STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WEST BEND JOINT SCHOOL DISTRICT NO. 1 Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act Involving a Dispute Between WEST BEND JOINT SCHOOL DISTRICT NO. 1 and WEST BEND EDUCATION ASSOCIATION	Case XXVII No. 24794 DR(M)-121 Decision No. 18512

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, 414 East Walnut Street, Green Bay, Wisconsin 54301, by Mr. Edward J. Williams, on behalf of the District.

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, on behalf of the Association.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

West Bend Joint School District No. 1 having, on June 20, 1979, filed a petition requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling to determine whether a proposal, submitted by the West Bend Education Association in negotiations, related to a mandatory subject of bargaining within the meaning of the provisions of the Municipal Employment Relations Act; and prior to any further action in the matter, and on December 5, 1979, said District and said Association having filed a joint petition, together with a stipulation of facts, seeking a declaratory ruling with regard to proposals submitted by both parties in their negotiations; and the parties having waived hearing in the matter, and having filed briefs in support of their various positions; and the Commission, having reviewed the stipulation and the briefs of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That West Bend Joint School District No. 1, hereinafter referred to as the District, is a municipal employer, operating a school system in and about West Bend, Wisconsin, where it maintains its principal offices.

2. That West Bend Education Association, hereinafter referred to as the Association, is an employe organization representing municipal employes for the purposes of collective bargaining, having its offices at 2395 West Washington Street, West Bend, Wisconsin.

3. That at all times material herein the Association has been, and is, the exclusive collective bargaining representative of all regular teaching personnel, teaching at least fifty percent of a full teaching schedule (whether actively at work or on leave of absence), including guidance counselors and librarians, and all

special service and professional staff in the employ of the District, excluding substitute per diem teachers, office and clerical employes, the superintendent, principals, assistant principals and other supervisory employes; that in said relationship the District and the Association have been parties, at least since 1977, to a collective bargaining agreement covering wages, hours and working conditions of the employes in the above described collective bargaining unit, and more specifically at the time of the filing of the instant proceeding, the District and the Association were parties to a collective bargaining agreement effective from August 15, 1977 through August 14, 1980, and included among its provisions was a provision providing that said agreement could be reopened on certain matters, provided notice thereof was served on the other party on or before February 1, 1979; that prior to the latter date the Association served such notice upon the District; that as a result the parties had their initial bargaining session on April 5, 1979, and continued to meet on a number of occasions between said date and August 23, 1979, during which the parties exchanged proposals and collectively bargained in an effort to arrive at agreement on the contract reopener items; that on or about the latter date the parties reached an agreement, which would be in effect from August 20, 1979 through August 14, 1981, with respect to all issues except counter proposals relating to staff reduction (layoffs) and with respect to fair-share; that the parties agreed to submit the fair-share issue to a voluntarily agreed upon final offer mediation-arbitration procedure; and that the parties further agreed to submit their individual proposals to the Commission for determination as to whether said proposals related to mandatory subjects of bargaining, since claims were made by each party that the proposal of the other party related to a non-mandatory subject of bargaining.

4. That on December 5, 1979 the parties jointly filed a petition for declaratory ruling with the Commission, and, as part thereof, included a stipulation of the facts material to the matters involved; that in said stipulation the Association withdrew its original petition for declaratory ruling, which it had filed on June 20, 1979; that prior to any further action, and on January 9, 1980 the Association withdrew its challenge to the proposal of the District; and that there remains for the Commission's determination whether the underlined portions of the Association's proposal on staff reduction, as follows, relate to a mandatory subject of bargaining:

> ARTICLE XXVII. STAFF REDUCTION
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> 1. If a reduction in the number of teachers for the forthcoming school year is necessary, the provisions set forth in this Article shall apply. The Board may layoff teachers only where such layoffs are made necessary for valid and unlawful reasons of educational policy and/or school system management and operation. The Board agrees that layoffs will be made only for the reasons stated by it, as provided in this paragraph and in paragraph 3, and not to circumvent the other job security provisions contained in this collective bargaining agreement.
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> The Board will notify the WBEA of the position(s) which it considers necessary to reduce, together with all of the reasons and the supporting facts relied upon by the Board for the contemplated reduction, prior to the implementation of any layoffs. Such notice shall be sufficiently timely to enable the WBEA, at its option, to discuss with the Board the necessity of the proposed reduction in teaching positions and to bargain concerning the impact of any necessary reduction.

