STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of THE MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION	Case CVIII No. 25187 DR(M)-128 Decision No. 17504
In the Matter of the Petition of THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and THE MILWAUKEE BOARD OF SCHOOL DIRECTORS	Case CIX No. 25188 DR(M)-129 Decision No. 17505 Case CX No. 25189 DR(M)-130 Decision No. 17506 Case CXI No. 25190 DR(M)-131 Decision No. 17507 Case CXII No. 25191 DR(M)-132 Decision No. 17508

Appearances:
Jeffrey L. Bassin, Assistant City Attorney, City of Milwaukee, appearing on behalf of The Milwaukee Board of School Directors.
Perry, First, Reiher & Lerner, S.C., Attorneys at Law, by Richard Perry, appearing on behalf of The Milwaukee Teachers' Education Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECLARATORY RULING, ORDER FOR HEARING AND ORDER OF DISMISSAL

The Milwaukee Board of School Directors (Board) filed a petition (Case CVIII) for a declaratory ruling on October 3, 1979 wherein it sought a determination as to whether twenty-three proposals in bargaining made by the Milwaukee Teachers' Education Association (MTEA) on behalf of teaching and related personnel were mandatory or non-mandatory subjects of bargaining. On the same date MTEA filed a petition (Case CIX) for a declaratory ruling wherein it sought a determination as to whether more than one hundred of its proposals in bargaining 1/ on behalf of teaching and related personnel, including the twenty-three proposals which were the subject of the Board's petition, were mandatory or non-mandatory subjects of bargaining. On October 4, 1979, MTEA filed additional petitions for declaratory

1/ Some of the MTEA proposals would continue existing contract language, the bargainability of which the Board's representatives have allegedly questioned. Other MTEA proposals would substitute new language for existing contract language in order to overcome the Board's objections as to the non-mandatory nature of the existing language. Still other MTEA proposals deal with new provisions to be included in the agreement.

rulings wherein it sought determinations as to whether six of its proposals in bargaining on behalf of a bargaining unit of school accountants and school bookkeepers (Case CX), ten of its proposals in bargaining on behalf of a bargaining unit of school aides (Case CXI), and seven of its proposals on behalf of a bargaining unit of substitute teachers (Case CXII) were mandatory or non-mandatory subjects of bargaining. The five petitions were scheduled for pre-hearing conference before the full Commission in its Madison office on October 22, 1979. During the course of said conference the Board waived its right to challenge the alleged non-mandatory nature of all but fourteen of the proposals in question during the current negotiations and moved to dismiss the petitions insofar as they related to MTEA's proposals in bargaining which are not disputed herein as being non-mandatory subjects of bargaining. MTEA accepted the Board's waiver but opposes the Board's motion to dismiss. Instead, MTEA proposes that the parties waive the provisions of Section 111.70(4)(b), Stats. that states that the Commission shall issue its decision within fifteen days of submission and the provisions of Section 111.70(4)(cm)6.g. Stats. which states that if a petition under Section 111.70(4)(b), Stats. is filed, the mediation-arbitration process shall be delayed. The parties agreed to waive the right to an evidentiary hearing on the question of whether the fourteen MTEA proposals which the Board disputes are mandatory or non-mandatory subjects of bargaining and agreed to file written arguments on those questions along with any additional arguments they desire to make with regard to the Board's motion to dismiss. Initial briefs were exchanged on October 29, 1979 and reply briefs were exchanged on November 2, 1979. The Commission has considered the record thus presented in issuing the following

FINDINGS OF FACT

1. The Board is a municipal employer which has its offices at 5225 West Vliet Street, Milwaukee, Wisconsin, and operates a public school system.

2. MTEA is a labor organization which has its offices at 5130 Vliet Street, Milwaukee, Wisconsin, and represents approximately six thousand teaching and related personnel in the employ of the Board in a certified bargaining unit, described in the parties current collective bargaining agreement as follows:

> "...all regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent (50%) 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 specialists, activity specialists, music teachers 550N who are otherwise regularly employed in the bargaining unit, excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors, and executives)."

3. In addition, MTEA represents approximately fifteen school accountants and school bookkeepers, seventeen hundred school aides and eight hundred substitute teachers in the employ of the Board in collective bargaining units which may be generally described as follows:

> (a) All school accountants and school bookkeepers (Junior High Schools) employed by the Board, excluding supervisors.
>
> (b) All general aides, technical aides and para-professional aides in the employ of the Board,

excluding social work aides, supervisory aides, teachers, administrators, supervisors, clerical and custodial employes.

(c) All regularly employed substitute per diem teachers, excluding all other employes and supervisors.

4. MTEA and the Board are parties to existing (1977-79) collective bargaining agreements covering the employes described in paragraphs 2 and 3 above which are due to expire on December 31, 1979. Proposals for new agreements to replace said agreements were exchanged on or about Friday, June 29, 1979. Thereafter, the parties met for the purpose of collective bargaining on a number of occasions. During the course of those negotiations the Board identified a number of existing contract provisions which MTEA proposes to be continued in the new collective bargaining agreements and other MTEA proposals which would either replace existing provisions or constitute new provisions in said agreements which the Board contended were permissive subjects of bargaining. On October 3, 1979 the Board filed its petition herein (Case CVIII) seeking a declaratory ruling with regard to twenty-three such proposals involved in the bargaining on behalf of the teaching and related personnel. On the same date MTEA filed its petition herein (Case CIX) seeking a declaratory ruling with regard to more than one hundred such proposals made on behalf of such personnel, including the twenty-three proposals which were the subject of the Board's petition. On the following day MTEA filed separate petitions seeking declaratory rulings on behalf of the bargaining units of school accountants and school bookkeepers (Case CX), school aides (CXI) and substitute teachers (Case CXII). During the course of a prehearing conference held on October 22, 1979, the Board waived its right to object to all but fourteen of MTEA's proposals 2/ during the course of the current negotiations including mediation-arbitration, if such process is invoked by either party. On the basis of such waiver the Commission finds that there is a "question" or "dispute" in negotiations with regard to those fourteen proposals which are discussed in paragraphs 5 through 15 below 3/ but that there is no "question" or "dispute" in negotiations with regard to any of the remaining proposals set out in the five petitions herein.

5. Providing Assistance to Teachers, Aides and Substitute Teachers for Physical Safety. The 1977-1979 collective bargaining agreements covering teaching and related personnel, aides and substitute teachers each contain the following provision which the Board indicated it believed was a permissive subject of bargaining:

2/ The Board expressly stated that its waiver went to the MTEA proposals as they are currently worded in the petitions herein and did not go to any future MTEA proposals which included any substantial changes which might effect their mandatory or permissive nature.

3/ Nine of the proposals relate to bargaining on behalf of the bargaining unit of teaching personnel; one of the proposals relates to bargaining on behalf of the bargaining unit of accountants and bookkeepers; one of the proposals relates to bargaining on behalf of the bargaining unit of aides; and three of the proposals relate to bargaining on behalf of the bargaining unit of substitute teachers. The two disputed proposals made on behalf of the aides and substitute teachers are identical to one of the disputed proposals made on behalf of the bargaining unit of teaching and related personnel. Two of the three proposals made on behalf of accountants and bookkeepers involve the same basic issue. Therefore, the fourteen disputed proposals are discussed in eleven separate paragraphs numbered 5 thru 15 below.

"e. In schools where there is a record of danger to the [teachers] [aides] [substitute teachers] or students, the Board shall provide appropriate additional personnel to help in building control."

MTEA would continue said provisions but, in view of the Board's objection, has made an alternative proposal on behalf of each bargaining unit which is disputed and reads as follows:

"e. In schools where the physical safety of employes in the bargaining unit may be in jeopardy, the Board shall provide appropriate central office support personnel to help in building control." (Emphasis added)

MTEA contends that this proposal deals with the physical safety of employes in the bargaining units and is, therefore, a mandatory subject of bargaining. The Board contends that this proposal is a permissive subject of bargaining because it relates exclusively to a management decision as to whether additional personnel should be hired. To the extent that this proposal would require the Board to provide help in building control under the circumstances described, it relates primarily to the working conditions of the employes in the three bargaining units in question. So much of this proposal as would require that the Board utilize "appropriate central office support personnel" when providing such help in building control, relates to the Board's formulation and management of public policy.

6. Prohibiting Additional Assignments for Teachers After the Regular Work Day. The 1977-1979 collective bargaining agreement covering teachers and related personnel contains the following provision which, according to MTEA, the Board indicated it believed was a permissive subject of bargaining:

"3. ADDITIONAL ASSIGNMENTS

a. In addition to the regular school day, teachers are required to perform collateral duties related to their teaching functions. Parent conferences, special help for students, faculty and/or departmental meetings and supervision of nonincome-producing activities which are of a school wide nature are examples of such collateral functions. One open house per semester shall be considered part of a teacher's assignment.

Pupils admitted to secondary buildings before 7:45 a.m. shall be required to have a pass. Early admission will be allowed only through a limited number of entrances to be determined by the physical structure of the building. On days of inclement weather, exceptions will be allowed to the above. If a school has unique needs requiring exceptions to the above, the time for entrance to areas in the building by students will be determined by the principal only after meaningful involvement of the faculty.

When it is necessary for principals to assign teachers within the school allocations to building and other necessary supervision before 8:05 a.m. or after 3:28 p.m., teachers will be paid at the part-time certificated rate with a guaranteed one-half hour of work. Teachers assigned to building and other necessary supervision prior to 8:05 a.m. will not be required to work before 7:35 a.m.

Teachers will be assigned from a list of volunteers on a rotational basis. When no volunteers are available, assignments may be made by the principal from the faculty on a rotational basis and paid as above. Assignment of nonvolunteers to such assignments shall not exceed one week in length and nonvolunteers shall not be assigned supervision both before 8:05 a.m. and after 3:28 p.m.

Nothing in this contract should be construed as discouraging attendance at or participation in, on a voluntary basis, activities of a professional nature such as clubs or community activities.

Assignments shall be a continuance of the normal school day, except in the case of being assigned to a commencement exercise or an open house.

b. In elementary schools, teacher assignments to extra-curricular activities of a school-wide nature, for which no additional compensation is paid or released time allowed, shall not exceed four (4) hours per week. One open house per semester, when scheduled, shall be considered part of a teacher's assignment. Nothing in this contract should be construed as discouraging attendance at or participation in, on a voluntary basis, activities of a professional nature, clubs or community activities. The four (4)-hour provision is designed as a guide in making necessary assignments and is not to be interpreted as a weekly requirement. Such assignments should be within the teacher's field of interest to the extent feasible. Within the above provisions, faculty meetings may be called in accordance with past practice.

c. Assignment of the four (4) hours shall be a continuance of the normal school day, except in the case of being assigned to an open house."

MTEA proposes to replace this provision with a disputed proposal which reads as follows:

"Teachers shall not be required to perform any work before or after their regular work day." (Emphasis added)

MTEA contends that this proposal is a mandatory subject of bargaining in that the obligation to perform overtime duties as well as the method of selection of individuals to work overtime and whether such duties will be compulsory, voluntary or on a seniority or rotational basis are all mandatory subjects of bargaining. The Board contends that this proposal is a permissive subject of bargaining because it relates to the level of service that the Board chooses to offer, which is solely a matter of management discretion. This proposal is primarily related to the formulation and implementation of public policy rather than wages, hours and working conditions.

