOINT SCHOOL DISTRICT, (ARB. GRABB, 1975), the Arbitrator found the salary improvement was given for "continuous professional improvement" which could not have been intended to refer to past and outmoded credits. The Arbitrator also noted that neighboring and similar school districts follow the same practice of requiring salary

credit to be earned after the degree is granted. In ROSHOLT SCHOOL DISTRICT, CASE 22, NO. 46692, MA-7046 (ARB. MCLAUGHLIN, 1992), the Arbitrator ruled in favor of the District under similar facts because the Association never challenged the District's placement in bargaining and it never bargained for the result it was seeking in arbitration. In WESTON SCHOOL DISTRICT, CASE 27, NO. 50571, MA-8374 (ARB. BURNS, 1994), the Arbitrator found the language clear – that credit are applied to the next step on the horizontal column in the salary schedule – and the grievant used credits to move **to** the BA+12 and BA+24 lanes. Finally, in GIBRALTAR SCHOOL DISTRICT, CASE 35, NO. 51929, MA-8781 (ARB. GALLAGHER, 1995), the Arbitrator found the contract to be silent on the issue and the past practice did not support the Association's position. The Arbitrator noted that if the parties intended to follow the lane progression urged by the grievant, they could have described such a progression in the labor contract but they did not do so. The same is true in the instant case. Antoniewicz testified that the sequencing of the graduate credits was not a topic of discussion during negotiations. The District concludes that its position in this matter is consistent with that of other districts and the interpretation of arbitrators, as well as being consistent with past practice and with the contract language.

The District also claims that the Association has presented no proof that it interfered with, restrained and unilaterally attempted to coerce a municipal employee in the exercise of his or her rights by not adhering to past practice. The District has adhered to past practices of requiring graduate credits to be earned after attaining the master's degree to move horizontally on the salary schedule to MS+12. Moreover, the question of Nettesheim and Wolf's proper placement on the schedule predated White's request to move to the MS+12 lane in the summer of 2005. Schauf questioned them regarding verification of credits earned after their master's degree in the fall of 2004. Also, Nettesheim's initial "deal" when hired apparently grew out of discussions with the high school principal who did not have the authority to agree to a horizontal salary schedule move.

In Reply, the Association

Contrary to the District's argument, bargaining history does not support the District's interpretation, the Association claims. Antoniewicz recounted that it was during the 1992-1995 bargain that the Association proposed the language that BS+36 graduate credits were to be compensated the same as the MS lane on the salary schedule, and that since they were going to pay BS+36 the same as a masters, then the credits should all be masters or graduate credits. The parties put the language of Article XVII, Paragraph C, into the contract to state that "to receive payment on the salary schedule for horizontal movement, the teachers must take graduate credits." The fact that the parties did not discuss the sequencing of graduate credits does not lead to an adverse inference.

Moreover, the Association contends that the parties deliberately clarified the sequencing of credits for vertical movement on the salary schedule but not for horizontal movement. The applicable principle of contract interpretation is that requirements that are expressly provided

as to some elements may not be inferred from silences as to other elements in the same section (*inclusion unius est exclusio alterius*). The parties clearly set forth in Article XV an element of time or sequencing of credits in case of vertical advancement on the salary schedule, and therefore, the parties did not intend an element of time or an implied sequencing of credits requirement for horizontal advancement on the salary schedule.

The Association takes issue with the District's citations of decisions in the Madison and Neenah cases. The Association challenges the District to explain how the Arbitrator's position in the Madison case applies to the specific language at issue here. The same is true with the Neenah case where the parties did not negotiate analogous language for horizontal advancement. The Association objects to the District's proposition that other districts require salary credit to be earned after the degree is granted where the District did not present any evidence at hearing as to industry practice. In any event, industry practice is not relevant absent evidence as to their contract language.

In Reply, the District

The District responds by stating that the Association has ignored the contract language – specifically the section entitled "Professional Growth." One does not grow or advance in one's profession by relying on course work that is perhaps decades old. Instead, the Association confuses the issue by focusing on the merger of the MS lane with the BS+36 lane. The merger of the two lanes has nothing to do with the issue at hand. A teacher at BS+36 is required to earn six additional credits every five years, while a teacher at the MS level is required to earn three additional credits every six years.

The District points out that Wolf, Nettesheim and White used their graduate credits outside of their masters' degrees to move horizontally on the salary schedule across the BS lanes, and they should not be allowed to use them a second time to move to MS+12 without earning 12 graduate credits after their masters' degrees. In that respect, the District's reliance on the Weston case is correct. The Rosholt and Gibraltar cases also note that credits had been used to move horizontally through the BS lanes.

The District objects to the Association's appeal for equity. Most, if not all, arbitrators have refused to apply equitable principles to contract interpretation. The fact of the matter is that Nettesheim and Wolf benefited from the mistake made in 2000 by receiving pay at the MS+12 lane for over four school years when they should have been paid at the MS lane. The District does not seek the return of those monies, but it does seek the return of these two individuals to the salary lane where they should have been all long.

