STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MADISON METROPOLITAN SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and MADISON TEACHERS, INC.	Case LXXX No. 23097 DR(M)-92 Decision No. 16598

Appearances:

Kelly, Haus and Cullen, by Mr. Robert C. Kelly, appearing on behalf of Madison Teachers, Inc.

Isaksen, Lathrop, Esch, Hart & Clark, by Mr. Gerald C. Kops, appearing on behalf of Madison Metropolitan School District.

DECLARATORY RULING

The Madison Metropolitan School District having filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission issue a declaratory ruling pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act, herein MERA, to determine whether it has a duty to bargain with respect to various items in dispute between it and Madison Teachers, Inc.; and hearing on said petition having been held on July 5, 1978, before Examiner Stephen Schoenfeld in Madison, Wisconsin; and the parties having filed briefs; and the Commission having considered the evidence and arguments of counsel, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Madison Metropolitan School District, District herein, is a municipal employer which operates a school system and has its offices in Madison, Wisconsin.

2. Madison Teachers, Inc., referred to herein as MTI, is a labor organization, has its offices in Madison, Wisconsin and is the recognized collective bargaining representative of certain teachers and "other related professionals" employed by the District in its school system.

3. On April 4, 1977 the Commission issued an order wherein it determined that the positions of Cataloger, Educational Reference Librarian, Text Librarian, and Title I Coordinator were included in the bargaining unit represented by MTI, described in para. 2 hereof. Thereafter the parties engaged in negotiations with respect to an addendum to be included in their 1977-78 collective bargaining agreement, which addendum would include provisions specifically relating to the above noted four positions, and during said negotiations a dispute arose as to whether certain proposals of MTI relate to mandatory, permissive or prohibited subjects of bargaining.

4. On May 11, 1978 MTI filed a petition with the Commission, wherein it requested the Commission to initiate Mediation-Arbitration, pursuant to Sec. 111.70(4)(cm)6 of MERA. During the processing of such petition a Commission investigator solicited final offers from

the parties, and at such time advised the parties that the submission of their final offers did not prejudice either of the parties in asserting legal arguments as to whether said offers contained proposals which related to non-mandatory subjects of bargaining. The parties submitted their final offers in response to such solicitation, and on June 6, 1978 the District filed the instant petition requesting a declaratory ruling as to whether the following proposals contained in the proposed final offer of MTI relate to mandatory subjects of bargaining:

a. "HOURS OF WORK

The regular schedule of hours of work for employees covered by this Memorandum shall be seven (7) hours and thirty (30) minutes daily, starting at 7:45 a.m. and ending at 4:15 p.m., Monday through Friday; thirty-seven and one half (37 - 1/2) hours per week. The noon lunch period shall be one hour. Both the scheduling of work hours and noon lunch period may, however, be adjusted, by mutual consent of the employee and his/her supervisor, but shall not result in the employee's total number of work hours being reduced as herein set forth."

b. "EMPLOYMENT PERIOD

Other related professional employees shall be employed on a 48 week basis, which shall include 210.5 work and/or convention days, 20 vacation leave days, and 9.5 holidays."

c. "EDUCATIONAL RELEASE TIME

With the approval of his/her supervisor, an employee may be released from his/her duties during regular work hours in order to pursue one educational course per semester."

d. "SALARY

Section III A, B, C, C-1, and C-2 of the Agreement shall apply to other related professionals, except that the salary rates appearing in tables C, C-1, and C-2 shall be prorated to reflect the number of weeks such employees work. For example, if such an employee is employed on a 48 week basis (213.5 days*) and holds a masters degree with no prior experience, his/her annual salary would equal 1.11 (213.5/192) times $11,165 (Track 4, Level 1 as of January 1, 1978) or $12,393.

Section III F, G, H, of the Agreement shall also apply to employees covered by this Memorandum; however, the terms 'teaching experience' as used therein, shall be construed to mean 'professional experience' when applied to such employees. Furthermore, inservice courses taken by employees covered herein, which heretofore had not been approved by the PACC, shall accrue to the credit of the employee for salary schedule placement purposes. Hereinafter, however, such approval will be required pursuant to Section III-H.