7. Department Chairpersons. The 1977-1979 collective bargaining agreement covering teaching and related personnel contains the following provision which the MTEA proposes to include in the new agreement and the Board contends is a permissive subject of bargaining:

"7. DEPARTMENT CHAIRPERSON. When a department has fifty (50) sections of classes or a major portion thereof, the chairperson of that department will be given a released period. If a department does not qualify, it will be combined with one or more others to qualify for released time. Where small departments are combined to qualify for released time, every effort

will be made to provide released time during the semester for these chairpersons. A release period for small departments may be shared on a proportional basis. If it is not possible to release a chairperson in the manner prescribed, a chairperson not so released will be paid in the following manner:

Proportion of released period for this department x

Number of days in semester x

Part-time certificated rate.

If the chairperson prefers, he/she may, in lieu of payment, request release in succeeding semesters, if it is possible to program in this manner." (Emphasis Added)

MTEA contends that this provision, as written, deals only with the impact of being assigned to perform department chairperson duties and does not require the Board to bargain over the policy decision of whether the Board will have departments or department chairpersons, which is the Board's prerogative. The Board contends that this proposal mandates that it must have department chairpersons as part of a school's organizational structure which is solely a matter for management's determination. The disputed portion of the proposal does not interfere with the Board's right to establish or maintain department chairpersons and, therefore, the disputed portion of the proposal does not relate to the formulation or management of public policy.

8. Providing inservice for Teachers Participating in Reading Continuum Program. The 1977-1979 collective bargaining agreement covering teaching and related personnel contains the following provision which the Board indicated it believed was a permissive subject of bargaining:

"E. BASAL READING PROGRAM, REMEDIAL READING AND READING CONTINUUM

1. Board funds, presently available in elementary schools through location budgets, may be used to purchase basal reading programs in those schools desiring such a program.

2. Reading resource teachers may be used as reading resource teachers, reading center teachers, or both.

3. As part of the implementation of the reading continuum, in-service educational opportunities shall be provided in the use of specific materials used in the continuum and the relation of the continuum to the regular instructional program. When the program is expanded to additional grade levels and/or skills, materials shall be provided to teachers prior to any in-service orientation on this matter. Aides will not be asked to assume duties beyond their position description or to exercise professional judgements related to the reading program which should be made by the teacher."

MTEA would continue said provision in the new agreement but in view of the Board's objection has made an alternative proposal, the first paragraph of which is disputed herein, which reads as follows:

"E. READING CONTINUUM PROGRAM

As part of the implementation of the program, inservice shall be provided to the participants. When the program is expanded to additional grade levels and/or skills, materials shall be provided to the participants prior to the inservice on this matter. (Emphasis added)

Bargaining unit work of reading teachers shall not be performed by school aides."

MTEA contends that the first paragraph of this proposal is a mandatory subject of bargaining since it deals only with the impact of the Board's decision to establish a program for the reading continuum, i.e. providing inservice training for the participants to enable them to carry out their duties. According to the MTEA this proposal is distinguishable from the general policy decision as to whether to offer inservice training and deals exclusively with the impact of the policy choice to establish such a program. The Board contends that the first paragraph of this proposal deals with a permissive subject of bargaining because it relates to the management decision as to whether inservice training should be conducted. This proposal relates primarily public policy choice as to whether to require or offer inservice training to employes.

9. Providing Inservice For Teachers in Multi-Unit Schools. The 1977-1979 collective bargaining agreement covering teaching and related personnel, contains a number of provisions dealing with elementary multi-unit schools which the Board indicated it believed were permissive subjects of bargaining. Included among said provisions was one dealing with in-service training which read as follows:

> "f. In-service courses shall be offered for teachers interested in the multi-unit school organization. Teachers assigned to a multi-unit school for the first time shall be provided forty (40) hours of in-depth orientation on a voluntary basis to the multi-unit organization either before or during the first semester of teaching. Teachers will be compensated at the part-time certificated rate. Ongoing in-service may be provided, where necessary, to teachers in multi-unit schools. Teachers interested in transferring to a multi-unit school should have knowledge of the program and may be given released time to make on site observations and discuss the program with the staff."

MTEA would continue said provision in the new agreement but, in view of the Board's objection, has made an alternative proposal which is disputed and reads in relevant part as follows:

> "f. Forty hours (40) of inservice training shall be scheduled during August or the first semester of each school year in each multi-unit school. Participation in such inservice shall be on a voluntary basis and participants shall be compensated at their individual hourly rate for each hour of participation." (Emphasis added)

MTEA contends that this proposal is a mandatory subject of bargaining because it deals with the impact of policy changes on teachers' wages, hours or conditions of employment. The Board contends that this proposal deals with a permissive subject of bargaining because it relates to a decision as to whether in-service training should be conducted, which is solely determinable by management. This proposal, insofar as it requires the Board to offer forty hours of in-service training to employes covered by its terms, relates primarily to the formulation or implementation of public policy.

10. Establishing and Maintaining Special Classes and/or Programs. The 1977-1979 collective bargaining agreement covering teaching and related personnel contains the following provisions which the Board indicated it believed were permissive subjects of bargaining:

> "J. INTERIM CLASSES AND/OR PROGRAMS
>
> Special classes and/or programs shall be expanded as the need arises to deal with socially-maladjusted pupils, as funds, teachers and facilities permit.

During the period of this contract, interim classes and/or programs shall be implemented and those classes started maintained in elementary and secondary schools for the purpose of meeting the secondary schools needs of students demonstrating a lack of reasonable self-control and whose behavior is seriously interfering with their own eduction, (sic) as well as the education of other children in the regular school program. These interim classes and/or programs shall be budgeted at an annualized (calendar year) level of seven hundred sicty-five (sic) thousand dollars ($765,000). Such classes and/or programs will adhere to the same general guidelines and procedures currently being used with the School Adjustment Centers.

Specific aspects of the program will reflect local school and or cluster needs. The principal and staff in each building may plan for and propose the establishment of such classes and/or programs and transmit such proposals to the Division of Curriculum and Instruction, where such proposals shall be reviewed and approved by the Superintendent within the budgeted amounts. These programs shall be reviewed and acted upon within one month after presentation (and need not go through the program improvement route). The principal and staff, when planning for classes and/or programs, shall take into consideration the facilities necessary to implement such classes and/or programs.

Where teachers are needed for interim classes and/or programs, the Division of Personnel shall recruit either new teachers or experienced teachers from within the system to staff such classes and/or programs. The MTEA will also help to acquaint teachers with such classes and/or programs.

1. The Administration will provide the MTEA and each school library with an updated listing of all existing interim classes and/or programs, as well as a brief description of each program.

2. A listing of other programs designed to meet the 'special needs of pupils' will be added to the above list (i.e. work-study programs, returnees, emotionally disturbed, DVR, Job Corps, community agencies, S.A.P.)."

MTEA would continue said provisions in the new agreement but in view of the Board's objection has made a proposal which would modify said provision slightly and reads as follows:

"J. INTERIM CLASSES AND/OR PROGRAMS

Special classes and/or programs shall be expanded as the need arises to deal with socially maladjusted pupils who present a physical danger to teachers and students. (Emphasis added

During the period of this contract interim classes and/or programs shall be implemented. Those classes started should be maintained in elementary and secondary schools for the purpose of meeting the needs of students demonstrating a lack of reasonable self control and whose behavior is seriously interferring with their own education, as well as the other children in the regular school program and whose behavior is a danger to the physical safety of the teachers and students. (Emphasis added)

These interim classes and/or programs shall be budgeted at an annualized (calendar year) level of seven hundred sixty five thousand ($765,000).

Specific aspects of the program will reflect local school needs. The principal and staff in each building may plan for and propose the establishment of such classes and/or programs and transmit such proposals to the Division of Curriculum and Instruction, where such proposals shall be reviewed and approved by the Superintendent within the budgeted amounts. These programs shall be reviewed and acted upon with (sic) one month after presentation. The principal and staff, when planning for classes and/or programs, shall take into consideration the facilities necessary to implement such classes and/or programs.

Where teachers are needed for interim classes and/or programs, the Division of Personnel shall recruit either new teachers or experienced teachers from within the system to staff such classes and/or programs. The MTEA will also help to acquaint teachers with such classes and/or programs.

1. The administration will provide the MTEA and each school library with an updated listing of all existing interim classes and/or programs, as well as a brief description of each program.

2. A listing of other programs designed to meet the 'special needs of pupils' will be added to the above list (i.e., work-study programs, returnees, emotionally disturbed, DVR, Job Corps, community agencies, S.A.P.)."

MTEA contends that this entire proposal is a mandatory subject of bargaining because it (1) deals with socially maladjusted pupils who present a physical danger to teachers and other students and, (2) provides that where interim classes and/or programs are needed, vacancies shall be made available to the members of the bargaining unit. The Board contends that this proposal deals with a management decision as to program establishment and is, therefore, a permissive subject of bargaining. This proposal, to the extent that it would require the establishment of and maintenance of special classes and programs to deal with socially maladjusted pupils who present a physical danger to teachers, relates primarily to educational policy rather than wages, hours and working conditions.

11. Supplemental Voluntary Early Retirement Plan for Teachers. MTEA has made a proposal in bargaining for a new provision to be included in the collective bargaining agreement covering teaching and related personnel, the bargainability of which is disputed and reads as follows:

"L. SUPPLEMENTAL VOLUNTARY EARLY RETIREMENT PLAN

Employes in this bargaining unit shall be provided a supplemental early retirement plan without cost to the employe. The details of the plan will be discussed when the matter is negotiated."

MTEA contends that this proposal deals with retirement and, as such, relates to wages and working conditions and is, therefore, a mandatory subject of bargaining. According to MTEA, the Board's contention that this is a permissive subject of bargaining arises out of a failure to distinguish this proposal, which deals with a supplemental voluntary retirement plan, from the State Teachers Retirement Plan. The Board contends that this proposal is a permissive subject of bargaining pursuant to the provisions of Section 42.245(2)(bm) and Section 42.78(2)(bm), Stats. This proposal would establish a supplemental early retirement program for employes represented by MTEA which is not governed by the provisions of Chapter 42 of the Wisconsin Statutes and primarily relates to wages and conditions of employment of employes represented by MTEA.

12. Summer Assignments for Community Recreation Specialists in Teacher Unit. The 1977-1979 collective bargaining agreement covering teaching and related personnel contains the following provision which the Board indicated it believed was a permissive subject of bargaining:

> "Community recreation specialists shall be given first consideration, after recreation supervisors for summer supervisory positions and/or special assignments."

MTEA proposes to replace this provision with a disputed proposal which reads as follows:

> "Community recreation specialists who make application for summer special assignments shall be selected in order of seniority." (Emphasis added)

MTEA contends that this proposal is a mandatory subject of bargaining in that it deals with the assignment and reassignment of members of the bargaining unit. The Board contends that it relates to the filling of non-bargaining unit positions and is, therefore, a permissive subject of bargaining. The record presented here does not establish whether the "summer special assignments" referred to in this proposal refer to work which is properly included in the teacher bargaining unit.

13. Prohibiting Certain Maintenance and Repair Work When Faculty is Present. MTEA has made a proposal in bargaining for a new provision to be included in the collective bargaining agreement covering teaching and related personnel, the bargainability of which is disputed, and reads as follows:

> "In order that teachers may carry out their duties in an atmosphere that is condusive to their health, safety, well being and comfort; painting, plastering, disturbing maintenance, repours (sic) or remodeling which interfer (sic) with the above will be done when the faculty is not present."