Necessary layoffs of teachers shall be accomplished in accordance with the time frame and provisions of Section 118.22, Wis. Stats. The Board shall inform the teacher(s) by preliminary notice in writing that the Board is considering nonrenewal of the teacher's contract for reasons of layoff and shall provide such teacher(s) with the right to a private conference, as provided in Section 118.22, Wis. Stats. Employes nonrenewed under this Article shall have the rights to reemployment set forth in paragraphs 5, 6 and 7 of this Article.

. . . .

4. The lay off of each teacher shall commence on the date that he or she completes the teaching contract for the current school year, and such teacher shall be paid for services performed under that contract to the date of such lay off in accordance with this Agreement. Also, if and only if such teacher exercises the conversion privilege under the District's group hospital-surgical insurance program, the District will continue to pay the single or family premium cost for the coverage of the personal medical insurance policy to which such teacher converts through the month of August immediately following the date of such teacher's lay off. Except as provided by this paragraph, such teacher's compensation and other economic benefits from the District shall cease as of the date of such teacher's lay off. The teacher shall not be precluded from securing other employment during such teacher's re-employment rights period.

5. That, since the objectionable language in the Association's "Staff Reduction" proposal relates to the timing of layoffs, especially by establishing that layoffs can only be implemented at the end of the school year, and further requiring the District to discuss the necessity of the proposed layoffs prior to the implementation thereof, said proposal primarily relates to the formulation and implementation and management of public policy, and not primarily to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

That the proposal of West Bend Education Association relating to "Staff Reduction" does not constitute a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING

That West Bend Joint School District No. 1 has no duty to bargain collectively with West Bend Education Association with respect to the latter's proposal relating to "Staff Reduction" as submitted to the West Bend Joint School District No. 1 in negotiations.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

During the course of negotiations on a new agreement both parties submitted proposals relating to staff layoffs, and during the progress of such negotiations both parties voiced objections to the proposal of the other, contending that both of said proposals, as written, related to permissive, rather than mandatory, subjects of collective bargaining within the meaning of the Municipal Employment Relations Act (MERA). The District originally filed a petition with the Commission seeking a declaratory ruling as to whether the Association's proposal related to a mandatory subject of bargaining. Prior to any Commission action on said petition, and apparently because the Association had in the meantime objected to the District's proposal in the matter, both parties joined in a stipulation of facts and jointly petitioned the Commission to rule on both of the proposals. Thereafter, and prior to any determination by the Commission, the Association withdrew its objection to the District's proposal. Therefore only the Association's proposal remains for the Commission's consideration. The objectionable portions of said proposal are set forth in the Findings of Fact, as well as those portions of the proposal not objected to by the District.

The District's Position:

The District argues that the portion of the Association's proposal, which requires layoffs to be accomplished in accordance with the time frame and provisions of Section 118.22, Stats., improperly integrates the concept of layoff and nonrenewal, which our Supreme Court in the Mack case 1/ has held are distinct and separate, and that if it were to be required to adhere to said statutory provision when laying off teachers, and restricting layoffs to the completion of the school year, unduly impinges upon the District's decision to layoff. The District contends that when layoffs should occur is part of the decision to layoff, otherwise, the right to decide to layoff could be emasculated by restricting the implementation of said decision and cites City of Brookfield v. WERC 87 Wis. 2d 819 (1979) for that proposition.

The District further argues that since the proposal imposes on when it limits layoffs to a particular time of the year it infringes on the educational policy decision as to class size. 2/ Accordingly, since class size and student-teacher ratio are primarily related to basic educational policy, so too, is the determination of the necessity to layoff teachers. The District contends that there are events which occur during the school year, such as unforeseen reductions in student body, or some other unforeseen catastrophe, which in the opinion of the electorate, through its elected officials, may require a reduction in the work force. As to the Association's proposal that layoffs "commence" at the end of the school year, the District argues, as a practical matter, it would

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1/ In Mack v. Joint School District No. 3 92 Wis. 2d 476 (1979), the Supreme Court held that a layoff of a teacher is not equivalent to a "refusal to renew" an individual teacher contract under Section 118.22. The Court further held that laying off of a teacher pursuant to a collective bargaining agreement during the term of the teacher's individual employment contract did not violate Section 118.22.

2/ Beloit Education Association v. WERC 73 Wis. 2d 43 (1976).

have no right to layoff. The District characterizes the Association's proposal as a "sugar coated" nonrenewal proposal rather than a layoff proposal.

Regarding the Association's proposal that it has the right to discuss with the District the necessity of the proposed staff reduction, the District asserts that since it has no duty to bargain over the decision to reduce staff, it therefore has no duty to discuss the layoff prior to implementation thereof. It does not deny a duty to bargain the impact of the layoff.

In response to the Association's claim that, based on the Supreme Court's decision in Mack, the layoff language in dispute relates to a mandatory subject of bargaining, the District argues that Mack was not concerned with the mandatory/permissive nature of the layoff proposal, but, rather, the distinction between a layoff and nonrenewal. Otherwise, the District notes, the Court would have had to distinguish, or overturn, its prior decision in Brookfield, where it held that the decision as to when a layoff is necessary relates to a permissive subject of bargaining.

The Association's Position:

The Association contends that its proposal that teacher layoffs be in accordance with Section 118.22, Stats., merely specifies the procedure for implementing necessary layoffs. It argues that its proposal, dealing with the timing and frequency of teacher layoffs, together with the procedures for implementing such layoffs, are not primarily related to the decision to layoff, nor to whether layoffs are necessary. To the contrary, the Association argues that all of the contested portions of the proposal primarily relate to employe wages, hours and working conditions, since they deal with the procedural rights of employes subject to impending layoff.

The Association argues that its proposal goes to when and how the District will implement a necessary staff reduction, and is similar to matters as to who will be laid off, which was found to be a mandatory subject of bargaining in Beloit. In addition, the Association contends that the Supreme Court's decision in Mack supports its contention that its layoff proposal relates to a mandatory subject of bargaining, since a layoff clause similar thereto was found to relate to a mandatory subject of bargaining. Conceding that, even though the layoff clause in Mack did not require a written preliminary notice of contemplated layoffs or a private conference with the District as provided in the proposal herein, it did require that teachers selected for layoff be notified in writing, on or before March 15 of the current year which, just as in the instant case, limited the timing and frequency of teacher layoffs.

With regard to its proposal requiring an opportunity to discuss the necessity of proposed layoffs, the Association argues that the District is not required to bargain concerning the decision to layoff teachers, but rather provides an opportunity for the Association to obtain needed information concerning the layoffs so that it can bargain meaningfully over the impact of those layoffs. The Association also claims that it has a constitutional right to discuss educational policy matters with the District, such as the purported need for teacher layoffs, citing City of Madison, Joint School District No. 8 v. WERC 429 U.S. 167 (1976).

Discussion:

The Association's proposal ". . . to discuss with the Board the necessity of the proposed reduction in teaching positions . . ." is in the opinion of the Commission clearly permissive.

Our Supreme Court in City of Brookfield held that the decision to layoff municipal employes to implement budget cuts relates to a non-mandatory subject of bargaining, while the impact of said layoffs on the wages, hours and working conditions is a mandatory subject of bargaining. Here the employer has agreed to provide timely notice to enable the Association ". . . to bargain concerning the impact of any necessary reduction". The Association proposes more, however, in that it wants to discuss the actual necessity of any proposed reduction. As such, said proposal clearly primarily relates to the decision of reduction itself and not the impact of same. Since the District has no duty to bargain regarding the layoff decision it follows that it may not be required, as a part of its bargaining duty, to discuss the necessity of said layoffs. We agree with the Association's contention that it may have a constitutional right to be heard on educational policy, such as the need for teacher layoffs. However, as the court stated in Brookfield the bargaining table is not the appropriate forum for the formulation or management of public policy.