*210.5 work and/or convention days plus 3 paid holidays."

e. "STATE TEACHERS' CONVENTION

1. When the Wisconsin Education Association and the American Federation of Teachers state conventions are scheduled on different dates, the certified bargaining agent for the employees employed by the Board of Education shall designate, subject to legal limitations, which convention is to be the official convention.

2. An other [sic] related professional who does not attend the official convention shall work in his/her assignment at professional work.

3. Other related professionals may, at their option, attend other appropriate professional conventions/conferences as determined by the parties to this Agreement so long as such consume no more than three days. Such, if so utilized will be in lieu of the days set forth for attendance at the WEAC and/or SWEIO Convention(s).

4. No more than three (3) days per year are provided for convention purposes."

f. "REPLACEMENT EMPLOYEES

Should an employee temporarily vacate his/her position in excess of one semester or more or its equivalent, and the Employer desires to have his/her duties performed during his/her absence, the Employer will secure a suitable temporary replacement employee. Said replacement employee shall be employed per the terms of this agreement, but only during the period for which the regular employee is absent."

5. The proposals of MTI set forth in Finding 4 (a-e), above, relate primarily to wages, hours and conditions of employment.

6. The proposal of MTI set forth in Finding 4 (f), above, relates primarily to the formulation or management of public policy.

On the basis of the above Findings of Fact, the Commission issues the following

CONCLUSIONS OF LAW

1. That MTI proposals in Finding 4 (a-e) are mandatory subjects of collective bargaining within the meaning of Section 111.70(1)(d), MERA, since they relate primarily to wages, hours and conditions of employment.

2. That MTI proposal in Finding 4 (f) is a permissive subject of bargaining within the meaning of Section 111.70(1)(d), MERA, since it primarily relates to the formulation and management of public policy.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Commission makes and files the following

DECLARATORY RULING

The District has a duty to bargain collectively with regard to MTI proposals referred to in Finding 4 (a-e), but not with regard to MTI's proposal set forth in Finding 4 (f), and therefore MTI may properly include the former proposals, but not the latter proposal, in its final offer for purposes of Mediation-Arbitration, pursuant to Section 111.70(4)(cm)6, MERA.

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Marshall L. Gratz, Commissioner

MADISON METROPOLITAN SCHOOL DISTRICT, LXXX, Decision No. 16598

MEMORANDUM ACCOMPANYING DECLARATORY RULING

The instant petition was filed by the District with respect to its contentions that various MTI proposals to be incorporated in an addendum to the parties' 1977-78 agreement are either permissive and/or prohibited subjects of bargaining. The addendum about which the parties are bargaining relates to four employes, the incumbents working in the classifications of Cataloger, Educational Reference Librarian, Text Librarian and Title I Coordinator. Said four classifications were determined by the Commission on April 4, 1977 to be within the "teacher" bargaining unit represented by MTI.

Following the July 5, 1978 hearing herein before Examiner Stephen Schoenfeld, the parties filed initial briefs by simultaneous exchange by August 15, 1978. Neither reserved the right to submit a reply brief. On September 12, 1978, the District's counsel submitted a reply brief to which MTI objected. The Commission, on September 15, 1978, returned the District's reply brief to its sender and informed the parties that the contents thereof would not be considered by the Commission in the determination of the instant matter.

THE LEGAL STANDARDS TO BE APPLIED

In determining whether a proposal is mandatory or permissive,

> "[t]he applicable standard . . . is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employes, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people. This test can only be applied on a case-by-case basis, and is not susceptible to 'broad and sweeping rules that are to apply across the board to all situations. . . .' [citations omitted]." 1/

In determining whether a proposal is a prohibited subject of bargaining because of conflicts between it and existing statutory provisions outside of MERA, the provision is to be deemed prohibited only if its implementation would require the violation of "an express command of law." 2/

THE DISPUTED ITEMS 3/

Hours of Work

MTI proposed a clause which states as follows:

> "The regular schedule of hours of work for employees covered by this Memorandum shall be seven (7) hours and thirty (30) minutes daily, starting at 7:45 a.m. and ending at 4:15 p.m.,

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1/ Unified School Dist. No. 1 of Racine County v. WERC, 89 Wis. 2d 28 (1978).