MTEA contends that this proposal is a mandatory subject of bargaining in that it deals with safe and healthful work facilities that are under the control of the Board. The Board contends that this proposal relates to the scheduling of repair work which is solely determinable by Management and is a permissive subject of bargaining. This proposal, as worded, is not primarily related to the wages, hours and working conditions.

14. Prohibition on Requiring the Performance of Clerical Duties by Accountants and Bookkeepers. The 1977-1979 collective bargaining agreement covering school accountants and school bookkeepers contains the following provision which the Board indicated it believed was a permissive subject of bargaining:

> "Part IV, Section F (5)
>
> The Board shall provide secretarial help in the school accountant's office on the basis of pupil enrollment as follows:

Pupil Enrollment	Secretarial Hours
Under 2,000	10 hours per week
2,000 to 2,500	15 hours per week
2,500 and over	16 hours per week"

MTEA would continue said provision in the new agreement but, in view of the Board's objection, has made an alternative proposal, which is disputed herein, and reads as follows:

"Bargaining unit employes shall not be required to perform clerical duties or duties performed by members of another bargaining unit, including but not limited to typing, filing, cataloguing. operation of a duplicating machine or acting as a telephone receptionist."

MTEA contends that this proposal is a mandatory subject of bargaining in that it deals with duties that would not be fairly within the scope of responsibilities of school accountants. The Board maintains that the duties enumerated are fairly within the scope of responsibilities of a school accountant and are, therefore, a permissive subject of bargaining. The record presented here does not establish whether the duties enumerated in the MTEA proposal are fairly within or fairly without the scope of responsibilities of school accountants and school bookkeepers.

15. Accusations Against Accountants by Principal or Supervisor and Hearings Before Assistant Superintendent. The 1977-1979 collective bargaining agreement covering school accountants and bookkeepers contains the following two provisions which MTEA proposes to include in the new agreement and the Board contends contain permissive subjects of bargaining:

"Part IV, Section I, (1)(a)

The principal or supervisor shall promptly notify the accountant on a form that an accusation has been made against the accountant which if true, could result in procedings (sic) under Part IV, Section G of the contract. The memo will also indicate that it would be necessary to confer on the matter and that such a conference, the accountant will be allowed to be represented by the MTEA, legal counsel, or any other person of his/her choice. This notice shall be followed by a scheduled, personnel conference during which the accountant will be informed of the nature of the charges of the alleged misconduct in an effort to resolve the matter. Resolutions of day-to-day problems which do not have a reasonable expectation of becoming serious, will not necessitate a written memo. (Emphasis added)

. . .

"Part IV, Section I, (1)(b)(c)

b. If the principal or supervisor decides on further action, he/she shall specify the charges in writing with the aid of the Accounting Division and then furnish them to the accountant and the MTEA and attempt to resolve the matter. The accountant and MTEA shall have a reasonable opportunity to investigate and prepare for a response. (Emphasis added)

c. If the matter is not resolved in this manner, a hearing shall be held within ten (10) working days to hear the charges and the response before the Assistant Superintendent of the Division of Personnel or his/her designee at which time the accountant may be represented by the MTEA, legal counsel, or any other person of his/her choosing. If in five (5) working days of the hearing, the accountant and the MTEA shall be notified of the decision relative to the charges, in writing, and the reasons substantiating such decision." (Emphasis added)

MTEA contends that these provisions are mandatory subjects of bargaining even though they specifically identify who will bring

charges of misconduct and who would review charges of misconduct. According to MTEA, due process procedures and all forms of discipline have long been held to be mandatory subjects of bargaining. The Board contends that this proposal relates to a permissive subject of bargaining because it concerns an evaluation procedure rather than a due process procedure and because the determination of which management official will perform the evaluation functions involved in the proposal has been held to be a management right and a permissive subject of bargaining. This proposal constitutes a procedure for the bringing of charges of misconduct and the determination of the validity of charges of misconduct and is not an evaluation procedure. The disputed portions of this proposal relate primarily to the working conditions of school accountants and do not, as worded, interfere with the Board's right to select representatives of its own choosing.

Based on the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. The following disputed proposals or portions of proposals, discussed in Findings of Fact numbered 5, 7, 11 & 15 above, are mandatory subjects of bargaining within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act to the extent indicated:

A. Providing Assistance to Teachers, Aides, and Substitute Teachers for Physical Safety -- all of the disputed portion except the portion which would require the Board to use "appropriate central office support personnel" when providing the required assistance.

B. Department Chairpersons -- all of the disputed portion.

C. Supplemental Voluntary Early Retirement Plan for Teachers -- all of the disputed proposal.

D. Accusations Against Accountants by Principal or Supervisor and Hearings before Assistant Superintendent or Designee -- all of the disputed portions.

2. The following disputed proposals, discussed in Findings of Fact numbered 6, 8, 9, 10 and 13 above, are permissive subjects of bargaining within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act to the extent indicated:

A. Prohibiting Additional Assignments for Teachers after Regular Workday -- all of the disputed proposal.

B. Providing In-service for Teachers Participating in Reading Continuum Program -- all of the disputed paragraph.

C. Providing In-service for Teachers in Multi-unit Schools -- all of the disputed portion.

D. Establishing and Maintaining Special Classes and/or Programs -- all of the proposal to the extent that it would require the establishment of and maintenance of special classes and programs.

E. Prohibiting Certain Maintenance and Repair Work when Faculty is Present -- all of the proposal as worded.

3. Section 111.70(4)(b) Stats. does not require that the Commission issue a declaratory ruling with regard to the duty to bargain on any subject unless there is a "dispute" in negotiations over the duty to bargain concerning said subject and Section 111.70 (4)(cm)6.g., Stats. does not permit either party to negotiations conducted thereunder to file a petition under Section 111.70(4)(b) and thereby delay the mediation-arbitration process unless the "question" raised concerning a proposal in such negotiations is also a "dispute" within the meaning of Section 111.70(4)(b) Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

DECLARATORY RULING

1. The Board has a duty to bargain collectively about the disputed proposals or portions of proposals discussed in Findings of Fact numbered 5, 7, 11 & 15 above to the extent indicated in Conclusion of Law number 1 above.

2. The Board has no duty to bargain collectively about the disputed proposals discussed in Findings of Fact number 6, 8, 9, 10 and 13 above as indicated in Conclusion of Law number 2 above.

Based on Findings of Fact numbered 12 and 14 above, and for the reasons set out in the Memorandum attached hereto, we hereby enter the following:

ORDER FOR HEARING

An evidentiary hearing shall be held, at a time and place to be established by a Commission Examiner in consultation with the parties, concerning the following disputed proposals:

A. Summer Assignments for Community Recreation Specialists.

B. Prohibition on Requiring the Performance of Clerical Duties by Accountants and Bookkeepers.

FURTHER, based on Finding of Fact numbered 4 above and Conclusion of Law number 3 above, and for the reasons set out in the Memorandum attached hereto, we hereby enter the following

ORDER OF DISMISSAL

Those portions of the petitions herein which relate to those MTEA proposals in bargaining with the Board, the bargainability of which is not questioned or disputed by the Board herein, are hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

Nos. 17504 17507
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17506

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, DECLARATORY RULING, ORDER FOR HEARING AND ORDER OF DISMISSAL

As noted in our findings, the petitions herein seek a determination as to the mandatory or nonmandatory nature of numerous proposals in bargaining which are no longer disputed within the meaning of Section 111.70(4)(b) Stats. because of the Board's willingness to waive its right to object to the bargainability of such proposals during the current negotiations, including mediation-arbitration proceedings if such are invoked. For this reason we confine our discussion herein to those proposals which are disputed and to MTEA's objections to the Board's motion to dismiss those portions of the petitions that seek determinations on proposals which are not disputed.

THE DISPUTED PROPOSALS

(1) Providing Assistance to Teachers, Aides and Substitute Teachers for Physical Safety

This proposal is a modification of the existing language contained in the collective bargaining agreements covering teachers, aides and substitute teachers. The disputed portion 4/ requires the Board to "provide appropriate central office support personnel to help in building control" where the physical safety of employes in each of the three bargaining units may be in jeopardy. The parties, in their arguments, attempt to make no distinction between the working circumstances of the three groups of employes involved and we see no reason for making such a distinction for purposes of our discussion here. All three bargaining units include employes who work with or in close proximity to students in the various schools and would, no doubt, have similar exposure to such risk as may exist in the various schools under the Board's direction and control.

BOARD'S POSITION:

The Board relies on two decisions 5/ to support its claim that this proposal is primarily related to the management and administration of the school system. According to the Board, this proposal deals with the assignment of non-bargaining unit personnel and management structure. Further, the Board argues, this proposal "impinges on the Board's ability to hire, staff and allocate personnel as needed by mandating that central office personnel be used in a certain fashion." The Board acknowledges that in certain instances proposals dealing with the physical safety of bargaining unit employes is a mandatory subject of bargaining as reflected in the Beloit case. 6/ However, it points out that a proposal is not bargainable merely because it is included in a proposal dealing with the physical safety of employes and argues that the

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4/ There is no dispute over MTEA's use of the expression "may be in jeopardy" in lieu of the existing language which refers to a "record of danger" and we, therefore, do not address MTEA's arguments herein dealing with that change.

5/ Oak Creek-Franklin Joint City School District No. 1 (11827-D) 9/74, affirmed Dane Co. Cir. Ct. 11/75; and Milwaukee Sewerage Commission (17025) 5/79.

6/ City of Beloit Schools (11831-C) 9/74, affirmed sub nom. City of Beloit v. WERC 73 Wis. 2d 43, 242 N.W. 2d 231 (1976).

proposal here constitutes an inextricable mixture 7/ of permissive and mandatory subjects. According to the Board, the fact that the MTEA proposal may reflect existing Board practices does not affect its bargainability as management policy.

MTEA'S POSITION:

MTEA contends that the Board misreads this proposal as requiring that it hire additional employes. It relies on the rationale contained in our Beloit decision to the effect that "the behavior of students in a classroom to the extent that it presents a physical threat to a teacher's safety is a condition of employment" and that proposals that go to such matters are mandatory subjects of bargaining. This proposal, MTEA alleges, merely reflects the Board's established practice of using central office professional personnel including human relations specialists and aides to help control disruptive students. Under the Commission's Beloit decision, as affirmed by the Wisconsin Supreme Court, proposals having a far greater impact on what might otherwise be considered a management prerogative have been held to be bargainable. In particular, MTEA contends that one of the proposals found mandatory in that case required referral of disruptive students to certain professional personnel (other than Counselors) where it dealt with threats to the physical safety of teachers. In addition, other proposals would have required the relieving of teachers of responsibility, transfers, and exclusion from the classroom of disruptive students where a physical threat was present.

DISCUSSION:

We agree with the Board's contention that the mere fact that a proposal in bargaining deals with the physical safety of employes does not necessarily make the proposal a mandatory subject of bargaining. It is true, as suggested by our decision in the Beloit case, that some proposals which might otherwise be found to be permissive subjects of bargaining are mandatory subjects of bargaining to the extent that they deal with threats to the physical safety of teachers. However, it is also true that some proposals, even where so limited, still do not relate primarily to wages, hours and working conditions. For example, one of the proposals in the Beloit case, found by the Commission to be a mandatory subject, would have required that disruptive students who posed a physical threat to teachers' safety and required the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, be referred to that particular person. The Dane County Circuit Court modified the Commission's ruling to hold that such a proposal was not a mandatory subject of bargaining. Contrary to MTEA's contention, this entire proposal, not just the portion dealing with counselors, was also found to be a permissive subject of bargaining by the Wisconsin Supreme Court.

