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-B

Appearances:

Nancy Kaczmarek, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Prairie du Chien Education Association.

Michael Cieslewicz, Kasdorf, Lewis & Swietlik, Attorneys at Law, One Park Plaza, 11270 West Park Place, Milwaukee, Wisconsin 53224, appearing on behalf of Prairie du Chien School District.

ORDER ON REVIEW OF EXAMINER'S DECISION

On May 22, 2007, Examiner Karen J. Mawhinney issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, concluding that the Respondent Prairie du Chien School District (District) had not violated a contract or unilaterally changed the status quo during a contract hiatus by refusing to allow certain employees to use credits earned before obtaining their Masters Degrees in order to advance to the "Masters Degree plus 12 credits" lane on the salary schedule. She therefore dismissed the alleged violations of Secs. 111.70(3)(a)5, 4, or 1, Stats.

On June 11, 2007, the Complainant Prairie du Chien Education Association (Association) filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Thereafter both parties filed written argument in support of their respective positions, the last of which was received on August 17, 2007.

For the reasons set forth in the Memorandum that accompanies this Order, the Commission affirms the Examiner's decision, but clarifies the analysis of how past practices affect the determination of the status quo during a contract hiatus.

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

ORDER

The Examiner's Findings of Fact, Conclusions of Law, and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of September, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

PRAIRIE DU CHIEN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER

The facts can be summarized as follows.

The most recent collective bargaining agreement between the parties, which expired on June 30, 2005, included a salary schedule that increased a bargaining unit member's salary "horizontally" at the following credit acquisition intervals: Bachelors Degree plus 12 credits (BS+12), Bachelors Degree plus 24 credits (BS+24), Bachelors Degree plus 36 credits and/or Masters Degree (BS+36/MS), and Masters Degree plus 12 credits (MS+12). The contract requires that credits must be at the graduate school level and pre-approved by the District in order to apply toward these advancements. The contract does not explicitly specify whether the 12 credits in the MS+12 lane may be earned prior to achieving the Masters Degree. The record also contains no evidence that the parties have discussed that issue at the bargaining table.

Prior to the events giving rise to this case, the District had authorized the advancement of two teachers (Wolf and Nettesheim) to the MS+12 level based upon credits earned prior to receiving their Masters Degrees. Both teachers had earned their Masters Degrees shortly before the 2000-01 school year and were offered contracts for 2000-01 at the MS+12 level. The 12 additional credits were in excess of those needed for the Masters Degree, but had been earned prior to the Masters and had also been utilized by each teacher for previous lane advancements. The advancements to MS+12 were approved prior to the arrival of the current District Administrator, James O'Meara, who began his tenure with the District in July 2001. The two teachers continued to receive annual contracts at the MS+12 level until the fall of 2005. At that time, after investigating and determining that these teachers had not earned 12 credits after receiving their Masters Degrees, O'Meara issued them revised contracts for the 2005-06 school year reducing their salary to the MS level. Each teacher lost approximately $1000 to $1200 in annual salary as a result of this action. The District did not require the teachers to reimburse the District for any alleged overpayments between 2000 and 2005.

In 2002, teacher Doug Rogers earned his Masters Degree and asked O'Meara for an advancement to the MS+12 lane based upon credits that Rogers had earned prior to his Masters and not needed for that degree. O'Meara refused, explaining his view that credits had to be earned after the MS in order to apply to the MS+12 advancement. Rogers did not inform the Association until some time in 2005 or 2006 about this conversation and did not file a grievance.

In July 2005, teacher Brian White, who had recently completed a Masters program, applied for an advancement to the MS+12 lane for his 2005-06 contract, based upon graduate credits he had earned while working for the District but prior to receiving his Masters. These credits were not related to or required for his Masters, but they had been utilized previously for horizontal "lane" changes. O'Meara denied White's request, asserting that the "plus" sign meant the credits had to have been earned after receiving the Masters.

