STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant	:	
vs.	:	Case XCI No. 22051 MP-789 Decision No. 15829-D
BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, Respondent.	:	

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, on behalf of the Complainant.
Mr. Nicholas Siegel, Principal Assistant City Attorney, on behalf of the Respondent.

ORDER AMENDING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teacher's Education Association having filed complaints on September 14, 1977, with the Wisconsin Employment Relations Commission alleging that Milwaukee Board of School Directors had committed prohibited practices within the meaning of Section 111.70(3)(a) of the Municipal Employment Relations Act; and the Commission having appointed Thomas L. Yaeger, a member of its staff to serve as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(5), of the Wisconsin Statutes; and complaints having been consolidated for hearing and hearing having been held at Milwaukee, Wisconsin on November 14, 15, 16, 18, 1977, and January 18, 19, 1978; and that on August 2, 1979, the Examiner issued Findings of Fact, Conclusions of Law and Order; and that on August 21, 1979, Complainant filed with the Examiner Motion to Reconsider and Set Aside Decision; and that on August 21, 1979, the Examiner pursuant to Wisconsin Administrative Code Section ERB 12.08 granted the abovesaid motion and set aside his Findings of Fact, Conclusions of Law and Order issued on August 2, 1979; and the Examiner having reconsidered his earlier decision;

Now, therefore, it is

ORDERED

1. That the Findings of Fact are hereby amended by deleting all the original paragraphs and substituting instead the following paragraphs:

1. That the Milwaukee Teachers' Education Association, hereinafter Complainant or Association, is a labor organization and the certified exclusive collecting bargaining agent for

> . . . all regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent of a full teaching schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialist, activity specialists, music teachers (550N) who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, and diagnostic teachers excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors and executives. 1/

as well as a unit of school aides, and has its offices at 5130 West Vliet Street, Milwaukee, Wisconsin.

2. That the Board of School Directors of Milwaukee, hereinafter District or Respondent, is a municipal employer having its principal offices at 5225 Vliet Street, Milwaukee, Wisconsin; and that at all times material herein Harrison, District Chief Negotiator, was employed by Respondent and functioned as its agent.

3. That both parties' 1975-76, and 1977-79, agreements contained the following language:

> Part I. C. 1.
>
> . . . The Board and the MTEA for the life of this contract each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this contract or with respect to any subject or matter not specifically referred to or covered in this contract, except as otherwise provided herein . . .
>
> Part I. F.
>
> 3. ADMINISTRATIVE PROCEDURES.
>
> a. A number of major administrative procedures affecting wages, hours and working conditions of members of the bargaining unit have been codified. As additional procedures are reduced to writing, they shall be added to the booklet containing such codified procedures.
>
> b. Where any new procedure or amendment of procedure conflicts with any specific provision of this contract, the contract shall govern.
>
> c. If, during the term of the contract, any administrative procedure is changed by amendment or by a new procedure, on which the contract is

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1/ This unit description resulted from an order clarifying bargaining unit issued by the Commission on March 30, 1978. (Decision No. 13787-C).

silent, which has a major effect on wages, nours, and working conditions of the members of the bargaining unit, no such procedure shall be effective until after negotiation with the MTEA. If, after a reasonable period of negotiation, no agreement has been reached, the MTEA may proceed to mediation prior to the implementation of such procedure. The MTEA may proceed to advisory fact finding if the matter is not resolved in mediation. In an emergency situation which would interfere with the orderly operations of the schools, the administration may temporarily implement emergency action prior to mediation.

* * *

APPENDIX "C"

SCHEDULE E - EXTRACURRICULAR ACTIVITIES

1977 SCHOOL YEAR

Directors, Leaders, Advisors, Manager, or Sponsors of:	
Intramural Activities (See No. 1)	450 (Senior high) 550 (Junior high)
Music Directors (per director-per year-See No. 13)	50 hours 115 hours minimum per school
Band, football games	105 hours (Senior high)
Plays and Musicals	250 hours
Forensics) 45 hours for an assistant Debate) for each if 30 or more students participate	90 hours 90 hours
Math (Junior or senior high) (Six year high)	30 hours 40 hours
Chess	50 hours
Stage, Auditorium, Set Constructions, and Lighting (See No. 2)	115 hours
Student Usher Manager, Ticket Takers, Room and Hall Supervisors	150 hours
Cheerleaders (Senior high only) Drill Team and Baton Twirlers (Senior and junior high)	125 hours 65 hours
Academic Enrichment Projects	140 hours