We are satisfied that this proposal is, in general, a mandatory subject of bargaining. It relates directly to the handling of physical threats to teachers in a way that omits the public policy implications which were present in the proposal found by the courts to be a permissive subject in the Beloit case. On the other hand, we are troubled by the reference to the use of appropriate "central office support personnel". While we understand that this aspect of the proposal

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7/ The Board cites our decision in City of Wauwatosa (15917) 11/77 in support of its argument that such mixed proposals are non-mandatory.

reflects current practice, the inclusion of that portion of the proposal in the agreement would restrict the Board in making determinations as to who in its organizational structure would provide such assistance or whether it should utilize employes in supplying such assistance. Such matters relate primarily to the Board's management functions as noted in our Oak Creek-Franklin decision as well as the Milwaukee Sewerage Commission case relied upon by the Board. It also interferes with the Board's choice as to assignment of particular personnel. 8/ Therefore, we conclude that this proposal, as worded, is a permissive subject of bargaining. If it were modified to exclude the words "appropriate" and the words "central office support personnel" so as to require the District to provide help when bargaining unit personnel are in jeopardy we would find it to be a mandatory subject as written. Worded in this manner, the Board would not be restricted to utilizing any particular personnel or employes of the District nor would it necessarily be required to hire additional personnel as argued in its brief.

(2) Prohibiting Additional Assignments for Teachers After Regular Workday

The existing agreement contains provisions regulating the timing and amount and otherwise establishing the conditions under which certain work assignments and professional activities occurring outside the normal workday will take place. Examples of required professional activities are parent conferences, special help for students, faculty and departmental meetings and non-income producing activities which are of a schoolwide nature (including one open house per semester). Time limits are placed on the admission of students to the building and the assignment of building and other supervision to teachers. Provision is also made for the use of volunteers before such assignments, which are limited to one week's duration (in either the morning or evening hours), can be made involuntarily. Elementary teachers may not be assigned to "extracurricular activities of a schoolwide nature" (without additional compensation or relief time allowed) in excess of four hours per week, to be assigned as a continuance of the normal school day, and may not be assigned more than one open house per semester. Such assignments are to be within a teacher's field of interest to the extent feasible and provision is made that faculty meetings may be called in accordance with past practice.

When the Board voiced objection to the continuation of these provisions in the collective bargaining agreement, MTEA proposed to replace them with the disputed provision which would prohibit the Board from requiring teachers to perform any work before or after their regular work day.

BOARD'S POSITION:

According to the Board, this proposal constitutes a significant interference with educational policy. Because most parents work, it is necessary to schedule programs designed to solicit parent involvement such as open houses, parent conferences and commencement activities at night. Such scheduling would be prohibited by this proposal. In addition, extracurricular activities for children, which the Board contends are important to the educational process, could not be

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8/ Cf. Madison Metropolitan School District (16598) 10/78; p.6.

scheduled, nor could it require the attendance of teachers before or after the school day to deal with special problems such as bussing difficulties associated with its integration program pursuant to a court order. According to the Board, MTEA's proposal is comparable to proposing to exempt police officers from working Saturday night or waitresses from working during a lunch hour and is, therefore, primarily related to the formulation and management of public policy. In this regard it relies on dicta in an examiner's decision in the Racine 9/ case and the Commission's decision in the Wauwatosa 10/ case. In particular the Board notes that the proposal in the Wauwatosa case, which was found to be a mandatory subject of bargaining, merely placed a limit on assignments after the regular workday and was not an absolute bar as is the case here. According to the Board, the proposal here is so extreme that it constitutes a permissive subject as suggested by the dicta in the Racine case.

MTEA'S POSITION:

According to MTEA, this proposal does not impinge on the level of service the Board chooses to furnish its students; it merely places a reasonable limit on the required performance of work before or after the regular workday. For this reason MTEA contends that the Board's objection goes to the merits of the proposal rather than its bargainability. MTEA also relies on the Commission's decision in the Wauwatosa case and the acknowledgement contained therein that many mandatory proposals of bargaining, if agreed to, place constraints on the capacity of a public employer to provide services. According to MTEA, a proposal identical to the proposal here has, in effect, been held to be a mandatory subject of bargaining and the Board's arguments here have been held to deal with the merits of the proposal rather than its mandatory nature. If the Board desires employes to perform certain duties after their regular workday, it may formulate proposals to that effect. However, the proposal here would not prevent the Board from obtaining the performance of work during regular hours.

With regard to the Board's claim that this proposal would prevent the holding of parent conferences, extracurricular activities, commencement exercises and supervision of students on late busses or during inclement weather, MTEA alleges in its reply brief that this argument is factually incorrect. In this regard MTEA contends:

(1) Its proposal, B/147, which provides that teachers "employed beyond the regular workday to perform extracurricular activities shall be paid at their individual hourly rate" would permit the Board to require the performance of such duties.

(2) Its proposal, B/96, providing that "the parent teacher conference schedule of two(2) days per year shall be conducted during the regular school hours", which the Board has waived any objection to, is evidence that such parent teacher conferences can be conducted during the regular school hours.

9/ Racine Unified School District (13696-C) 4/78, p. 54.

10/ City of Wauwatosa (15917) 11/77, reversed Milwaukee Co. Cir. Ct. 10/79.

(3) The bargaining history of the parent-teacher conference issue would establish that such conference has been historically accomplished during the regular workday and that the agreement has been amended in the past at the request of MTEA to provide that teachers may, with permission of the principal, perform this work at night and that MTEA has proposed to continue this provision as part of its proposal, B/96.

(4) Its proposal, A/54, providing that "teachers assigned to commencement shall be paid their individual hourly rate for each hour assigned;" its proposal, A/54a, which provides for the use of volunteers and the payment of hourly compensation to teachers who are assigned to building and other necessary supervision before and after the regular school day and also provides that "assignment of non-volunteers to such assignment shall not exceed one week in length and non-volunteers shall not be assigned supervision both before and after the school day;" and existing contract language at Appendix K with regard to snow emergencies which the Board would delete and MTEA proposes to continue and states "if, as a result of an emergency it is impossible to evacuate the students from school, teachers shall be responsible for the supervision of their students"...all permit the employer to require the performance of duties after the regular workday.

Notwithstanding its claim that the Board may require the performance of certain duties under the above proposals and contract provision, MTEA argues that to the extent that there are other duties which the Board desires to require after employes have completed the regular workday, they are mandatory subjects of bargaining as to whether such "overtime" should be required and the amount of compensation to be paid.

DISCUSSION:

We find this proposal, as written, to be a permissive subject of bargaining. We do so because the proposal here places an absolute ban on the Board's ability to require its employes to perform work necessary to the implementation of its educational program outside the regular workday.

MTEA's reliance on our decision in the Wauwatosa case is misplaced. In that case we held that a proposal which limited the performance of routine work (non-emergency work other than fire fighting) to the first eight hours of a fire fighters's twenty-four hour shift was a mandatory subject of bargaining. We compared such a proposal to a proposal limiting the amount of time during a scheduled shift that active work can be required, i.e. before paid breaks and rest periods will take place. We acknowledged that such proposal, like a proposal to substantially increase wages, indisputably placed a burden on the employer's ability to provide public services and that such fact went to the merits rather than the bargainability of the proposal. However, we did not find that the proposal would effectively prevent the employer from providing public services.

On the other hand, in that same case we found that two other proposals would have had such an effect and were, therefore, permissive subjects of bargaining. First of all, we found that a proposal which

limited home inspections to the hours after 10:00 a.m. and before 4:00 p.m. and prohibited such inspection on Sundays and/or holidays directly affected the type and level of services to be provided the community. Similarly, a majority of the Commission found that a proposal which would have banned all routine (non-emergency or fire-fighting) work on holidays was a permissive subject of bargaining since it would have effectively prevented the employer from assigning any duties which are a necessary concomitant of its firefighting function on such days. 11/

Here, contrary to the assertions of MTEA, the proposal would effectively prevent the employer from scheduling various functions important to its educational program outside the normal workday. The fact that the Board may have scheduled parent-teacher conferences during the day in the past, like the fact that the employer in the Wauwatosa case had previously scheduled home inspections during the hours proposed, does not alter the fact that this proposal would effectively preclude a policy choice to change that practice. Nor are we persuaded by MTEA's contentions that this proposal would not have the effect of preventing the scheduling of activities outside the regular school day. Its proposal, B/147, does not directly address the question of whether the employer may require the performance of extracurricular activities outside the regular workday. Furthermore, that proposal, as interpreted by MTEA, like MTEA's proposal, A/54, dealing with assignments to "commencement" and "necessary supervision" would be contradicted by the wording of the proposal here and could be withdrawn if this proposal were found to be a mandatory subject of bargaining. Finally, the existing contract language in Appendix K deals with only one circumstance where the Board might reasonably require the attendance of teachers to meet its obligations to the public and, like the two proposals discussed above, is not part of the disputed proposal so that it might be considered together with the disputed proposal.

(3) Department Chairpersons

The existing agreement contains a provision granting release time to department chairpersons and provides, in relevant part, that "when a department has fifty (50) sections of classes or a major portion thereof, the chairperson of that department . . ." MTEA proposes to continue this provision.

BOARD'S POSITION:

The Board contends that the underlined portion of this proposal, in effect, mandates a form of organization which includes departments and department chairpersons. According to the Board, decisions as to organizational structure are a permissive subject of bargaining. 12/ The Board also alleges that there is a dispute between MTEA and the Board over the Board's authority to abolish the department chairperson position which dispute arises out of its decision to institute a major organizational change by converting junior high schools, which have departments and department chairpersons, into middle schools which do not. In its reply brief the Board notes that MTEA concedes that organization structure is an exclusive management prerogative and that a bargaining proposal cannot require that the Board have a department chairperson position.

11/ The dissenting Commissioner in that case focused on the view that this was a benefit in lieu of time off and indicated that he would have agreed with the majority if he believed that the proposal would have prevented the employer from accomplishing its basic fire-fighting mission.

12/ The Board relies on the Examiner's decision in Racine Unified School District (13696-C) 4/78 in support of this position.

MTEA'S POSITION:

MTEA contends that the Board misinterprets the language of the current agreement. According to MTEA, the current agreement does not require the Board to have department chairpersons. However, if an employe in the bargaining unit is appointed to perform the additional duties of chairperson, the agreement requires released time or increased compensation. MTEA relies on the Commission's decision in the Oak Creek-Franklin case 13/ in support of its position and notes in its reply brief that the Board failed to cite that decision which held: (1) that the employer had the unilateral right to establish such positions; and (2) if the duties are performed by bargaining unit personnel, the employer has the duty to bargain with respect to the wages, hours and working conditions of said position.

DISCUSSION:

We agree with the Board that if this proposal, requires the establishment of or maintenance of an organizational structure which includes department chairpersons, it would constitute a permissive subject of bargaining. We have previously so held in the Oak Creek-Franklin case. 14/ However, in that case the proposal in question undisputably required the establishment of department chairman.

We find that the proposal here would not appear to mandate the establishment of or maintenance of department chairperson positions. Therefore, we feel compelled to accept as a verity the position of MTEA, that this provision of the existing agreement does not require the establishment of or maintenance of department chairperson positions. This is particularly so in view of the Board's claim that there is a dispute over the impact of a proposed organizational change on the need to continue such positions. Such an admission on MTEA's part here would foreclose any claim that the continuation of this provision mandates the continuance of department chairperson positions if this provision is continued in the new agreement unchanged.