In its complaint, the Association made much of the placement of Durley on the MS+12 lane, particularly at paragraph 9 on page 9 of its complaint. The Association claims that Durley received placement on the MS+12 lane in March of 1995 on the basis of credits earned prior to her master's degree. The evidence at hearing did not support this allegation. At the

time of her hire, Durley had a master's degree plus 24 credits. She received her master's degree in August of 1991 and thereafter completed an additional 24 credits. When she moved to the MS+12 lane, she had earned more than 12 graduate credits after her master's degree. In its brief, the Association referred to the effect that Durley had been moved to the MS+12 lane based merely upon her handwritten note to the former superintendent, Foster. However, she notified the District in her initial application that she had 30 graduate credits beyond her master's degree. Thus, the Association incorrectly stated that the practice applied to three different employees since it did not apply to Durley. Thus, only two employees were on the MS+12 lane without 12 credits earned after the attainment of their masters' degrees, and two incidents are not sufficient to establish a binding practice. Wolf and Nettesheim's requests were made about the same time in 2000. With the exception of the contemporaneous placement of Wolf and Nettesheim at MS+12 in 2000, the District's practice both before and after has been consistent, i.e., 12 graduate credits must be earned after the master's degree.

DISCUSSION

The parties' collective bargaining agreement for 2003-2005 has expired, and since there is no collective bargaining agreement in place, there can be no breach of contract violation under Sec. 111.70(3)(a)5, which makes it a prohibited practice to violate a collective bargaining agreement. While the parties have tended to treat this as a breach of contract case, the analysis must be whether there is a violation of Sec. 111.70(3)(a)4, Stats.

Legal Principles

The Commission stated the applicable legal principles recently in SCHOOL DISTRICT OF KETTLE MORAINE, DEC. NO. 30904-D (WERC, 4/07):

> . . . It is a fundamental tenet of Commission law, and labor relations law in general, that, where employees are represented by a union, an employer may not change the existing wages, hours, or working conditions without exhausting its obligation to bargain in good faith with the union about those subjects. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS. 2D 671 (CT. APP. 1994); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (CT. APP. 1994); MAYVILLE SCHOOL DIST. V. WERC, 192 WIS.2D 379 (CT. APP. 1995); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (CT. APP. 1997). The Commission summarized the reasons for this rule long ago as follows:
>
> > 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, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), GREEN COUNTY, DEC. NO. 10308-B (WERC), 11/84. SEE ALSO NLRB V. KATZ, 396 U.W. 736 (1962).

The concept underlying this longstanding principle is that the purposes of the Municipal Employment Relations Act (MERA) – effective bargaining and labor peace – are best effectuated by maintaining stability regarding wages, hours, and working conditions while these matters are under negotiation.

This duty to maintain the "status quo" applies whenever there is a duty to bargain, including the period between the expiration of one contract and the execution of its successor. During this "hiatus," while the parties are negotiating over the terms of the successor agreement, the Commission has long required the employer to maintain the existing wages, hours, and working conditions until the new contract is finalized. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). Either party may negotiate for changes, including a proposal to make those changes retroactive to the beginning of the hiatus. However, during the hiatus, while the bargaining process is ongoing, no changes may be implemented without the other party's consent. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), AT 21.

A primary element in a unilateral change violation is establishing what the existing wages, hours, and working conditions were at the time the employer allegedly changed them. Under the Commission's traditional approach, this determination is based upon relevant language (if any) in the expired contract, bargaining history that may shed light on such contract language, and the parties' actual practices on the topic. See, e.g., CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). While the expired contract plays an important role, "[I]t is crucial… to observe that, since the contract no longer exists, the duty to maintain the status quo is not contractual in nature. Rather, it is a function of the collective bargaining law. SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-B (WERC, 3/06) AT 17.

The Commission also stated that what comprises a practice for contract arbitration is not the same as what comprises a practice for the purposes of status quo. In DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, 2/07), the Commission noted that:

It may be appropriate to utilize a relatively high standard for proving that an unwritten practice has become so enduring and pronounced that it is enforceable as a contract. There is a difference, in other words, between a practice that is contractually "binding" and a practice that simply exists, since, by definition, the former has become more than "a mere nonbinding way of doing things."

The Language

The starting point is the language, if any, of the expired contract. The contract is silent on the issue of whether teachers must have completed their masters' degrees first before getting additional graduate credits to move to the MS+12 lane for whether they may use graduate credits not used for a master's degree and earned before a master's degree to move to the MS+12 lane. The contract is clear only with respect to the fact that all lane or horizontal movement must be with graduate credits. See Article XV, Section C. The language in Section B of Article XV refers only to vertical or step movement and is not relevant to this dispute. Thus, we are left with the lane designation of "MS+12" as the sole language to interpret.

The MS+12 reference could be read to support either party's position. It could mean that any graduate credits amount to 12 or more – in addition to a master's degree – would be counted in this lane, no matter when earned. It could mean that the master's degree must be earned first, then one must have an additional 12 credits to move to this lane. Because both positions are plausible and there is no specific language dealing with this, the parties have correctly looked at bargaining history and past practices.