Inter-high Council Advisors (One junior high and one senior high)	60 hours
Bookstore Manager**	
Librarian**	
Marching Band Director (one day)	
Guidance Counselors***	
Vocational Counselors****	
Orchestra Director (one day)	

APPLICATION

1. The minimum base is to be established at four hundred fifty (450) hours (senior high) and five hundred fifty (550) hours (junior high) for up to one thousand five hundred (1,500) pupil enrollment and progressive allocations of one hour for every additional three (3) pupils beyond one thousand five hundred (1,500) enrollment.

2. If the stage, set construction, lighting and auditorium manager is the same person, the hourly allotment per school per year is to be considered the maximum compensation. If the duties are divided, the amount shall be prorated according to the time spent on each job.

3. Any event where admission is charged, the teachers who work as ticket takers, hall or room supervisors, etc., shall be paid out of the money collected by admission to the event or out of the hours allowed each school per year.

4. "Academic enrichment" is defined as an activity which provides students with the opportunity of enriching their educational experience. The activity is to take place after 4:00 p.m. on school days or on nonschool days. This activity shall be certified by the principal with the approval of the Division of Administrative and Pupil Personnel Services. Academic enrichment includes only activities other than those covered under other sections of Schedule E.

5. The additional compensation allowances for teachers provided by Extracurricular Pay Schedule E shall be applicable only to services rendered outside regular school hours, excluding compensation for any such extracurricular services rendered by any teacher during the required minimum of two and one-half (2-1/2) hours per week. Teachers will be required by principals to file a report of hours worked.

6. All assignments to positions designated in Schedule E shall be certified by the principal with the approval of the Assistant Superintendent concerned.

7. Amounts listed in Schedule E are maximums. Prorating of the allowable compensation shall be based on the hourly rate of the teachers' part-time services.

8. It is understood that the persons assigned to these extracurricular activities will carry out all the necessary functions of the activity, and the hourly rate will be applied only for the purposes of prorating allowable compensation where the person assigned does not put in at least the total number of hours allocated. In cases where responsibilities for assignments are divided between two (2) or more teachers, prorating of the allowable compensation shall based as nearly as possible on the hourly rate for teachers' part-time services.

9. **The amount of service in each of these two (2) areas authorized for each of the secondary schools shall not exceed five (5) days.

10. ***Limited to: 40 hours per school of 1,500 enrollment or less
64 hours per school of 1,501 to 2,200 enrollment
80 hours per school of 2,201 enrollment and above
Hours assigned before the opening of school will be assigned on a rotating basis except where an unusual need can be demonstrated. Counselors not assigned one summer will be given first priority in succeeding summers.

11. ****Vocational counselors coordinating the work experience program will be allowed ten (10) days above the school year at their daily rate of pay.

12. Employes paid on Schedule E shall be paid at the end of the semester at the rates in effect, on a separate check.

13. The hours allotted for music director are not to be considered an individual maximum if there are additional hours available in this category

4. That in 1976, due to a considerable amount of work necessary to the processing of student referrals by multidisciplinary teams, the Association and Respondent reached agreement on multidisciplinary team employment by Respondent during the summer of 1976; that in early June 1977, Harrison advised Deeder, Association Assistant Executive Director, of Respondent's plan to again employ multidisciplinary teams during the summer of 1977, as it had done the preceding year; that shortly therafter, the parties commenced negotiation on the impact of said decision on the wages, hours and conditions of employment of said team members employed in said program; that Respondent and Association thereafter bargained in good faith to impasse on said matter; that after reaching impasse and because the program had to go forward, Respondent implemented its last proposal made in bargaining concerning said program; and that from the time of impasse and implementation until filing of the subject complaint the impasse persisted.

5. In 1976, Respondent adopted the Hillside Terrace Study Project which was a program to provide tutorial services to students living in the Hillside Terrace Housing Project; that Respondent and the Association bargained in October and November, 1976, about wages, hours, and working conditions for the positions to be utilized in the program; and that no agreement resulted and negotiations broke off in November, at or near the time of negotiation for a successor agreement to the 1975-76, contract; that thereafter Respondent implemented the program during the spring semester of the 1976-77 school year; that in June, 1977, after concluding negotiations on the 1977-79 collective bargaining agreement, the Association demanded Respondent resume negotiations on the program for the 1977-78 school year; that a meeting was held in mid-June between Deeder and an administrator involved with the program, but no agreements were reached; and that thereafter Respondent refused to meet with the Association to bargain about the program.

6. That in early June 1977, a committee of the District Board of School Directors recommended, and the Board adopted, a program of employing Vocational Counselors at the Milwaukee Trade and Technical High School during the summer; that said grade level counselors were to work with private industry in the summer to familiarize said counselors with the kinds of job opportunities that would be available to students attending said school; that on June 22, 1977, Deeder met with Harrison and presented him with a memorandum of understanding governing the use of the aforesaid counselors; that the District never responded to this proposal despite requests in August and September by the Association that it do so; and that the program was implemented without the District ever bargaining with the Association concerning the wages, hours and conditions of employment of said counselors.

7. That on May 7, 1977, the District advised the Association the programming of students into the high school for the next semester was not able to be completed within the then existing time constraints and, therefore, Administrators were going to be working evenings and the District wanted some guidance counselors to work with them; that the District proposed it would be seeking volunteers to work evenings and Saturdays and would pay them the contractual part-time certificated rate; that on June 24, 1977, the Association proposed a memorandum of understanding governing said counselors' rate of pay for hours worked after school, on Saturday, and during the summer; that in a meeting on June 24th, the District advised the Association it would not bargain on this subject because it was covered by the existing contract; and that said matters were covered by both the 1975-76, and 1977-79, collective bargaining agreements.

2. That the Conclusions of Law are hereby amended by deleting the original paragraphs 1 and 2 and substituting instead the following paragraphs:

1. That Respondent by first bargaining in good faith to impasse with the Association over the impact of its decision to employ professionals in the Diagnostic Exceptional Education Program for the summer of 1977, and use multidisciplinary team employes during evenings, Saturdays, and Sundays, before implementing its last bargaining proposal on said matter, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Wisconsin Statutes.

2. That Respondent, by refusing to bargain in 1977 with respect to the impact of continuation of the Hillside Terrace Study Project for the 1977-78 school year, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Wisconsin Statutes.

3. That respondent, by refusing to bargain with Complainant over the impact on wages, hours, and conditions of employment of its decision to employ Vocational Counselors from the Milwaukee Trade and Technical High School during the summer of 1977, committed a prohibited practice within the meaning of Section 111.70(3)(a)4 and 1, Wisconsin Statutes.

4. That because the subject of employment of Guidance Counselors outside the normal school day was covered by the parties' collective bargaining agreements, Respondent did not have a duty to bargain during the term of said agreements on that subject, and therefore, Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Wisconsin Statutes, by refusing to bargain with the Association on the subject in 1977.

3. That the Order is hereby amended by deleting the original order and substituting instead the following:

It is ordered that Respondent, Milwaukee Board of School Directors and its agents shall

1. Cease and desist from:

   a. Refusing to bargain with Milwaukee Teachers Education Association with respect to a wage rate for hours worked during the summer of 1977, by Vocational Counselors employed by Milwaukee Trade and Technical High School, but not in the Work Experience Program.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

   a. Upon request, bargain to agreement or impasse with respect to a retroactive wage rate for hours worked during the summer of 1977, by Vocational Counselors employed by Milwaukee Trade and Technical High School exclusive of the Work Experience Program.

   b. Notify all employes, by posting in a conspicuous place on its premises, where notices to all employes are usually posted, a copy of the notice attached hereto and marked "Appendix A'. Such notice shall be signed by the Respondent's Chief Negotiator and shall be posted immediately upon receipt of a copy of this Order. Such notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission, in writing within twenty (20) calendar days following the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to all violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 10th day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, Examiner

emw

Appendix "A"

Notice to All Employes Represented by the Milwaukee Teachers' Education Association

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employes that:

WE WILL, upon request, bargain with the Milwaukee Teachers Education Association about the wages of Vocational Counselors employed during the summer of 1977, at the Milwaukee Trade and Technical High School exclusive of any hours worked in the Work Experience Program.

WE WILL refrain from all other forms of interference, restraint and coercion of employes in the exercise of their right under Section 111.70(2) of the Municipal Employment Relations Act.

Dated this day of , 1980.