2/ Glendale Policeman's Association v. City of Glendale, 83 Wis. 2d 90, 102 (1978).

3/ In its brief, the District withdrew its earlier contention that the MTI's "Collective Bargaining Unit Work Assignment" proposal was non-mandatory.

Monday through Friday; thirty-seven and one-half (37 - 1/2) hours per week. The noon lunch period shall be one hour. Both the scheduling of work hours and noon lunch period may, however, be adjusted, by mutual consent of the employee and his/her supervisor, but shall not result in the employee's total number of work hours being reduced as herein set forth."

The District initially argued that the above proposal is entirely permissive, but in its brief, it withdrew its objection to all but the last sentence. The District argues, contrary to MTI, that the objected to portion of the proposal "relates to management's authority to direct the work force in the most efficient manner depending upon the needs of the employer" and that it would place the District "in a straight-jacket" with regard to the scheduling of District operations such that it relates primarily to management policy.

The District's withdrawal of its objection to the balance of the proposal is apparently predicated upon its belief that the District's right to alter such hours is elsewhere protected in portion(s) of the addendum not herein at issue, but that the addition of the last sentence quoted above would be inconsistent with, and therefore would negate such management prerogative. Thus, the real issues at stake are, whether the proposed starting and ending times and lunch period for the instant classifications are mandatory subjects of bargaining, and, if so, whether the last sentence permitting adjustment thereof by mutual consent at the workplace makes the proposal permissive.

In analyzing those issues, we note certain facts as regards the nature of the duties of the instant classifications. 4/ None of the employes occupying the four classifications deals directly with students. Rather, they assist and consult in various capacities with teachers and other District employes. Thus, while the District needs to have these employes with at least some degree of overlap of hours with other District employes, the precise hours of work proposed for these employes will not require adjustments in so broad a range of other District operational decisions as to significantly relate to the formulation or management of public policy by the District. On the other hand, the proposed work schedule directly relates to the hours of work of the employes in the instant classifications. Therefore, we find that the proposed starting and ending times, and lunch period for the four classifications primarily relates to the wages, hours and conditions of employment of the employes in those classifications, and therefore, the times proposed are a mandatory subject of bargaining.

MTI also proposed, however, that those specific times may be changed by mutual agreement away from the bargaining table and at the individual workplace, i.e., "by mutual consent of the employee and his/her supervisor", so long as there is no resultant reduction in the employe's prescribed total number of work hours. That proposal would deviate from the times fixed in the preceding portion of the provision only upon mutual agreement including that of the District's first-line supervisor. The degree of District control over scheduling therefore appears little affected by this portion of the proposal since the supervisors are free to say "no". Hence, the last sentence in the proposal does not entail significant dimensions regarding the formulation or management of public policy. Since the availability of individual adjustments upon mutual consent of employe and supervisor from the hours otherwise fixed in the proposal has a direct relationship to the hours of work of the employes involved, we find the last sentence, as well, to be primarily related to wages, hours and conditions of employment, and therefore a mandatory subject of bargaining.

4/ Established in the unit clarification proceeding. Official notice was taken thereof by the examiner at the District's request. Tr. 3, 5.

Replacement Employes

The Union proposed a clause which states as follows:

"Should an employee temporarily vacate his/her position in excess of four (4) consecutive weeks and the Employer desires to have his/her duties performed during his/her absence, the Employer will secure a suitable temporary replacement employee. Said replacement employee shall be employed per the terms of this agreement, but only during the period for which the regular employee is absent."