As to the remaining disputed portions of the Association's proposal, the threshold question, given the Brookfield decision, is whether said proposal, which concerned the timing and frequency of layoffs, are an integral part of the layoff decision and the public policy determinations leading to said decision and the implementation thereof 3/, or whether it is primarily related to the impact of the decision. We conclude that proposals relating to the timing and frequency of layoffs interfere with the actual decision concerning same and thus effectively prevents the municipal employer from implementing public policy which the Commission and the Supreme Court have already determined constitute non-mandatory subjects of bargaining.

Here, we disagree with the Association's contentions that its layoff proposal which requires teacher layoffs to be accomplished in accordance with Section 118.22, Stats., is merely procedural and not primarily related to the layoff decision and, further, is similar to matters as to who will be laid off, which was found to be a mandatory subject of bargaining in Beloit 4/. A seniority provision, unlike the proposal herein, which provides for the timing of the layoff decision and its implementations, does not unduly interfere with the layoff decision by having to adhere to the time frame of Section 118.22, Stats., in deciding and implementing layoffs. Under the Association's proposal the District may have to either delay layoffs or initiate layoffs in advance of the facts and circumstances that necessitates the layoff, e.g. reductions in state and federal aid or unanticipated enrollment declines.

The Association's reliance on Mack for the proposition that the layoff proposal at issue herein is a mandatory subject of bargaining is misplaced, since the mandatory versus permissive nature of the layoff provision was not at issue in Mack. Therein the Court's focus was on the alleged illegality of the

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3/ The Commission has previously held that the determinations as to class size and student teacher ratios City of Beloit Schools, (11831-C) 9/74, affirmed sub nom City of Beloit v. WERC 73 Wis. 2d 43 (1976); the establishment or maintenance of certain employe positions City of Waukesha (Fire Department) (17830) 5/80 and Milwaukee Board of School Directors (17504 - 17508) 12/79; minimum manpower requirements City of Manitowoc (Fire Department) (18333) 12/80 and City of Brookfield (11489-B, 11500-B) 4/75; and the level of services City of Brookfield (17947) 7/80 non-mandatory subjects of bargaining because they relate primarily to the formulation or management of public policy.

4/ In Beloit a proposal which provided for layoffs by seniority - "inverse order of the appointment of such teachers" - was found to be a mandatory subject of bargaining.

layoff provision to the extent that it was inconsistent with Section 118.22, Stats. When the court in Mack referred to the layoff provision as a mandatory subject of bargaining, it did so in the context of its decision in Beloit, which we have already distinguished from the proposal at issue herein. We agree with the District that the Court in Mack dealt with the distinction between layoff and non-renewals, pursuant to Section 118.22, Stats., and that the issues presented herein are controlled by the Court's decision in Brookfield.

The Commission concludes that the Association by tying the timing and frequency of layoffs to Section 118.22, imposes an unwarranted restriction upon the employer's right to lay off personnel. The Association's proposal and its reliance on Section 118.22 requires a preliminary notice and the right to private conference, before the layoff decision, all within a narrow specified time period during the school year 5/ and further limits the layoff to the end of the school year. Thus the Association's proposal requires more than just notice of impending layoffs but rather interferes with the Employer's right to determine when layoffs are to occur. We therefore conclude that the Association's proposal is primarily related to the formulation, implementation and management of public policy and not primarily related to wages, hours and conditions of employment.

Dated at Madison, Wisconsin, this 15th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Gary L. Covelli, Commissioner

5/ Section 118.22(2) provides that "On or before March 15 of the school year . . . the board shall give the teacher written notice of renewal or refusal to renew his contract . . ." Section 118.22(3) provides that "At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contract."