(4) Providing In-service for Teachers Participating in Reading Continuum Program

The Board has objected to the continuation of the existing provision dealing with the Board's basal reading program, remedial reading program and reading continuum program. Although MTEA would prefer to continue the existing language, it has proposed to replace the existing language with two paragraphs dealing with the reading continuum program. Only the first paragraph of that proposal, which would require the Board to provide in-service training to members of the bargaining unit who participate, is disputed.

BOARD'S POSITION:

It is the Board's position that this proposal is a permissive subject of bargaining because it deals with the decision whether to

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13/ Supra, note 5.

14/ We confine our discussion herein to the Board's objection and the arguments of the parties related thereto and do not deal with the question of whether any other aspect of this proposal is a mandatory or permissive subject of bargaining. Any other possible objection not raised by the Board must be deemed waived. Madison Metro. School District (16598-A) 1/79.

institute in-service training. The Board points out that MTEA concedes that such decision is normally one made by management and disputes MTEA's claimed basis for distinguishing this proposal. According to the Board, this proposal does not deal with release time or the impact of a Board decision on wages, hours and working conditions. It hires teachers in the belief that they have sufficient skills to perform the work assigned and the decision as to whether special training is needed to perform a particular work assignment is a decision for the Board to make.

MTEA'S POSITION:

MTEA concedes that the decision to establish in-service training for bargaining unit members is a permissive subject of bargaining. However, MTEA argues that the in-service here is not for the purpose of training employes to perform the routine duties of bargaining unit employes. Rather, it is for the purpose of providing necessary training to perform new types of duties required as a result of a change in or newly established Board policy. Such training is necessary to insure that employes receive adequate preparation so that they do not lose their employment or suffer other adverse consequences. MTEA points out that the Commission has held that release time for professional training is a mandatory subject of bargaining 15/ and that the impact of new programs which the employer expects employes to participate in is also a mandatory subject of bargaining. 16/ According to MTEA, it is clearly a condition of employment that an employe know what is expected in carrying out newly created duties. MTEA alleges that the duties associated with the newly created program of Reading Continuum are "extremely technical" and further argues that such duties cannot be "fairly within the duties required" 17/ of employes in the bargaining unit unless they have been clearly informed of the nature of the duties and have been trained to perform them.

DISCUSSION:

Although MTEA concedes in its brief that the decision to establish in-service training for bargaining members is a permissive subject of bargaining, we have not previously so held. In the Beloit case we held that the number of in-service days to be included in the school calendar and the days of the week on which they would fall were mandatory subjects of bargaining but that the types of programs to be held on such days and the participants 18/ therein were not. Similarly, in Oak Creek-Franklin we held that a proposal to form a committee to investigate and sponsor in-service programs and deal with their content and participants was a permissive subject of bargaining. The Examiner in the Racine 19/ case held that the Employer there did not violate its duty to bargain in good faith where it met its obligation to bargain concerning the calendaring of an additional in-service day since it is ordinarily the Employer's prerogative to assign such work as falls fairly within the scope of responsibilities of the employes.

15/ MTEA cites Madison Metropolitan School District (16598-A) 10/78 in support of this position.

16/ Citing Oak Creek-Franklin Joint School District No. 1. Supra note 5.

17/ MTEA refers to our decision in Milwaukee Sewerage Commission (17025) 5/79 wherein we discussed the right of an employer to unilaterally assign such duties.

18/ The Association had proposed the use of Consultants at a stated maximum cost.

19/ Supra, note 11, pp. 69-70 and 106-107.

We believe, for the reasons cited by the examiner in the Racine case, that the decision as to whether to provide or require in-service training is ordinarily a matter over which an employer is not obligated to bargain. Here MTEA argues that an exception should be made to this general rule because the purpose of the proposed training is to aid employes in the proper performance of their work. MTEA would have us find that this proposal is like the proposal in the Beloit case which required the employer to orient new teachers to evaluation instruments and procedures.

We disagree. In this regard we find that if this proposal is to be distinguished from general in-service programs it is more akin to the proposal, found to be a permissive subject of bargaining in the Beloit case, that would have required the employer to provide assistance to teachers having professional difficulty. We have therefore concluded that this proposal relates primarily to the public policy choice of whether to offer such in-service training.

(5) Providing In-service Training for Teachers in Multi-Unit Schools

The existing agreement contains a number of provisions dealing with elementary multi-unit schools. MTEA would continue those provisions in the new agreement. However, when the Board objected to the continuation of those provisions, MTEA proposed to replace them with other provisions. Only that part of its proposal dealing with in-service training is disputed herein. It requires the Board to schedule forty hours of in-service training during August or during the first semester in each multi-unit school so that bargaining unit members at said schools may, if they desire, participate in such training and receive compensation if they elect to do so.

BOARD'S POSITION:

The Board relies on the same arguments it advanced with regard to its objection to MTEA's proposal that employes participating in the reading continuum program be provided with in-service training in support of its position that the proposal here is a permissive subject of bargaining. With regard to MTEA's contention that this proposal deals with "orientation," the Board contends that it does not. According to the Board, orientation deals with "familiarization with an adaptation to a situation or environment" whereas in-serve deals with "training as in special courses, workshops, et cetera, given to employes in connection with their work to help them develop skills". 20/ It is the Board's position that MTEA's reliance on the decision of the Commission and Courts in the Beloit 21/ case is misplaced. That case held that orientation of new teachers as to evaluation procedures was a mandatory subject of bargaining. Here the proposal deals with the Board's decision as to whether employes should be given additional training which was held in the same decision to be a permissive subject of bargaining. Further, the Board argues, that since the Commission and courts held in that case that the decision as to whether employes who have received poor evaluations should be given additional in-service training is a permissive subject of bargaining, the decision as to whether such in-service training should be provided where there is only a hypothetical possibility of an unfavorable evaluation must also be a permissive subject of bargaining.

20/ The Board cites Webster's New World Dictionary (1978) for these definitions.

21/ Supra, note 6.

MTEA'S POSITION:

MTEA contends that its proposal here is a mandatory subject of bargaining because it deals with the impact of an assignment of bargaining unit employes to a special mode of instruction, multi-unit schools, which are alleged to be organized in a manner that is "radically different" than "non-specialty schools." According to MTEA, its proposal recognizes that part of the impact of the assignment of teachers to multi-unit schools is the possibility that they might perform poorly without adequate training and thereby jeopardize their employment. MTEA points out that the Commission held in the Beloit case that the "orientation" of new teachers as to evaluation procedures is a mandatory subject of bargaining and contends that such "orientation (another word for in-service) of new teachers" is like the in-service here. It is essential that teachers required to perform a substantial type of new duty be given training to maintain an adequate level of performance and avoid the jeopardy of loss of employment for inadequate performance.

DISCUSSION:

As a practical matter, we see little difference between the disputed portion of this proposal and the previous proposal. The purpose of the proposed in-service training here, likewise, is to acquaint and train the affected employes with the specific duties of their employment to assist them in the performance of those duties. For the reasons cited above, we find that the proposal relates primarily to the public policy choice of whether to offer such in-service training.

(6) Establishing and Maintaining Special Programs

The disputed proposal here represents a slightly modified version of existing contract language. The proposal, as rewritten, 22/ can be summarized as:

(1) requiring the expansion, "as needed", of special classes and/or programs to deal with "socially maladjusted pupils who present a physical danger to teachers and students."

22/ The major differences between the esisting contract language and the disputed proposal are:

(1) The disputed proposal deletes the reference to "as funds, teachers and facilities permit" in the first paragraph and substitutes the words "who present a physical danger to teachers and students."

(2) The disputed proposal adds the words "and whose behavior is a danger to the physical safety of the teachers and students" to the sentence which is now the second sentence in the second paragraph.

(3) The disputed proposal deletes the last sentence from the second paragraph of the existing provision which stated that "such classes and/or programs will adhere to the same general guidelines and procedures currently being used with the School Adjustment Centers."

(4) The disputed proposal deletes a portion of the third sentence in the third paragraph which describes the procedure for establishing such classes and programs and states "and need not go through the program improvement route."

(2) requiring implementation of such classes during the term of the agreement.

(3) requiring the maintenance of such classes in schools where started for the purpose of meeting the needs of students whose behavior (a) interfers with their own or others' education; and (b) is a danger to the physical safety of teachers and students.

(4) requires the budgeting of such classes and programs at a level of $765,000 per calendar year.

(5) prescribes the procedure to be followed by the administration in establishing such classes and programs and provides for participation by bargaining unit members in the planning of such classes and programs.

(6) provides that the recruitment of teachers for such classes and programs may come from existing faculty or new hires and provides for MTEA participation in the process of "acquainting" such teachers with the classes and programs.

(7) requires the Board to provide MTEA with the following information:

(a) an updated listing and description of such classes and programs; and

(b) an additional list of certain other specialized programs designed to meet the special needs of pupils.

BOARD'S POSITION:

The Board contends that this proposal deals with the establishment of special programs for students and argues that such decisions are permissive subjects of bargaining. The Board relies on the examiner's decision in the Racine 23/ case and the Commission's decision in the Oak Creek-Franklin 24/ case. According to the Board, MTEA is taking the position that merely by using the words "physical danger" it can make a permissive proposal mandatory. Nevertheless, the Board contends that this proposal deals with matters of educational policy by: (1) requiring the Board to adopt a policy of segregating problem students from the general population; (2) specifying the procedure for implementing such policy; and (3) specifying how much money the Board should spend. The Board relies heavily on the discussion of the Supreme Court in the Beloit 25/ to the effect that collective bargaining is not a suitable method for deciding matters of educational (public) policy. It argues that the holding in the Beloit case that certain proposals regarding physical safety were mandatory subjects of bargaining is distinguishable because none of those proposals which were held mandatory imposed a major program establishment decision on the Board as does the proposal here. Finally, the Board contends that this proposal

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23/ Supra, note 12.

24/ Supra, note 5.

25/ Supra, note 6 at page 51.

mixes one mandatory element, physical safety, with a host of permissive factors which creates an inextricable mix which is permissive in nature. 26/

MTEA'S POSITION:

MTEA concedes that normally the establishment of programs for students relates to the level of service provided by a school district to the public and, as such, is a permissive subject of bargaining. It contends, however, that the proposal here constitutes an exception to that general rule since it deals with the need for programs to deal with "socially maladjusted pupils who present a physical danger to teachers and students." MTEA points out that both the Commission and courts have held, in the Beloit case, that methods of dealing with students who present a danger to the physical safety of teachers is a mandatory subject of bargaining. According to MTEA, the Board cannot escape the holding of that case by arguing that the proposal here is inextricably mixed with permissive subjects. Further, MTEA contends that the Board's reliance on certain portions of the Supreme Court's decision in the Beloit case is misplaced since the discussion relied on dealt with proposals found to be permissive subjects of bargaining rather than proposals dealing with physical safety of employes which were found to be mandatory subjects of bargaining. Where teacher safety was involved, the Wisconsin Supreme Court held, as mandatory subjects of bargaining, proposals dealing with: referral of problem students to specialized personnel; the exclusion of problem students from a classroom; and the consent of a teacher to accept such students.