By _____
Chief Negotiator
City of Milwaukee Public Schools

MILWAUKEE BOARD OF SCHOOL DIRECTORS, XCI, Decision No. 15829-D

MEMORANDUM ACCOMPANYING
ORDER AMENDING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Association filed a motion with the undersigned on August 21, 1979, seeking reconsideration of the decision issued on August 2, 1979. In its motion, Complainant alleges that the Examiner based his decision on a material mistake of fact. It claims the undersigned mistakenly found a waiver of its statutory right to demand to bargain over matters not covered by or referred to in the parties' collective bargaining agreement on the basis of the general waiver clause found at Part I. C. of the parties' contract. Moreover, it claims the undersigned overlooked language in the same contract at Part I. F. 3 which provides an exception to the general waiver clause; and that the circumstances present in this case fall within that exception. Therefore, it requested the undersigned to reconsider his decision and set it aside.

After consideration of said motion, the undersigned determined that in the interest of administrative efficiency the decision should be set aside and the parties permitted to file briefs with respect to whether said Findings of Fact, Conclusions of Law and Order were erroneous. Thereafter, both parties filed briefs concerning whether the undersigned should, after reconsideration, amend or reinstate his decision. Respondent contends the Examiner's decision was the correct one. In support of that conclusion it argues Part I.F.3., being relied upon by Complainant in its arguments against the Examiner's finding of a contractual waiver, permits unilateral implementation of emergency action when circumstances are present that "would interfere with the orderly operations of the schools". Further, it contends that the procedures of Part I.F.2. and 3. are subject to arbitral determination before bargaining commences.

WAIVER:

The undersigned, in reconsidering his decision, has examined the language of Part I.F.3. relied upon by complainants and concurs that it does provide an exception to the general waiver language appearing at Part I.C. In the case of changes in administrative procedures, by way of amendment or a new procedure, about which the contract is silent, and where said change has a major effect on wages, hours and working conditions of bargaining unit members, said procedure cannot be effective until after negotiation with the Association. Thus, any new or altered administrative procedure meeting these tests is not a matter about which the Association has waived its statutory right to demand to bargain over during the contract term. In those instances where the new or altered administrative procedure that is not otherwise governed by the contract and does not fall within the purview of Part I.F.3., it necessarily is governed by the general waiver of Part I.C., which the undersigned previously found was enforceable.

It is necessary, therefore, to first determine whether any of the programs about which the Association sought to bargain fall within the exception set forth in Part I.F.3. Deeder testified that an "Administrative procedure would be procedures or functions that the Administration would carry out that were not matters considered, per se by the School Board and acted on as a Policy or Board Rule". The record evidence establishes that implementation of the programs in issue was within the authority of the Respondent's Administrators and did not constitute Board Policies or Rules. As such, the decisions concerning implementation of the various programs in issue were administrative procedures.

Second, because the Association sought to bargain about the wages to be paid and the hours of work of employes employed in the subject projects or programs, it is axiomatic that the Respondent's decisions respecting same had a "major effect" on wages, hours, and working conditions. Last, except in the case of the employment of Guidance Counselors outside of the normal school day, which is dealt with in Appendix C of the contract, it was not established by a clear and satisfactory preponderance of the evidence that the other administrative procedures which are the subject of this case were covered by the collective bargaining agreement. 2/

Consequently, because the programs in dispute herein, with the exception of use of Guidance Counselors outside the normal school day, fall within the scope of Part I.F.3. of the contract, the general waiver clause appearing at Part I. C. is inapplicable. Thus, in this instance, said clause is not a clear and unmistakeable waiver of the Association's statutory right to demand to bargain over implementation of said administrative procedures.

1977 MULTIDISCIPLINARY TEAM EMPLOYMENT

In 1976, a program for the use of multidisciplinary teams during the summer was adopted and implemented. The program was the result of a backlog of work for the multidisciplinary teams engaged in processing several thousand student referrals with exceptional education needs. The number of students was sufficiently large that processing could not be completed during the spring semester. Consequently, the teams were to complete processing during the summer. The Respondent and Association bargained about implementation of said programs and reached agreement thereon by May 26, 1976, and executed a "Memorandum of Understanding and Explanation of Summer Employment Opportunities" on said date.