The Bargaining History

However, neither the bargaining history nor the past practices are of much help in this case. The bargaining history is as silent with respect to when teachers must earn 12 credits – before or after they attain their masters' degrees – to move to the MS+12 lane. The testimony of the Association's negotiator, Antoniewicz, confirms that the parties never negotiated over this very issue. They only determined that graduate credits are needed to make any lane movement. The Association argues that graduate credits are the only requirement for lane movement, and that if the District wanted to restrict the use of them, it could have done so by stating that such graduate credits must be beyond or after or past the master's lane for movement to that lane. The inverse is also true – that if the Association wanted the use of graduate credits to move through lanes at any time without regard to the degree obtained, it could have bargained for such language. Neither party should obtain now that which it did not obtain in negotiations. The parties simply did not bargain over it, and no adverse inferences can be made.

The Association believes that because the parties clarified the sequencing of credits for vertical movement on the salary schedule, the failure to do so for horizontal movement means that they did not intend an element of time or implied sequencing of credits to be required for horizontal movement. The parties' language regarding vertical movement is in Article XV, Sections A & B, while the language regarding horizontal movement is in Article XV, Section C. The fact that there is a time frame in Section A to get six credits every five years without a master's degree or the time frame in Section B to get three credits every six years to move vertically is not relevant to when teachers have to get additional credits to move horizontally to the MS+12 lane. They did not exclude a time to get graduate credits to move to the MS+12 lane by expressing when people have to obtain credits to move vertically. They simply did not address the issue one way or the other, and to make any inferences would be to add something to the contract that is not there.

Accordingly, the bargaining history is of no help in this case.

Parties' Actual Practices

The practices of the parties are a little messy. The District never moved anyone to the MS+12 lane without having 12 credits earned after his or her master's degree – with two exceptions. Both exceptions occurred in the year 2000, under the same superintendent, Rossetti, and both were grieved when the District rescinded the lane placement of MS+12 of Wolf and Nettesheim and put them back to the MS lane in October of 2005. The other example used by the Association – Durley – does not match up with the Association's position. Durley had the required credits after her master's degree, and her placement on the MS+12 lane by then superintendent Foster supports the District's position. So while the Association argues that there were three employees and two superintendents involved in this past practice of putting people on the MS+12 lane with credits earned before their masters, there are only two people under one superintendent, Rossetti, in one year, 2000. The practice both before and after the Wolf and Nettesheim placements show that the District has consistently interpreted the contract to mean that one earns the master's degree first, then additional credits after that in order to move to the MS+12 lane.

The question is what is the status quo regarding the practice. There is no mutually agreed upon practice or one that a party has tacitly agreed to through inaction. The Association did not know that teachers were being denied movement to the MS+12 lane until White brought his grievance forward.

However, it is true that District's "practice" – that of not moving teachers to the MS+12 lane until they first obtained their masters' degrees and subsequently earned 12 more graduate credits – is the more prevalent practice in this case and therefore, could be considered to be the status quo more easily than the Association's "practice" whereby two teachers were moved to the MS+12 lane without having earned 12 graduate credits after obtaining their masters' degree. Thus the more prevalent or more prevailing practice is the District's practice and is the status quo. The Association is correct that where there are few incidents giving rise to the issue, relatively few instances may establish a binding practice. However, the cases of Rogers, Ashbacher, Lewke and Bollum – with Bollum's case coming about the same time as Wolf and Nettesheim's move to the MS+12 lane – show that the District was more consistent in interpreting the contract to mean that one earned the master's degree first, and then had to earn additional credits to move to the MS+12 lane, than it was in allowing credits earned before a master's degree to be used to move to the MS+12 lane. The practice – despite the mixed results – tends to favor the District, if ever so slightly.

While it is difficult to determine exactly what the status quo is in this case because of the lack of language and bargaining history and a practice that has some deviations, it is ultimately the Association's burden to prove that the status quo has been unilaterally changed, and it has failed to do that. The Examiner finds that the status quo is that the master's degree

must be earned first, then additional graduate credits earned after that may be applied to move to the MS+12 lane, and credits earned before the attainment of the master's degree are not considered to be applicable to movement to the MS+12 lane.

There is still a question about whether the District's action in moving Wolf and Nettesheim backwards on the salary schedule from the MS+12 lane to the MS lane changed the status quo. While it changed the status quo for them as individuals who were getting more money, it did not necessarily change the status quo – which is, that one must obtain his or her master's degree and subsequently earn 12 graduate credits before moving to the MS+12 lane on the salary schedule. There is never a good time to lower someone's salary. To its credit, the District does not seek any retroactive payment of what it considers to be overpayment of salaries to Wolf and Nettesheim. If employees were incorrectly placed on the salary schedule in a lower place than they should have been, it would not be necessary to wait until the contract hiatus is over to move them to a correct salary in a higher lane. The District's action brought Wolf and Nettesheim back into the status quo. Therefore, there is no violation of Sec. 111.70(3)(a)4, Stats.

There was no record evidence of any violation of Sec. 111.70(3)(a)1, Stats., and that allegation has also been dismissed along with the other allegations.

Dated at Elkhorn, Wisconsin this 22nd day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

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