DISCUSSION:

The principal thrust 27/ of MTEA's proposal is to require the establishment of and maintenance of special classes and programs at a minimum level of cost of $765,000 per year to deal with socially maladjusted pupils who present physical danger to teachers. MTEA places its principal reliance on the Beloit case where several proposals dealing with the handling of problem students were found to be mandatory subjects to the extent that they were limited to the behavior of students in a classroom which presented a physical threat to the teacher's safety. In that case we stated in relevant part:

> "Problem Students:
>
> The behavior of students in a classroom, particularly to the extent it presents a physical threat to the teacher's safety, is a condition of employment. Thus, proposals that go to such matters are mandatory subjects of bargaining. The instant proposal, unfortunately is ambiguous as to whether it covers only such misbehavior; and the record herein does not clarify such

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26/ Citing City of Wauwatosa, Supra, note 7.

27/ There are other aspects of this proposal, such as the reference to physical safety of students and the reference to the interference with the education of students and prescribing the procedure for the implementation of the programs which would also appear to be permissive subjects of bargaining but could be eliminated from this proposal without changing this purpose or "thrust." Further, the provision that teachers be considered for these positions and the proposal that information be provided to teachers concerning this program, possibly relate to working conditions but would not appear to be the focus of the Board's objection or MTEA's concern in making this proposal.

ambiguity. Misbehavior of students that does not involve threats to physical safety is not a condition of employment and therefore, is a permissive subject of bargaining. Thus, for example, determining the appropriate response to students who are disruptive but not physically threatening, because they suffer a physical handicap, is a basic educational policy."

There were six proposals in all. They provided for:

"(1) Referral of problem students to specialized personnel and others,

(2) Relief of teacher responsibility with respect to problem students,

(3) Consent of teacher to whom problem student is assigned,

(4) Exclusion of problem student from classroom, report thereof, and consultation prior to return to classroom,

(5) Teacher self-protection and report of action taken, and

(6) Liability insurance coverage and compensation resulting in absence from duty from injuries in performance of teaching and related duties, with no deduction from accumulated sick leave."

Only the first of these proposals is relevant to the discussion here. That proposal read in its entirety:

"'A. The Board recognizes its responsibility to give all reasonable support and assistance to teachers with respect to the maintenance of control and discipline in the classroom. Whenever it appears that a particular pupil requires the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, such students shall be referred to that particular person.'"

The Dane County Circuit Court affirmed the Commission's decision in a respects except for its finding that this proposal, even to the extent that it was "strictly limited" to situations where the problem student posed a physical threat to the teacher, was a mandatory subject of bargaining. The court concluded that this proposal "involves a matter that falls primarily in the field of educational policy and, therefore, was not a subject of mandatory collective bargaining." 28/ The Wisconsin Supreme Court affirmed the decision of the circuit court in this regard.

Given this conclusion that a proposal that would require the referral of problem students who posed a physical threat to the safety of teachers in the classroom to the enumerated specialized personnel, the conclusion is inescapable that the proposal here which requires the establishment and maintenance of a major educational program for

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28/ Slip op. p. 9.

the same purpose primarily relates to educational policy rather than wages, hours and working conditions.

(7) Supplemental Voluntary Early Retirement Plan For Teachers

This proposal would add a new provision to the agreement which would establish a new fringe benefit in the form of a supplemental early retirement plan. The details of the plan, which would be provided without cost to the employe, would be the subject of future negotiations.

BOARD'S POSITION:

The Board contends that any proposal to establish a voluntary early retirement plan for teachers in Milwaukee is a permissive subject of bargaining. The Board argues that the wording of Section 42.245(2)(bm) Stats. dealing with the establishment of early retirement plans for teachers outside the City of Milwaukee makes the establishment of an early retirement program a mandatory subject of bargaining by virtue of the provisions of sub-paragraph 3 and 4. That paragraph reads as follows:

> "'(bm) An employer may elect that the date used for determining amounts under par. (b)2. a and b shall be the 62nd birthday of the member, rather than the 65th birthday of the member for its employes voluntarily applying for a retirement annuity prior to January 1, 1983, for the purpose of calculating that annuity only, except:
>
> "'1. This paragraph shall apply only to employes who voluntarily terminate their employment after the date on which the employer elects under this paragraph and prior to January 1, 1983.
>
> "'2. Any action under this paragraph for state employes shall be taken in accord with s. 111.92 or 230.12.
>
> "'3. Any action under this paragraph by a school district for teachers who are represented by a labor organization shall be taken pursuant to a collective bargaining agreement.
>
> "'4. This paragraph does not prohibit making election under this paragraph a subject of collective bargaining.'"

On the other hand, the Board points out that these same provisions are missing from the parallel provision (Section 42.78(2)(bm) Stats.) dealing with the establishment of early retirement plans for teachers in Milwaukee. That paragraph reads in relevant part as follows:

> "'(bm) The Board of school directors may elect that the date used for determining amounts under par. (b)1, a and b shall be the 62nd birthday of the member, rather than the 65th birthday of the member, for its employes

voluntarily applying for a retirement annuity prior to January 1, 1983, for the purpose of calculating that annuity only, except:

"'1. This paragraph shall apply only to employes who voluntarily terminate their employment after the date on which the board of school directors elects under this paragraph and prior to January 1, 1983.

"'2. The board shall pay to the department of employe trust funds the difference, as determined by the department, between the actuarial cost of the annuity which would have been paid if the board of school directors had not elected under this paragraph and the actual cost of the annuity payable. The amount payable shall be paid to the department in 3 equal annual payments, plus interest at the effective rate. . .'"

The Board argues that this difference in the wording of the two Statutes reflects a legislative intent to make early retirement in the Milwaukee school system a permissive subject of bargaining. Because the Board does not contend that this proposal is a prohibited subject of bargaining, it contends that MTEA's argument dealing with the intent of 1979 AB-109, a bill which would overhaul the retirement system for teachers and most other public employes, is irrelevant.

MTEA'S POSITION:

MTEA contends that the Board's reasoning that an early retirement plan for teachers in Milwaukee is a permissive subject of bargaining because of the absence of provisions in Section 42.78(2)(bm) Stats., to the effect that it is a subject for collective bargaining is fallacious. MTEA concedes that the conditions under which a teacher governed by Chapter 42, Stats. may retire early, is a permissive subject of bargaining regardless of whether the provisions of Section 42.245(2)(bm) and Section 42.78(2)(bm) Stats. apply because of the existence of the provisions dealing with that subject contained in Chapter 42 of the Wisconsin Statutes. According to MTEA, its proposal, which deals with a supplemental early retirement plan, is not governed by Chapter 42 and is a mandatory subject of bargaining because it deals with wages and conditions of employment of members of the bargaining unit. Further, MTEA points out that Assembly Ammendment 2 to 1979 AB-109, a bill currently pending in the legislature, would, if adopted, prohibit the Board from agreeing to establish a supplemental early retirement plan. According to MTEA there would be no need for the legislature to be considering such action if it were true that the Board is "restricted" from negotiating concerning such a proposal. According to MTEA the legislature, to date, has never adopted a limitation or made any restriction on municipal employers negotiating supplemental early retirement benefits such as that proposed here so long as such benefits do not in any way affect the operation of the state plan. The proposed MTEA plan would be totally independent of the state plan and would be unregulated by the provisions of Chapter 42, Stats. and is a mandatory subject of bargaining since it deals with both conditions of employment and compensation.

DISCUSSION:

We are constrained to agree with the MTEA that this proposal, which deals with the establishment of a new fringe benefit program, is a mandatory subject of bargaining.

Nothing in Chapter 42 of the Wisconsin Statutes would preclude the Board from establishing such a new benefit program. 29/ Indeed, the Board expressly denies making any claim herein that it is prohibited from bargaining with regard to any such proposal. The absence of a provision of Section 42.78(2)(bm) Stats. paralleling the provisions set out at sub-paragraphs 3 and 4 to Section 42.245(2)(bm) Stats. would not appear to indicate a legislative intent that the Board be relieved of any obligation to bargain concerning what would otherwise be a rather conventional fringe benefit -- a supplemental early retirement program. Such a program negotiated on behalf of existing employes is indisputably related to working conditions and compensation and, therefore, a mandatory subject of bargaining. 30/

(8) Summer Assignments for Community Recreation Specialists in the Teacher Unit

This proposal would replace an existing proposal which gives community recreation specialists, who are members of the teacher bargaining unit, "first consideration" after recreation supervisors for the filling of "summer supervisory positions and/or special assignments." The proposal as reworded, which is still objected to by the Board, provides that community recreation specialists who apply for "summer special assignments" will be awarded such assignments in order of seniority.

BOARD'S POSITION:

The Board contends that this proposal is a permissive subject of bargaining in that it concerns bargaining unit employes, community recreation specialists, who apply for non-bargaining unit positions, summer special assignments. The Board concedes that this would be a mandatory subject of bargaining if it dealt with bargaining unit employes who make application to fill bargaining unit positions. In this regard the Board relies on the negative inference that may be drawn from the Commission's decision in the Sheboygan County 31/ case where the Commission placed special emphasis on the fact that the "vacancies" referred to in the disputed proposal in that case were assignments of bargaining unit work. Any other result would be poor public policy in that it would permit a union to bargain provisions dealing with non-bargaining unit positions including supervisory positions.

MTEA'S POSITION:

MTEA contends that its proposal does not deal with the qualifictions for the positions but with the criteria for selection for such vacancies as may exist in the bargaining unit during the summer when one or more bargaining unit members apply. Based on the Commission's recent

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29/ Such benefits are wages. See OAG 1/28/74. It should be noted that MTEA's proposal leaves the details of this program to further negotiations. Therefore, we cannot say whether any proposal that MTEA might make in this regard would be in conflict with the provisions of Chapter 42 or some other provisions of law. See City of Glendale v. Glendale Professional Policemen's Association, 80 Wis. 2d 90 (1978).

30/ See City of Appleton (14615-C) 1/78.

31/ Sheboygan County (Handicapped Children's Education Board) (16843) 2/79, p. 5.

decision in the Milwaukee Sewerage Commission 32/ case, such a proposal is a mandatory subject of bargaining. MTEA argues that the expression "special assignments" refers to the use of community recreation specialists to perform the same duties that they perform during the Regular school year on a special assignment basis during the summer. Further, MTEA points out that the proposal in no way impinges on the Board's right to determine if there will be any summer special assignments

It is MTEA's position that the Board's claim that summer special assignments are not bargaining unit positions is factually incorrect because: (1) community recreation specialists perform two tasks during the regular school year -- supervising children on playgrounds at certain schools and coordinating the activities of part-time temporary employes; (2) these same duties are performed on a special assignment basis during the summer months with two minor exceptions -- playground supervision during the summer months takes place during expanded hours and is more often conducted outdoors; and (3) the wage rates for summer recreation specialists, like the wage rates for summer school teachers, are set out in the collective bargaining agreement at page 93. MTEA argues that if the Board were serious in its contention that summer assignments are non-bargaining unit positions, it could seek a unit clarification to that effect. Contrary to the Board's claim, these positions are bargaining unit positions and its argument concerning supervisory positions is inapposite. Finally, MTEA contends that this proposal is analogous to the criteria for the selection of regular school year teachers to perform the same duties during the summer which MTEA alleges we found to be a mandatory subject of bargaining in the Beloit 33/ case.

DISCUSSION:

This proposal represents another instance where the Commission is required to interpret a proposal in order to determine whether it constitutes a mandatory or permissive subject of bargaining. This is so because the Board concedes that if the proposal relates to the criteria for selection of bargaining unit employes for vacancies in bargaining unit positions, it is a mandatory subject of bargaining.