At the hearing, the District objected to said proposal on the ground that it attempts to bargain for employes who are "casual temporary employees" not within the scope of MERA. MTI responded to that objection by immediately modifying its proposal to replace ". . . of four (4) consecutive weeks . . ." by ". . . of one semester or more or its equivalent". At the examiner's suggestion, the District caucused concerning the ramifications of MTI's modification of position. When the hearing resumed after that short recess, the District took the position that the examiner ought not permit the modification during the course of the declaratory ruling hearing. The examiner, however, permitted the modification. The District did not request a postponement to permit it to prepare a response to the proposal as amended. Instead, the District pressed its procedural objection, and the only substantive objection to the proposal thereafter asserted by the District, either at the hearing or in its brief, was that by requiring the hiring of a "suitable" replacement, the MTI proposal ". . . invades the power of the employer to determine the qualifications of replacement employees."

We find no prejudicial error in the examiner's procedural ruling noted above. For, the nature of the mediation-arbitration investigatory process presupposes that proposed final offers are tentative until the investigation is closed by our investigator. To require otherwise, e.g., that once the declaratory ruling procedure is invoked, the parties are locked into their existing proposals until the declaratory ruling was issued, would potentially result in a succession of petitions for declaratory rulings in the same case. Since the objections of one party could not, under those rules, be responded to by a revision until the ruling issued, rulings would be required where they might not be necessary, and subsequent rulings might well be required once the ruled upon offer was modified in the investigation following the issuance of a declaratory ruling. Such an approach is inconsistent with the dispute narrowing and settlement objectives of the provisions of MERA. While a party experiencing surprise due to such a modification would be entitled to a reasonable postponement of the declaratory ruling hearing upon request, no such request was made herein by the District.

Addressing ourselves to the District's single pending substantive objection to the proposal, we find it well taken. The testimony of MTI's Assistant Executive Director established that this proposal was intended to serve two purposes: to preserve the job rights of an employe on a leave of absence, and to "maintain the workload of others; in other words, those people who do not go on leave may end up having to perform the duties and responsibilities of the individual who is gone on leave. So, by hiring a replacement during a period while one employee is on leave would [sic] absorb the work . . ."

We find the proposal's relationship to wages, hours and conditions of employment reflected in those concerns more oblique than its relationship to the formulation or management of public policy involved in the determination of the qualifications for initial hire of replacement personnel. Therefore, limiting our consideration herein to the sole substantive objection raised by the District, we find that objection to be well taken, and the proposal to be a permissive subject of bargaining.

Employment Period

MTI proposed the following clause:

"Other related professional employees shall be employed on a 40 week basis, which shall include 210.5 work and/or convention days, 20 vacation leave days, and 9.5 holidays."

In its brief the District withdrew objections to this clause except insofar as it refers to convention days.

The District bases its argument that the reference to convention days is prohibited or permissive on two points: that it has no legal authority to grant convention days to employes other than teachers, and that in the alternative the District should have the exclusive right, as a matter of policy, to decide that convention attendance is an appropriate use of non-teachers' time, only in that event having an obligation to bargain the impact of that decision. The District initially raised its first contention above in its brief, so MTI's arguments do not address either contention directly, though MTI does generally contend that what ". . . the District has invented and attempted to promote in this proceeding is that what may be mandatorily bargainable for 'traditional teachers' is not necessarily bargainable for 'related professionals.'"

The District bases its first argument on Section 118.21(4), Wis. Stats., which provides:

"School boards may give to any teacher, without deduction from his wages, the whole or part of any time spent by him in attending a teachers' educational convention. . . ."

The District apparently contends that said provision reflects an implied limitation of such District expenditures to those expressly authorized by the above provision. The statutes do not contain such a prohibition in explicit form, and we do not share the District's proposed interpretation.

Regarding the District's alternative argument above, the issue before us is the status of the instant proposal as mandatory or non-mandatory. The appropriateness of leave for conventions is not controlling; rather, whether the leave for such purpose relates more to wages, hours and conditions of employment or to formulation or management of public policy is what we must determine. We find the proposal no more restrictive on the District's ability to make work assignments and to thereby implement public policy determinations than would be, e.g., a proposal for a paid holiday or paid vacation. Hence, like paid holidays or paid vacations, the proposal is primarily related to wages, hours and conditions of employment of the instant employes, and is a mandatory subject of bargaining.

Educational Release Time

MTI proposed the following provision:

"With the approval of his/her supervisor, an employe may be released from his/her duties during regular work hours in order to pursue one educational course per semester."