In early June, 1977, Respondent orally advised Deeder of the details of its plans to again use multidisciplinary teams to complete programming of pupils with exceptional education needs as had been done the previous year. On learning this, Deeder advised Harrison orally on June 3, and in writing on June 6, of the Association's desire to bargain. On June 13, Deeder spoke with Administrator Neudauer to establish a date on which to meet and bargain over the details of the program. On June 16, Deeder presented Respondent with a proposed memorandum of understanding similar to that agreed to in 1976.

2/ Any questions concerning Respondent's compliance with the provisions of Part I,F.3. are not before the undersigned.

This memorandum governed four (4) separate programs: Program I - Multidisciplinary Team Employment on June 17, and June 20-21, 1977; Program II - Employment of Forty (40) Summer Disciplinary Teams. Program III - Pupil Programming Resource Centers Six Week Summer Program; Program IV - Saturday and After School Multidisciplinary Team Work. Program IV was new and was not a part of the previously agreed-to 1976, memo. Furthermore, Program IV contained in the June 16, Association memorandum is the same program that was the subject of a later memorandum dealing exclusively with that subject prepared by Deeder and given to Harrison. Further, the record is devoid of any evidence that Program IV, although the subject of a separate memorandum, was discussed other than during discussions on 1977, multidisciplinary team employment, and is so dealt with herein.

Thereafter, on June 17, the Respondent countered with its own memorandum. On the same date, the Association offered to continue the previously agreed to 1976, memorandum except for changing of dates to reflect the appropriate 1977, date. However, on June 20, the Respondent advised Deeder that the 1976 memorandum was not acceptable. Deeder responded by offering to remove the objectionable provisions. Then on June 21, the parties met and exchanged at least three additional proposed memorandums, but no agreement was reached between the parties. When it became apparent to the Association that the parties were going to be unable to reach agreement, it advised Respondent that it would seek mediation. Upon being so advised, Harrison informed the Association that time was of the essence with respect to implementation of the program and that it was proceeding therewith. Subsequent to June 21, no additional meetings were held, no proposals were exchanged nor did the Association obtain mediation of the dispute, however, the program was implemented.

The Association argues that Respondent, by unilaterally implementing the program without reaching impasse, while at the same time rejecting the Association's proposal to continue the prior year's agreement, committed a prohibited practice. On the other hand, Respondent's answer, and its witnesses' testimony and counsel's arguments at hearing assert that these matters were already governed by contract and subject to the grievance procedure contained therein. Further, it claims that employes employed in the program were not unit employes. Last, it argues that the Association waived its right to bargain about these matters.

It is undisputed that negotiations broke off on June 21, 1977. Prior to that time, the parties had bargained, and exchanged proposals relative to the program. However, after exchanging at least three proposed memorandums on June 21, the parties were deadlocked. Neither had any additional offers to make, nor is there any evidence that either suggested holding additional meetings. The bargaining session concluded with the Association advising Respondent it would seek mediation and Respondent advising it was going to implement the program. In point of fact 3/ the parties were deadlocked and at an impasse.

3/ NLRB v. Assn. of Steel Fabricators, 98LRRM 3150(CA2, 1978); Midwest Casting Corp., 79LRRM 1098 (1971).

Once a genuine impasse has been reached, as herein, the Respondent is free to implement its latest proposal made in bargaining. 4/ No claim is made by the Association that what was implemented was other than Respondent's last negotiation proposal. Rather, it claims Respondent had implemented the program before negotiations concluded on June 21. The record, however, will not support such a conclusion. Harrison's uncontradicted testimony is that after being advised by the Association on June 21, that it would seek mediation after the parties were unable to come to an agreement, he informed the Association that "it was getting time to start the program . . . in the meantime we're going to implement our program, because the program has to go forward." It is reasonable to infer therefrom that the program had not been implemented prior to reaching impasse. 5/ At the least, there is not a clear and satisfactory preponderance of evidence to establish an earlier implementation date.

The examiner has rejected the Association's claim that Respondent did not bargain in good faith during negotiations that preceded the impasse. Obviously, were that to be the case the impasse would be negated. 6/ However, this assertion is based upon the Respondent's rejection of an Association proposal to take out the objectionable provisions of the prior year's agreement. However, Deeder's own testimony establishes that said Association proposal was conditioned upon the Respondent agreeing to submit to arbitration a dispute over Diagnostic Instruction Specialists as team managers. In view of the Association's conditional offer and the Respondent's objections to continuing the 1976 memorandum without change, the Respondent's rejection of the Association proposal was not by itself evidence of bad faith. 7/ Consequently, there is no basis to conclude that Respondent bargained in bad faith to impasse.