Because of the elimination of the reference to "summer supervisory positions" the proposal in question would no longer appear, on its face, to refer to non-bargaining unit positions of a supervisory nature. Nevertheless, the Board contends that the remaining "summer special assignments' language refers to non-bargaining unit positions and it is not possible on the record presented here to determine if this is the case

The phrase, "summer special assignments," is in itself an ambiguous term. MTEA alleges that it is only intended to relate to positions, the duties of which are in most substantive respects, identical to the work performed during the regular school year by the community recreation specialists, i.e. the supervision of children on playgrounds and the coordination of the activities of part-time employes working in the community recreation program. 34/ However, it is again not possible

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32/ Milwaukee Sewerage Commission (17302) 9/79.

33/ Supra, note 6.

34/ It would appear to be incumbent upon MTEA to modify the wording of this proposal to more clearly reflect its intent, if it is to be included in the agreement. Such clarification could be easily accomplished by adding the words "of work of the type normally performed by the community recreationspecialists during the regular school year" or similar words after the expression "summer special assignments."

on the record presented to determine if this is in fact the case. Furthermore, we have no evidence to establish whether this work has historically been performed exclusively by employes in the teacher bargaining unit or whether employes in other bargaining units or potential bargaining units have performed this work in the past.

For these reasons, the Commission concludes that it cannot determine the instant issue without additional facts, primarily relating to whether the summer work involved relates to the teacher bargaining unit and therefore have declined to rule on the proposal and ordered further hearing in the matter.

(9) Prohibiting Certain Maintenance and Repair Work When Faculty is Present

This proposal would include a new provision in the agreement which would provide that all painting, plastering, disturbing maintenance, repairs or remodeling which interfer with an atmosphere which is conducive to the health, safety, well being and comfort of bargaining unit members will be carried on when the faculty is not present.

BOARD'S POSITION:

The Board contends that this proposal is permissive in that it impinges on the Board's responsibility to schedule needed maintenance, repairs, remodeling, painting and plastering. Under this proposal, the Board would no longer have the unfettered right to deal with maintenance problems as they arise. Since it is not practical to evacuate a school or portion thereof, the Board would not be able to carry out these activities during the normal school day for fear a faculty member might approach whose comfort would be disturbed. If this work were limited to evenings and weekends, the Board's facilities would fall into a state of disrepair. The Board acknowledges that it has a duty to maintain safe and healthful conditions in its schools for the benefit of its faculty as well as for students, parents and the public, but argues that this proposal impinges on its ability to meet that responsibility rather than contributes to the fulfillment of that goal. According to the Board, MTEA's argument ignores the broad ramifications of this proposal which result in part from the use of ill defined terms such as "well being" and "comfort." The enumerated activities inevitably cause noise, vibrations and unpleasant smells which may interfere with ones comfort and well being. They may also cause changes in building entrances, traffic patterns and other distractions which arguably interfere with an employe's well being and comfort.

MTEA'S POSITION:

MTEA contends that this proposal deals with conditions of employment which directly affect the health, safety, well being and comfort of members of the bargaining unit and, therefore, is a mandatory subject of bargaining since the facilities in question are owned, operated and under the control of the Board. In this regard MTEA relies on the Commission's decision in the Sheboygan County 35/ case where it was stated that a proposal that dealt with the adequacy of work places utilized by teachers to maintain the health, safety and welfare of such employes would probably be a mandatory subject of bargaining to the extent that the work places in question were under the control of the employer. According to MTEA the proposal here is exactly that which the Commission has indicated primarily relates to wages, hours and conditions of employment. The proposal here

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35/ Supra, note 31.

directly relates to the health, safety, well being and comfort of members of the bargaining unit while they are performing their duties in facilities which are owned, operated and controlled by the Board. Further, the proposal does not impose an "unqualified obligation" to maintain the proposed standard for any office or teaching area used. Rather, according to MTEA, it would only apply to those buildings owned and controlled by the Board and only where the conditions would interfere with the health, safety, well being and comfort of members of the bargaining unit while performing their duties. Finally, MTEA contends that the Board's arguments relate to the problem of scheduling unexpected and major repairs, both of which go to the merits and desirability of the proposal rather than its bargainability.

DISCUSSION:

There are two major differences between the proposal here and the proposal in the Sheboygan case. First of all, the proposal in the Sheboygan case required that the work places utilized by teachers be maintained in certain respects to maintain the "health, safety and welfare" of the teachers utilizing said work places. As we noted in our decision there the words utilized, "health, safety and welfare" closely tracked the wording of the safe place statute and, therefore, constituted a defined and legally established standard for safety. Here, the proposal in question relates to the "well being and comfort" of the employes in question which constitutes an undefined standard that is clearly not limited to employe safety.

Secondly, the proposal here does not require the maintenance of certain minimum standards to protect employe safety. Instead, it severely restricts the time period during which any maintenance or repair work can be accomplished if it can be said that such work interferes with the well being and comfort of teachers.

Given these differences between the proposal here and the proposal in the Sheboygan case, we conclude that, on balance, its restrictive impact on the Board's ability to carry out necessary management functions so far outweighs its relationship to the working conditions of employes that it does not constitute a mandatory subject of bargaining under the primary relationship test. If this proposal were reworded so as to state that the Board is prohibited from performing the enumerated activities at times where the performance of such activities actually poses a threat to the life, health, safety and welfare of bargaining unit members, we would no doubt come to an opposite conclusion.

(10) Prohibition on Requiring the Performance of Clerical Duties by Accountants and Bookkeepers

The current agreement covering school accountants and school bookkeepers contains a provision which provides for a specified number of hours of secretarial help for school Accountants based on the pupil enrollment at the school where the Accountant works. Because of the Board's objection to the continuation of this proposal in the next agreement, MTEA has proposed to replace it with a proposal which would prohibit the Board from requiring school acountants or school bookkeepers to perform clerical duties or duties performed by members of another bargaining unit including but not limited to typing, filing, cataloging, operation of a duplicating machine, or acting as a telephone receptionist.

BOARD'S POSITION:

The Board argues that the enumerated duties, the assignment of which would be prohibited by this proposal, are all "fairly within"

the responsibilities of school accountants. The position description for school accountants indicates that they are required to maintain records for school funds, prepare the school budget, operate the school bookstore, supervise inventory and do the purchasing. According to the Board, certain clerical duties are an inherent part of record keeping, particularly cataloging and filing. Some typing may be required if an accountant's handwriting is illegible. Also, in any office, an employe may be required or expected to answer the telephone or operate a photocopy duplicating machine regardless of their position when the designated receptionist or other office employe who normally operates such machines is unavailable. In summary, the Board argues that this proposal ignores the realities of the accountants' functions and office life by assuming that such activities are not "fairly within" the scope of a school accountant's responsibilities.

MTEA'S POSITION:

MTEA relies on the Commission's findings in a case detailing the duties of the school accountants in the Milwaukee school system 36/ to support its claim that the enumerated duties are not fairly within the scope of the responsibilities of school accountants. According to MTEA the record in that case indicates not only that the duties in question have not been performed by accountants in the past but, in addition, makes clear that they have, in fact, been performed by school secretaries who are in a different bargaining unit and represented by a different labor organization. Further, in this regard, MTEA points out that the current agreement requires the Board to furnish secretarial help for the performance of these duties that the Board now argues are fairly within the scope of the responsibilities of the school accountants. According to MTEA, the Commission has held in both the Oak Creek-Franklin 37/ case and the Wauwatosa 38/ case that even where the disputed duties were previously performed by members of the bargaining unit, the continued performance of such duties was nonetheless a mandatory subject of bargaining. In Wauwatosa the firefighters had previously performed clerical functions -- switchboard duties -- and in Oak Creek-Franklin the teachers had previously performed occasional clerical functions. In summary, MTEA argues that a review of the duties of the school accountants as set out in the Commission's unit clarification proceeding when analyzed in light of the criteria set out in the Milwaukee Sewerage Commission 39/ case, results in the conclusion that the clerical duties referred to in the instant proposal are not fairly within the scope of responsibility of school accountants.

DISCUSSION:

The answer to the question of the mandatory versus permissive nature of this proposal necessarily turns on the factual determination of whether the clerical activities identified in and prohibited by the proposal fall fairly within the scope of the duties of school accountants and school bookkeeper. The Board attached a copy of the description of the school accountants to its brief. It reads in relevant part as follows:

36/ Milwaukee Board of School Directors (14494-A) 12/76.

37/ Supra, note 5.

38/ Supra, note 7.

39/ Supra, note 17.

"POSITION DESCRIPTION

TITLE: School Accountant

REPORTS TO: School Principal

SUPERVISES: Functional supervision over student help in bookstore and occasionally in other assignments.

BASIC FUNCTION: To maintain accounts relative to school generated funds, purchase items with such funds, maintain school equipment and material inventory, operate school bookstore, and assist in preparing school budget.

MAJOR DUTIES
AND RESPONSIBILITIES:

1. Accounting - Maintain records for funds arising in school, and the receipt, deposit, and disbursement of same.

2. Purchasing - from school funds.

3. Budgeting - Prepare tentative budget for school after confering with principal and department heads. Control requisitions issued and maintain check on receival and distribution of materials.

4. Inventory supervision - annual check-off, and taken every fourth year.

5. Bookstore - Operate and manage; order books and resell; supervise student help; take physical inventories yearly; prepare annual financial statement.

6. Issue books to indigents and faculty, bill Board, receive books and reimbusement."

These duties are not contradicted by and are, in fact, confirmed and expanded upon in our findings in the decision relied upon by MTEA. The relevant findings in that case read as follows:

"The School Accountant reports to the principal of his assigned high school and is responsible for certain financial activities at that school, such as the following: operating and managing the school bookstore, including the ordering of books and supplies, the processing of the financial statements; maintaining records for funds of various student organizations and activities, including the receipt, deposit and disbursement of such funds; keeping records of and supervising the conduct of the school's physical inventory; and, coordinating the preparation of a tentative annual school budget, after conferring with the principal and department heads at his assigned school. While the bookkeeper is involved in basically the same activities at the junior high school, some differences do exist. The Accountant may deal with forty to sixty different student activity and organization accounts compared to two or three such accounts for the Bookkeeper.

> Similarly, the volume of bookstore-related activities is smaller at the junior high school than at the senior high school. The senior high school budget involves larger amounts of maney and is more complex than is the junior high school budget. The Accountant does have clerical assistance in varying weekly amounts dependent on the pupil enrollment at the individual schools, while the Bookkeeper does not have such assistance." (Emphasis added)

Since neither party objected to the inclusion of these descriptions of the duties of the school accountants in the other party's brief, we have considered them in evaluating the proposal in question. However, in the absence of evidence concerning the day-to-day activities and work surroundings of the school accountants, we do not believe that it is possible to find that all of the enumerated activities, i.e. typing, filing, cataloguing, operation of a duplicating machine or acting as a telephone receptionist or other similar duties, fall outside the scope of responsibilities of a school accountant as alleged by MTEA. Furthermore, we have no evidence on which to reach such a finding with regard to the school bookkeepers who are also included within the scope of this proposal, since it refers to "bargaining unit employees". 40/

For these reasons the Commission concludes that it does not have sufficient facts relating to the day-to-day activities and work surroundings of the school accountants and the school bookkeepers to determine whether the instant proposal is a mandatory subject of bargaining. We have therefore declined to rule on the proposal and ordered further hearing in the matter.