Eight bargaining unit members in addition to White, Rogers, Nettesheim, and Wolf, have at least 12 graduate credits beyond those needed for their Masters Degrees but have not earned at least 12 such credits subsequently to obtaining that degree. None of those eight has been paid at the MS+12 level. Three of the eight had asked personnel in the District's business office, but not the District Administrator, whether they could advance to the MS+12 lane based upon their pre-Masters credits and were informed that such was not permitted. None of the three pursued the issue with the District Administrator or informed the Association about the issue until the instant proceeding was underway. The record does not contain information about whether the other five individuals had sought lane advancement or what happened if they did.

The instant grievance/prohibited practice complaint challenges the District's actions in reducing Wolf's and Nettesheim's salaries from the MS+12 level to the MS level and in denying White's request to advance to the MS+12 level.

DISCUSSION

This case, which essentially claims that the District violated the salary schedule in the expired collective bargaining agreement, is before the Commission because the underlying events occurred during the hiatus between the expiration of the prior contract and the execution of a successor contract. During that period of time, if an employer allegedly violates a term of the expired contract, both parties must utilize the preliminary steps of the contractual grievance procedure to try to resolve the matter, but neither party can be required to submit the issue to grievance arbitration; arbitration has been held to require mutual assent in the form of an actual existing contract. SCHOOL DIST. NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77); RACINE UNIFIED SCHOOL DIST., DEC. NO. 29203-B (WERC, 10/98). However, as in this case, the "grievance" may be submitted to the Commission in the guise of an alleged unilateral change in the status quo regarding wages, hours, and conditions of employment that are mandatory subjects of bargaining, which an employer is required to maintain during a hiatus between contracts. BROWN COUNTY, DEC. NO. 31511-B (WERC, 6/07), and cases cited therein. See generally DODGELAND SCHOOL DIST., DEC. NO. 31098-C (WERC, 2/07), at 24-26, and cases discussed therein.

The Examiner properly noted that the status quo as to mandatory subjects of bargaining during a hiatus has traditionally been determined by examining relevant language in the expired contract, bargaining history that may shed light on such contract language, and the parties' actual practices on the topic. In the somewhat unusual cases where the contract either does not address the topic at all (e.g., DODGELAND SCHOOL DIST., *supra*) or contains language that has long been ignored in favor of a conflicting but unwritten practice (e.g., SUN PRAIRIE AREA SCHOOL DIST., DEC. NO. 31190-B (WERC, 3/06)), the contract is less significant in determining what the status quo is. In such cases, the status quo is determined chiefly by examining how the parties have actually handled the particular topic; if there is a clear and consistent pattern or practice, the employer must adhere to that practice during the hiatus. In those cases, where the status quo is practice-based rather than contract-based, the Commission

has stated that evidence of the practice need not reach the level of proof that might be required if a party were trying to enforce the practice as a binding but unwritten term of a contract. DODGELAND, *supra*, at 17. Such unwritten practices, after all, can simply be renounced by one of the parties at the outset of negotiations and thereby rendered obsolete in the successor agreement. Renunciation is not an available option for relieving a party of undesirable contract language. Rather, a change in contract language (whether clear and unambiguous or interpreted through past practice) must be negotiated with the other party.

However, in run-of-the-mill hiatus cases, like the instant one, that are essentially contract grievances arising after a contract has expired and therefore not required to be arbitrated, the contract provisions presumptively establish the status quo. Cases like the instant one are premised upon an underlying grievance contending that the contract has been violated. There is no dispute in these cases that the contract itself – rather than an independent unwritten practice – establishes the status quo. The Commission must determine the meaning of the contract language and, in doing so, past practice and bargaining history play the same role – and are evaluated by the same standards – as in grievance arbitration. BROWN COUNTY, *supra*; SCHOOL DIST. OF KETTLE MORAINE, DEC. NO. 31904-D (WERC, 4/07).

The Examiner obscured this distinction between cases where a practice itself is claimed to be the status quo (as in the DODGELAND case), and a case, like this one, where the contract provision (the salary schedule and specifically the "MS+12" term) is what is alleged to have been violated, and past practice evidence is offered as an aid to discerning the meaning of that contract provision. Thus the Examiner wrote, "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," followed by a quote from DODGELAND (Examiner's decision at 14). In fact, however, the quoted segment from DODGELAND concerned the quantum of proof necessary to establish the existence of an independent, unwritten practice not addressed in the contract. Later in the DODGELAND decision itself the Commission took pains to distinguish such an issue from:

> … the quite different and extremely common question of whether the parties' practices in implementing contractual provisions may shed light upon the proper interpretation of those provisions. … While this most commonly occurs during grievance arbitration, *the Commission may also rely upon past practice as an aid in construing contract language for purposes of the status quo during a hiatus. The contract provision, as so construed, is the status quo.* … The instant decision does not address practices of this nature.