Thus, Respondent having bargained in good faith to impasse before implementing its last bargaining proposal did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Wis. Stats. by doing so.

In view of the foregoing findings it is unnecessary to discuss the Respondent's other defenses to the charge.

4/ Racine Unified School Dist. No. 1, (1369C-C, 13876-B) 4/78; Winter Joint School Dist. No. 1, (14432-B) 3/77.

5/ Although Deeder testified that he learned on June 20, that employes in the program had received a "Handbook of Procedures" for the program. he did not testify it had been implemented prior to June 22, nor does the document establish when the program was in fact implemented.

6/ NLRB v. Palomar Corp. and Gateway Service Co., 465 F2d. 731(CA5).

7/ It should also be noted that no action was taken by the Association after the 21st to break the impasse and in fact it did not file the subject complaint until almost three months later.

HILLSIDE TERRACE STUDY PROJECT:

The Hillside Terrace Study Project was a specially funded program adopted by Respondent that was intended to provide tutorial services to students living in the Hillside Terrace Housing Project. The City of Milwaukee Housing Authority had refurbished a room in the project for use as a study center, and it was to open in early December 1976. In October and November, 1976, Respondent and the Association met and negotiated implementation of the program. Among other things, they negotiated hours and wages. The discussions were never concluded, but the District went ahead and implemented the program which was operative during the 1976-77, school year.

After negotiations were discontinued in late 1976, the Association did nothing with respect to further negotiations until June 1977, when it advised the District it wished to continue negotiations on the program. Deeder met with an administrator responsible for the program in mid-June, 1977, at which time Deeder proposed a memorandum of understanding pertaining to the project for the 1977-78, school year. No additional meetings were held after said mid-June meeting, and the filing of the subject complaint, notwithstanding the Association's requests for same in mid-August, 1977.

The Association argues that the Respondent refused to negotiate at all on the subject after requested to do so in 1977, and never informed it of its objections to the Association proposal. It concludes therefrom that the Respondent, by implementing the program without bargaining to impasse and in not even responding to the Associations demands to meet, committed a prohibited practice.

The Respondent's position as gleaned from its answer and testimony of Harrison, is that it did negotiate in the summer of 1977, and informed the Association what it found objectionable with its proposal. Thereafter, the Association said it would seek mediation, but never did even after being advised the Respondent was going ahead with the program. Further, it also claims that in any event it complied with the contract in establishing rates of pay. Alternatively, it also claimed the employes were not bargaining unit members.

The essence of the Association's assertions as reflected in its brief herein are that Respondent committed a prohibited practice by refusing to resume negotiations on the program at least six months after they were "interrupted" by negotiations for the 1977-79, collective bargaining agreement which concluded in agreement on July 9, 1977. Presumably the reason that negotiations were commenced over implementation of the program in the first place was that the then existing collective bargaining agreement was silent with respect to the matter. Consequently, there was no reason to cease negotiating about the matter because of contract negotiations, particularly inasmuch as the program was not to commence until after the effective date of the successor agreement. Indeed, that would have been a most appropriate forum within which to conclude the negotiations. The answer as to why those contract negotiations interrupted negotiations for the Hillside Terrace Project is not to be found in the instant record.

Consequently, by commencing negotiations on the matter, never resolving same, but reaching agreement on a collective bargaining agreement covering the period during which the program was to be in effect, is conclusive evidence of a waiver of the Associations right to demand to bargain about said matter during the term of said agreement. The Respondent bargained with the Association on the matter to the point where the Association abandoned those negotiations, and made no attempt to provide for same in the 1977-79, contract, notwithstanding that negotiations for said contract went on for some five to six months after negotiations for this project were broken off. Thus, because the Association waived its right to demand to bargain about the Hillside Terrace Center Study Project for the 1977-78, school year, 8/ the Respondent did not commit a prohibited practice in refusing to do so. It is unnecessary to discuss the other defenses raised by Respondent in light of the foregoing findings.

MILWAUKEE TRADE AND TECHNICAL HIGH SCHOOL SUMMER COUNSELORS

The Association claims that the use of these Vocational Counselors during the summer of 1977, was a new program and Appendix C of the parties' agreement did not apply to their employment in this program. Consequently, the District, by refusing to respond to Deeder's proposed memorandum of understanding, but nevertheless proceeding to implement the program, refused to bargain in violation of Section 111.70(3)(a)4, Stats. The Respondent, however, contends it had no duty to bargain about this matter in that it was governed by Appendix C of the 1977-79, collective bargaining agreement. Furthermore, it claims that this was not bargaining unit work.