(11) Accusations Against Accountants by Principal or Supervisor and Hearings Before Assistant Superintendent

The current agreement covering school accountants and bookkeepers contains provisions dealing with the procedure for handling "accusations" made against accountants which, if true, could result in disciplinary proceedings under Part IV, Section G of the agreement. Those provisions which are set out in our findings of fact No. 15, provide in relevant part that "the principal or supervisor" shall notify the accountant of such accusations and shall decide, after a conference on the accusations where the accountant may be represented, whether further action is warranted and shall specify the charges in writing. It further provides that if the matter cannot be resolved on the basis of the response of the accountant and MTEA, the "Superintendent of the Division of Personnel or his/her designee" shall hold a hearing on the charges and response and issue a decision relative to the charges. MTEA proposes to continue these provisions in the next agreement unchanged and the Board objects to the continuation of these provisions to the extent that they specify the management officials who will make the "accusations" and hold the "hearing" which it contends are evaluation functions.

BOARD'S POSITION:

The Board, in its brief, relies on the Commission and Wisconsin Supreme Court decisions in the Beloit 41/ case to the effect that the

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40/ It should be noted that the findings in the unit clarification proceeding relied upon by MTEA reflect that the school bookkeepers do not receive any clerical assistance in performing their duties.

41/ Supra, note 6.

determination of which management official will perform the evaluation function is a management right over which there is no duty to bargain. It is the Board's contention that the portions of the provisions to which it objects do not involve due process or job security but relate instead to the naming of the management official who will evaluate the employe's performance.

MTEA'S POSITION:

MTEA contends that the provisions in which the disputed language is contained are integral parts of a detailed due process procedure dealing with the handling of accusations of misconduct in connection with employment and, as such, are mandatory subjects of bargaining. 42/ It is not, according to MTEA, a procedure dealing with evaluation, nor does it deal with the question of who should be appointed supervisors by the employer. MTEA alleges that the school principals are the immediate supervisors of the accountants and it is for this reason that the procedure calls for having the principal notify the accountant of the charges and make the initial determination. However, the procedure also allows for some other management official to bring the charges and make the initial determination if the principal were not, in fact, the supervisor or where some other supervisor has knowledge of the alleged misconduct since the disputed language refers to "the principal or supervisor." For example, if a central office supervisor of accounting were to determine that misconduct in connection with accounting procedures has occurred, the central office supervisor could bring the charges. According to MTEA the Board's argument acknowledges that the procedure deals with employe misconduct but confuses the thrust of the proposal by arguing that it relates to the evaluation of employes and ignores the decision in the Beloit case where the disputed procedure provided that an employe subject to misconduct charges was entitled to notice from, and suspension by, a specific management official, the superintendent of schools.

DISCUSSION:

We cannot accept the Board's claim that the procedure in question deals with the "evaluation" of accountants. In our view, MTEA correctly identifies the procedure as a due process procedure dealing with charges of misconduct which generally relate to wages, hours and working conditions. In the establishment of such procedures it is, as a practical matter, necessary to identify the level of responsibility of management and union officials who will be representing the employers' and employes' interests at the various steps. For this reason such a procedure normally, if not universally, identifies the job title or union office of the representatives of the employer and the union. However, it is not necessarily the intent of either party who may agree to such provisions to dictate to the other the identity of the individual who will serve as their representative, a matter which is generally conceded to be a permissive subject of bargaining. 43/

Here the provisions in question do not appear to be intended to dictate to the Board who in particular should represent its interests in the procedure provided. Rather, the procedures are worded so as to insure that the charges are brought at the "supervisory" level and reviewed at a higher level. The actual identity of the supervisor or the management designee at the higher (assistant superintendent of the

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42/ MTEA relies on the Beloit case, supra, note 6 and the Commission decision in Appleton Joint School District No. 10 (10996-A&B) 1/78 in this regard.

43/ See the Examiner's decision in the Racine case, supra, note 12, at pp. 138-139, and the cases cited therein.

division of personnel) level is within the control of the Board. Further if the Board believes that the level at which charges are brought or reviewed should be changed, it is free to seek MTEA's agreement to such change. Similarly, if it believes that the level of responsibility enjoyed by MTEA's representatives should be modified, it may make proposals of its own in that regard.

For the above and foregoing reasons, we find that the objected to portions of this proposal relate primarily to working conditions and are, therefore, mandatory subjects of bargaining.

THE MOTION TO DISMISS

As noted in our Findings of Fact, the Board waived its right to object to the alleged non-mandatory nature of all but fourteen of the proposals which are the subject of the five petitions herein. Such waiver expressly covers the course of the current negotiations up to and including mediation-arbitration, if such procedure is invoked. Based on this waiver, the Board has moved to dismiss the petitions except those portions dealing with the fourteen disputed proposals discussed above. MTEA opposed the motion to dismiss at the hearing and, in it's brief, asks that if the Commission does dismiss the petitions, that it not do so on the basis of mootness or lack of jurisdiction.

BOARD'S POSITION:

The Board's position is twofold. It first contends that the petitions are moot to the extent that they seek Declaratory Rulings on proposals which the Board is willing to bargain about without objecting to their alleged non-mandatory nature. The Board cites the Wisconsin Supreme Court's recent statement that "a case is moot when a determination is sought which, when made, cannot have any practical effect upon an existing controversy" 44/ in support of its motion. It contends that in view of the expressed willingness of both parties to bargain on some one hundred and thirty-five proposals, a declaratory ruling on these items can have no practical effect on these negotiations.

Secondly, the Board argues that the Commission lacks jurisdiction to issue declaratory rulings with regard to the items over which both parties are willing to negotiate because there is no "dispute" as required by Section 111.70(4)(b) Stats.

The Board points out that MTEA argued at the hearing that the Commission should issue Declaratory Rulings with regard to all proposals set out in its petition so there can be "certainty in the law" and for guidance. However, according to the Board, there seldom is certainty in the law because no two fact situations are alike and that is particularly true in the case of declaratory rulings of the type sought herein. The Commission has taken a case-by-case approach which was expressly approved by the Wisconsin Supreme Court in the Beloit 45/ case and recently reaffirmed in the Racine 46/ case.

Finally, the Board argues that it would not only be contrary to the case-by-case approach to issue declaratory rulings on non-disputed items, it would also be contrary to public policy as well. This is so because sound case law results from an "adversarial system" where opposing litigants, with an interest in the outcome, advance positions that they believe in. Here the Board is willing to bargain about the

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44/ City of Racine v. J-T Enterprises 64 Wis. 2d 691, 221 N.W. 2d 869, 874 (1974).

45/ Supra, note 6 at 73 Wis. 2d 55.

46/ Unified School District of Racine v. W.E.R.C. 81 Wis. 2d 89, 102, 259, N.W. 2d 724 (1977).

proposals in question, thereby indicating its belief that they do not seriously affect the operation of the Milwaukee school system. Any interest the Board has in the mandatory or permissive nature of these items is academic. On the other hand, other school boards or municipalities might be of the opinion that the proposals here could seriously affect their interests. Therefore, any declaratory rulings on these items should be left for issuance pursuant to petitions brought by other parties who have a concern about the outcome.

MTEA'S POSITION:

At the hearing MTEA took the position that the Commission should issue Declaratory Rulings on the proposals which are no longer disputed because a "question" had, in fact, arisen in bargaining concerning their mandatory nature and because such rulings would provide certainty in the law and guidance to the parties for the purpose of formulating future proposals in bargaining. Although MTEA acknowledges that the Board's waiver of its right to object to these proposals during the current round of negotiations means that the petitions filed as a result of the "question" which arose in bargaining here, will no longer operate as a bar to the mediation-arbitration process under Section 111.70(4)(cm) 6. g. Stats., it contends that the Commission still has jurisdiction to issue a declaratory ruling. According to the MTEA the reference to a "dispute" in Section 111.70(4)(b) Stats., should be read in light of the language of Section 111.70(4)(cm) 6. g. Stats., which merely requires that a "question" arise in negotiations.

MTEA in its brief disputes the Board's claim that the petitions are moot or that the Commission lacks jurisdiction to issue declaratory rulings on these items. MTEA points out that the Wisconsin Supreme Court has expressly held that an issue as to the bargainability of a proposal is not moot merely because there is no longer an immediate dispute over its mandatory nature. In the Madison "school calendar" case 47/ the court held that the dispute over the school calendar which was then "history" was not moot because it was likely to recur. MTEA also cites the Allis-Chalmers 48/ case to the same effect with regard to a potentially recurrent labor dispute.

Finally, MTEA argues that if the Commission determines that it does not intend to issue a declaratory ruling under the circumstances present here due to the burden of its case load, it should so state but it should not dismiss the petitions for lack of jurisdiction since such action would be contrary to law.

In summary, MTEA asks that the Commission deny the Board's motion to dismiss and rule on the balance of the proposals. In the alternative, if the Commission dismisses the petitions, MTEA requests that it do so because it declines to rule in light of the unconditional waiver of the Board and not because of mootness or lack of jurisdication.

DISCUSSION:

It is not possible to state at this juncture whether the petitions are moot with regard to any or all of the non-disputed items. As MTEA correctly points out, there is substantial case law to the effect that a labor dispute is not moot merely because the parties have settled the

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47/ Joint School District No. 8, City of Madison et al v. W.E.R.B. 37 Wis. 2d 483 (1967).

48/ W.E.R.B. v. Allis-Chalmers 252 Wis. 436 (1948).

matter for the term of a collective bargaining agreement. Therefore, we wish to make it clear that our dismissal is not based on mootness.

With regard to the question of jurisdiction we, likewise, agree with MTEA that we have jurisdiction to issue a declaratory ruling on the non-disputed items. However, that jurisdiction is based on a significantly different interpretation of the relevant statutes than that which is advanced by MTEA.

Section 111.70(4)(b) Stats., provides that the Commission is required to issue a declaratory ruling whenever a dispute arises between a municipal employer and a union of its employes over the duty to bargain on any subject. That provision, which provides that decisions should be issued within fifteen days of submission, obviously contemplates disputes which obstruct the collective bargaining process which now includes mediation-arbitration. We cannot accept MTEA's claim that the legislature, in enacting Section 111.70(4)(cm) 6. g. Stats., intended to provide that the mediation-arbitration process could be interrupted by the filing of a petition pursuant to Section 111.70(4)(b) Stats., because a "question" arose in collective bargaining which was not also a "dispute" within the meaning of Section 111.70(4)(b) Stats. To conclude otherwise would be to allow a party who had made a proposal in bargaining, the mandatory nature of which the other party "questioned" but did not "object to" under Section 111.70(4)(cm) 6. a. Stats. and ERB 31.11 Wis. Admin. Code, to delay the mediation-arbitration process by the simple expedient of filing a petition for declaratory ruling.

We conclude that we have jurisdiction to issue a declaratory ruling on any of the non-disputed items which are not moot but not pursuant to the provisions of Section 111.70(4)(b) or Section 111.70 (4)(cm) 6. g. Stats. Our jurisdiction to do so would stem from the provisions of Section 227.06 Stats. It is our determination not to issue a declaratory ruling pursuant to the discretionary authority granted to us under that section for the sound reasons advanced by the Board in its brief.

While the Commission's case load is considerable we would, if we believed that it would advance the policies of the Municipal Employment Relations Act, utilize the resources available to us to resolve the question of the mandatory nature of the remaining proposals pursuant to the provisions of Section 227.06 Stats. However, we are not persuaded that it would further the policies of the Act to do so at this time. 49/

Dated at Madison, Wisconsin this 20th day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner

49/ But see Ashwaubenon School District No. 1 (14774-A) 10/77.