DODGELAND, *supra*, at 19 n. 12. (Citations omitted) (emphasis added).

Accordingly, we would not frame the issue as the Examiner did, i.e., "what is the status quo regarding the practice." (Examiner's decision at 16). Rather, the issue is the status quo regarding advancing on the salary schedule at the MS+12 lane, which, in this case depends upon the meaning of the contract provision "MS+12."

Like the Examiner and contrary to the Association, we see that term as ambiguous on its face as to whether the credits must be garnered after the Masters degree. The Association argues that, lacking any extrinsic limitation on the 12 credits, the language clearly means they can be any 12 credits regardless of when they were earned. While this is not an unreasonable interpretation, it is not inherent in the term "+12." In our view, both parties' proposed interpretations imply an unstated modifier: for the Association, it is the modifier "any" and/or "other," and for the District, the modifier "subsequent." Thus, in and of itself, the language reasonably could be interpreted either way. Hence, it is appropriate to examine the parties' practices, if any, to see whether they shed light on the meaning of the language.

Investigating the issue purely in terms of practice, the Examiner concluded that the prior practice was mixed, with the District having twice authorized advancements to the MS+12 lane based upon credits earned prior to the Masters degree, but four other teachers having been denied that advancement. Hence, she found that the practice "tends to favor the District, if ever so slightly." (Examiner's Decision at 16). Since the burden of proof was on the Association, she concluded that the status quo in terms of practice did not require the District to apply credits earned before the attainment of the Masters degree to movement to the MS+12 lane.

It is not clear whether the Examiner would have reached the same conclusion if she had approached the question as a matter of contract interpretation. In addition, the Association argues that the Examiner did not analyze the past practice properly, since she failed to distinguish between situations in which the District's management had actually rendered a decision and those situations in which lower-level business office personnel expressed opinions in response to questions from teachers, but where those opinions were rendered without the knowledge or approval of either the District or the Association and never tested. According to the Association, the latter situations shed no light upon how the parties to the contract interpreted the language and have no probative value.

The record suggests that some segment of the school population may have had the impression that the 12 additional credits had to be earned after receiving the Masters degree. Of the 12 situations addressed in the record involving teachers with 12 or more credits outside of their Masters, five involved teachers who may never have questioned the lack of lane movement. At least some members of the business office staff held a similar view and passed it on to the three teachers who inquired. However, we agree with the Association that, under traditional past practice principles, none of these eight situations is probative of the parties' views of the meaning of the contract – which is the proper inquiry. The four situations that did involve at least one of the parties (Rogers, Wolf, Nettesheim, and White) are split equally, with previous Superintendent Rossetti approving the advancement of Wolf and Nettesheim and current Superintendent O'Meara refusing the advancement of Rogers and White. The Association was not aware of the Rogers refusal and hence, while that situation was handled consistently with the District's current view of the contract language, it has little probative value because it lacked express or putative mutuality. The Association has challenged the one situation that contradicts its view of the contract language, i.e., the White situation (and the

resulting/concomitant reductions for Nettesheim and Wolf). Accordingly, the Association has a valid point that the relevant prior practices of the parties can be seen as a two to one split favoring the Association. Nonetheless, a two to one split in a potential universe of 12 occurrences (indicating this situation arises with some frequency) does not reach the level of a clear and consistent practice such that it reveals the parties' mutual understanding of the MS+12 provision. [1]

Since there is no bargaining history or persuasive past practice, this dispute ultimately must be decided upon the more reasonable interpretation of the contract language itself, in context with the rest of the salary schedule and the likely purpose of the professional growth/lane advancement provisions. The question is very close and both points of view are quite reasonable, but ultimately the District has the better of the argument. A review of the six arbitration awards that the parties have offered indicates that most arbitrators, in the absence of specific contrary language, solid past practices, or bargaining history, favor a "default" interpretation requiring that credits for "MS plus" lane advancement be acquired subsequent to the degree. The prevailing rationale, which we find persuasive, is that the basic purpose of such advancement is to encourage "growth" and currency in professional skills:

> To the layman who is not an educator the 'plus' designation might not clearly convey that the intent was that no credit could be counted except that taken after the MA was earned. But to an educator the contra connotation would be true. This is because there is such a strong tradition in the educational field not to apply toward certain degrees credits which are earned before a certain time. Undergraduates are often allowed to take graduate level courses but are most frequently not allowed to count them toward a Master's degree even though they be excess credits beyond what is required for a bachelor's degree. Undergraduates or students working on a Master's degree may be allowed to take a course in a law school but if not actually admitted to Law School as a student working toward a law degree they most frequently cannot count the courses toward a law degree if later they should be admitted to law school …

JT. SCHOOL DIST NO. 1 STEVENS POINT (Seitz, undated), quoted in MADISON TEACHERS INC. (Hales, undated), at 7. While the factual patterns diverge and have varying similarities to the instant facts, a similar analytical framework and conclusion are reflected in five other awards brought to the Commission's attention in this case. See NEENAH JT. SCHOOL DIST. (Grabb,

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[1] We agree with the Examiner that the situation involving employee Debra Durley is not pertinent to the issue at hand. Ms. Durley was hired with a Masters Degree and had in fact earned the additional credits for the MS+12 lane after she had earned her Masters. The Association suggests that, at the time the District conferred the MS+12 advancement upon Durley, the relevant District personnel had not investigated the issue of when Ms. Durley had earned the additional credits. However, as the Examiner found, the record contains no affirmative evidence on this point. The record does reflect that the District was in possession of Durley's academic records at the time the District made its decision and, absent contrary evidence, the District cannot be presumed to have been unaware or uninterested in the contents of those records, including the dates on which she had earned the credits.

7/75); ROSHOLT SCHOOL DIST., MA-7046 (McLaughlin, 6/92); WESTON SCHOOL DIST., MA-8374 (Burns, 12/94); GIBRALTAR SCHOOL DIST., MA-8781 (Gallagher, 4/95). [2]

In the instant case, the credits in question were not only earned prior to the Masters degree, but had already been utilized to advance horizontally on the salary schedule. In addition to the salary schedule itself, the only other clause in the instant collective bargaining agreement that refers to lane advancement (Article XV. C.) is entitled "Professional *Growth*." Absent contrary practice or bargaining history, the term "growth" more reasonably implies new or future credits, rather than credits that the District has already acknowledged through increased compensation.

Thus, the District correctly determined that advancement to the MS+12 lane requires the acquisition of at least 12 approved graduate credits following receipt of the Masters degree. Having reached that conclusion, we also agree with the Examiner that the District not only properly refused White's request for advancement, but also properly reduced Wolf's and Nettesheim's salaries to the level appropriate to their educational attainments and consistent with the manner in which other bargaining unit members were compensated.

Subject to the foregoing clarification of the status quo analysis, the Examiner's findings, conclusions, and order are affirmed.

Dated at Madison, Wisconsin, this 13th day of September, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

[2] The lone contrary result among the cases submitted is WITTENBERG-BIRNAMWOOD SCHOOLS (Krinsky, 6/99), where the arbitrator was influenced by the fact that the current superintendent had himself approved the advancement of the several grievants, for periods of several years, based upon credits prior to their Masters' degree, and then had reduced their salaries unilaterally, offering only the excuse that he had not been paying attention when he signed off on the lane advancement. The arbitrator concluded that the contract language gave the superintendent discretion to allow or disallow the advancement and, having allowed it to the grievants, there was no contractual basis for subsequently revoking it, and that doing so constituted a "reduction in compensation without just cause," even though other teachers had not been treated similarly. We are reluctant to follow suit. Here the current District Administrator had been consistent in his interpretation of the provision (i.e., that it requires credits obtained after the Master's degree). In addition, the WITTENBERG analysis would allow inconsistent application of the contract language, such that similarly-situated teachers could be compensated differently, which strikes us as unwise and unfair.