It cannot be disputed in light of the evidence that, although the Union sought to bargain concerning the impact of adoption of the program, bargaining never took place. Respondent Board of School Directors adopted the program in early June 1977, upon the recommendation of its administrators, but did so subject to bargaining impact with the Association. On or about June 22, Deeder presented Respondent with a proposal for a memorandum of understanding relative to impact, but the District never countered this proposal. In fact, it never responded at all to the proposal. It was not until several months later that the Respondent claimed it had no duty to bargain with the Association on its proposal, because it allegedly was governed by Appendix C of the 1977-79, collective bargaining agreement.

Deeder testified that although Vocational Counselors had been used outside the school year in prior years this was a different program. In addition he described the program as being

> a localized kind of program to involve the grade level Counselors in working with private industry in the area of the City to sensitize them to the kinds of job opportunities that might be available to the students that went to Milwaukee Trade and Technical High School and involved them traveling from one business location to the other.

While Appendix C, Schedule E deals with the number of hours, rate of pay and so forth for Vocational Counselors coordinating the Work Experience Program, it is not clear from an examination

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8/ Racine, supra.

thereof that the use of counselors in the aforesaid activities as described by Deeder fall within the Work Experience Program. Admittedly, were that proven, the Association would have waived its right to demand to bargain over the matter.

However, waivers of statutory rights must be clear and unmistakeable and not implied. In this case, the Respondent did not adduce any evidence to establish that the subject program was an extension or part of the Work Experience Program. To the contrary, it is impossible to conclude from this record that the Association waived its statutory right to insist upon bargaining about the impact of the use of Vocational Counselors in this program. Deeder's uncontradicted testimony was that the summer counselor program in issue herein did not relate to the Work Experience Program. Consequently, there is no basis for finding a clear and unmistakeable waiver as urged by Respondent.

Respondent's other defense to the refusal to bargain charge is that the Vocational Counselors were employed in a part-time capacity, and not in the bargaining unit, thus, relieving it from any duty to bargain over their employment in the subject program. Again, as with its defense of waiver, Respondent adduced no evidence to support the claim. The record is devoid of any evidence respecting who filled the positions, the nature of work versus the duties of full-time Vocational Counselors, the hours worked by employes employed in the program, and so forth. Obviously, Respondent has not met its burden of proof with respect to said defense in that it has not established by a clear and satisfactory preponderance of the evidence that this was not unit work and these were not unit employes.

Consequently, in view of Respondent's refusal to bargain about the impact of the program adopted in early June 1977, regarding the use of Vocational Counselors during the Summer of 1977, a matter about which it had a duty bargain, it committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Wis. Stats.

GUIDANCE COUNSELORS

Near the end of the 1976-77, spring semester, it became obvious that because of the 17 day strike that concluded in early May, there was not enough time left before the end of the semester to finish programming of students at some schools for the 1977-78, fall semester. As a consequence, Respondent determined to have administrators work evenings and "possibly" Saturday mornings to conclude the job, and to seek qualified Guidance Counselors to volunteer to assist in this effort. 9/ Harrison so advised the Association in a letter dated May 27, 1977, wherein he also stated that volunteers would be paid the contractual "part-time certificated rate", and that he would "discuss the matter at greater length" if that was the Association's desire.

9/ Those volunteering would be performing the same work they were ordinarily doing during the school day.

On June 1, Deeder spoke with Harrison and advised him the Association wanted to negotiate on the use of Guidance Counselors prior to their use. At that time, Harrison advised Deeder, after some investigation that the plan was already being used. Deeder did not want any "further implementation" prior to negotiation. It was agreed between Harrison and Deeder that they would discuss it further on June 22. They met on the 22nd, but nothing was resolved. Thereafter, on June 24, Deeder proposed a memorandum of understanding governing the selection process as well as establishing the rate of pay as the contractual "individual hourly rate." Respondents advised Deeder that it was not agreeing to the memorandum and that it had no duty to bargain about the matters contained therein. Thereafter, no additional meetings were held on the subject nor was an agreement ever reached.

The Association contends that in this instance, Respondent not only implemented a program without first negotiating it, but also was hostile to requests to bargain. Respondent contends as it did with respect to other of complainant's charges that this matter was governed by the contract and that any disputes concerning compliance therewith should be submitted to binding arbitration. In addition, it claimed that this was not unit work.

Appendix C of the parties' 1977-79 collective bargaining agreement contained the following "Schedule E - Extracurricular Activities":

APPENDIX "C"

SCHEDULE E - EXTRACURRICULAR ACTIVITIES

1979 SCHOOL YEAR

Directors, Leaders, Advisors, Managers, or Sponsors of:	
Intramural Activities (See No. 1)	450 (Senior high) 550 (Junior high)
Music Directors (per director-per year-See No. 13)	50 hours 115 hours minimum per school
Band, football games	105 hours (Senior high)
Plays and Musicals	250 hours
Forensics) 45 hours for an assistant Debate) for each if 30 or more students participate	90 hours 90 hours
Math (Junior or senior high) (Six year high)	30 hours 40 hours
Chess	50 hours
Stage, Auditorium, Set Constructions, and Lighting (See No. 2)	115 hours

Student Usher Manager, Ticket Takers, Room and Hall Supervisors	150 hours
Cheerleaders (Senior high only)	125 hours
Drill Team and Baton Twirlers (Senior and junior high)	65 hours
Academic Enrichment Projects (See No. 4 and No. 6)	140 hours
Inter-high Council Advisors (One junior high and one senior high)	60 hours
Bookstore Manager**	
Librarian**	
Marching Band Director (one day)	
Guidance Counselors***	
Vocational Counselors****	
Orchestra Director (one day)	

APPLICATION

* * *

5. The additional compensation allowances for teachers provided by Extracurricular Pay Schedule E shall be applicable only to services rendered outside regular school hours, excluding compensation for any such extracurricular services rendered by any teacher during the required minimum of two and one-half (2-1/2) hours per week. Teachers will be required by principals to file a report of hours worked.

6. All assignments to positions designated in Schedule E shall be certified by the principal with the approval of the Assistant Superintendent concerned.

7. Amounts listed in Schedule E are maximums. Prorating of the allowable compensation shall be based on the hourly rate of the teachers' part-time services.

8. It is understood that the persons assigned to these extracurricular activities will carry out all the necessary functions of the activity, and the hourly rate will be applied only for the purposes of prorating allowable compensation where the person assigned does not put in at least the total number of hours allocated. In cases where responsibilities for assignments are divided between two (2) or more teachers, prorating of the allowable compensation shall be based as nearly as possible on the hourly rate for teachers' part-time services.

* * *

10. ***Limited to: 40 hours per school of 1,500 enrollment or less
64 hours per school of 1,501 to 2,200 enrollment
80 hours per school of 2,201 enrollment and above

Hours assigned before the opening of school will be assigned on a rotating basis except where an unusual need can be demonstrated. Counselors not assigned one summer will be given first priority in succeeding summers.

It is pellucid that the subject of use of guidance counselors outside 'regular school hours', during the term of the 1977-79 contract has been bargained. That agreement (1977-79) expressly deals with rate of pay, and number of hours, inter alia. Inasmuch as the contract deals with the subject, it operates as a clear and unmistakeable waiver of the Association's right to demand to bargain during the contract term to the extent that the matters which it seeks to bargain about are covered by the contract. 10/

Herein, the Association's proposal of June 22, dealt with rate of pay and selection. However, both of these matters are covered in Appendix C, Schedule E. Consequently, the Association waived its statutory right to insist that Respondent bargain about the matters contained in its proposal of June 24, and therefore, Respondent had no duty to bargain. Thus, it did not commit a prohibited practice by refusing to bargain as requested by the Association on the use of Guidance Counselors to complete programming of students for the fall semester.

Clearly, any disputes regarding pay for said Guidance Counselors were subjects for the contractual grievance and arbitration machinery. Furthermore, there has been no showing that Respondent unilaterally changed the agreement that is reflected in Schedule E, respecting the number of hours worked by those guidance counselors who volunteer. 11/

Dated at Madison, Wisconsin this 10th day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger, Examiner

10/ Madison Metropolitan School District, (15629-A) 5/78; City of Kenosha, (16392-A) 12/78.

11/ No such claim was argued by the Association, although there was reference to same in both Deeder and Harrison's testimony.