The District argues that this proposal relates primarily to educational policy, that educational release time is not appropriate for non-teachers, and that the District's sole obligation in this respect would be to bargain over the impact of a decision to allow educational release time if and when the District, as a matter of educational policy, made such a decision. MTI contends that "we are dealing with professional

employees and the subject of their continued training and ability to advance is fundamental to their wages, hours and conditions of employment."

We assume that the proposal is for release time with pay. The degree to which the instant proposal would deprive the District of the ability to provide services in the manner it deems appropriate and desirable seems insignificant, since the approval of the District's first-line supervisor would be required before any employe would be released for the purpose noted in the proposal. In addition, we find the instant proposal to be akin to leave of absence provisions, e.g., for personal business, which would also ordinarily be mandatory subjects of bargaining. The instant proposal relates to wages, hours and conditions of employment for the reason noted by MTI, above. Since we find it to primarily relate to such wages, hours and conditions of employment, given the minor affect on the District's ability to operate, we find the proposal to be a mandatory subject of bargaining.

Salary

MTI proposed the following provision:

"Section III A, B, C, C-1, and C-2 of the Agreement shall apply to other related professionals, except that the salary rates appearing in tables C, C-1, and C-2 shall be prorated to reflect the number of weeks such employees work. For example, if such an employee is employed on a 48 week basis (213.5 days*) and holds a masters degree with no prior experience, his/her annual salary would equal 1.11 (213.5/192) times $11,165 (Track 4, Level 1 as of January 1, 1978) or $12,393.

Section III F, G, H, of the Agreement shall also apply to employees covered by this Memorandum; however, the terms 'teaching experience' as used therein, shall be construed to mean 'professional experience' when applied to such employees. Furthermore, inservice courses taken by employees covered herein, which heretofore had not been approved by the PACC, shall accrue to the credit of the employee for salary schedule placement purposes. Hereinafter, however, such approval will be required pursuant to Section III-H.

*210.5 work and/or convention days plus 3 paid holidays."

The District contends that this proposal is permissive because it would treat "other related professionals" the same as teachers, giving salary advancement for various courses taken by such employes. It bases its argument on the premise that since it had not adopted a policy that "other related professionals" should receive additional salary for such additional training or education, it has no obligation to bargain such "policy".

The District's argument above, carried to its logical conclusion, would be that, until the District establishes a policy that a given grouping of its employes is deserving of a new type of benefit or condition of employment, the District need not bargain collectively with MTI concerning a proposal that such a provision be included in a collective bargaining agreement. But it is not the existence or nonexistence of a District policy on the subject of a proposal that is controlling. Rather, it is whether, as a general proposition, the public policy dimensions of a proposal outweigh the relationship thereof to employe wages, hours and conditions of employment. Here, it seems obvious that the public policy dimensions of the decision whether to advance employe salary based on educational background are of a lesser magnitude than

the direct relationship with employe wages, hours and conditions of employment of the instant proposal. Hence, we have found the proposal to be a mandatory subject of bargaining.

State Teachers' Convention

MTI proposed a clause worded as follows:

"1. When the Wisconsin Education Association and the American Federation of Teachers state conventions are scheduled on different dates, the certified bargaining agent for the employees employed by the Board of Education shall designate, subject to legal limitations, which convention is to be the official convention.

2. An other [sic] related professional who does not attend the official convention shall work in his/her assignment at professional work.

3. Other related professionals may, at their option, attend other appropriate professional conventions/conferences as determined by the parties to this Agreement so long as such consume no more than three days. Such, if so utilized will be in lieu of the days set forth for attendance at the WEAC and/or SWEIO Convention(s).

4. No more than three (3) days per year are provided for convention purposes."

The District objected to this proposal also on the basis that the District has not made an "educational policy decision" that other related professionals should attend conventions. As noted in the preceding discussion, that is not determinative herein. After applying the considerations noted in the preceding discussion, we conclude that the above proposal is a mandatory subject of bargaining for the same reasons as were noted under "employment period", above.

Dated at Madison, Wisconsin this 6th day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner