STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case LXI No. 29137 MP-1298 Decision No. 19357-A

Appearances:

Schwartz, Weber & Tofte, Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin 53403, appearing for the Racine Education Association.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by Mr. Jack D. Walker and Mr. Thomas R. Crone, 119 Monona Avenue, P.O. Box 1664, Madison, Wisconsin 53701, appearing for Racine Unified School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Racine Education Association having, on January 21, 1982, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District had committed a prohibited practice within the meaning of Section 111.70(3)(a)(4) of the Municipal Employment Relations Act; and the Commission having appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Racine, Wisconsin on March 3 and 19, 1982; and briefs having been filed by both parties with the Examiner by June 30, 1982; the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Racine Education Association, herein referred to as the Association, is a labor organization having its offices at 701 Grand Avenue, Racine, Wisconsin, and that at all times material herein James Ennis has been, and is, the Executive Director of the Association and its agent.

2. That Racine Unified School District, herein referred to as the District, is a municipal employer which operates a kindergarten through 12th grade school district in and about Racine, Wisconsin, and has its principal offices at 2220 Northwestern Avenue, Racine, Wisconsin, and that at all times material herein Richard C. Nelson and Delbert Fritchen were respectively the District's Superintendent and Assistant Superintendent for Personnel Services, and its agents.

3. That at all times material herein the Association has been, and is, the certified collective bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the District, excluding on-call substitute teachers, interns, supervisors, administrators, and all other employes of the District.

4. That the Association and the District have been parties to a succession of collective bargaining agreements concerning wages, hours and working conditions of the employes described in Finding of Fact No. 3; that the most recent such

agreement was in effect from August 25, 1979 through August 24, 1982; and that said 1979-82 agreement contained, among its provisions, the following which are material in this proceeding:

Article III

TEACHER RIGHTS

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6. The Association shall be informed in writing of any contemplated change in policy affecting working conditions in order that the Association may present its views to the Board.

7. The Superintendent of Schools or his/her designee will meet with representatives of the Association to hear them express the Association's views before the Board makes a change in policy that has a substantial effect on the wages, hours, or conditions of employment of teachers.

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Article IV

TEACHER PROTECTION

1. A teacher who is assaulted in the course of his/her employment shall make a report about it to his/her principal on a form provided by the Board. Forms are available in the principal's office. The principal shall send a copy of the form to the pupil Personnel Office, which shall send a copy to the REA.

2. A teacher shall be informed immediately of his/her rights and obligations with respect to such assault, and informed that the District will provide assistance by obtaining relevant information from the police or principal, by accompanying the teacher in court appearance, and providing other reasonable help.

3. If the teacher wishes to file a complaint, the principal shall call the police to investigate the assault. The principal will call the police to investigate if the teacher is physically unable to tell the principal whether he/she wishes to file a complaint.

4. If criminal or civil proceedings are brought against a teacher alleging he/she committed an assault in connection with his/her employment, the Board shall provide the teacher all assistance necessary pursuant to Wisconsin Stats., sec. 895.46. (See Appendix I)

5. A teacher who is absent as a result of being injured by an assault in the course of his/her employment will receive 130 days additional sick leave without loss of pay, which shall be taken for this purpose before the teacher's sick leave defined in Article XIV, sections 1 and 2. The Board's medical consultant may monitor the use of such sick leave in order to determine whether it is used appropriately.

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Article VIII

STAFF UTILIZATION
AND
WORKING CONDITIONS

1.a. . . .

b. Reasonable efforts will be made to maintain academic subject class sizes as follows:

Elementary

K - 3	Recommended	25
	Maximum	30
4 - 6	Recommended	25
	Maximum	32

Secondary

7 - 12	Recommended	30
	Maximum	35

c. The foregoing standards are subject to modifications for educational organization or specialized or experimental instruction, which shall not violate the intent set fourth (sic) in Article VIII, 1.,a. and b. In elementary schools, the principal, working with the teaching staff, shall determine the staffing pattern and staff utilization of the school within the Board's teacher-student ratio policy; so long as students receive the instructional time designated by the Board, the principal, working with the teaching staff, may utilize staffing patterns so as to provide a minimum of 140 minutes per week (effective 1979-80 -- 1981-82 school years) individual teacher preparation time and/or aides to assist teachers in or to assume supervisory duties.

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e. The school administration, working with the teaching staff, shall determine the use of aides in supervisory duties.

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10. A teacher may identify to his/her immediate principal students who chronically disrupt his class and who do not respond to usual classroom teaching techniques. The Director of Pupil Personnel will decide whether to transfer a student to special facilities, depending upon the relative need for special placement and the amount of classroom space and staff available.

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12. Student Discipline Procedure

a. When a teacher refers a student to the office, he/she must supply necessary background information on a form to assist an administrator in making a decision about the referral. The student will not be returned to the classroom until the administrator commuicates with the teacher on the form about the disposition of the referral.

b. A teacher has the right to get school district personnel to escort to the office students referred for disciplinary action.

c. Chronic Student Misbehavior: Before a teacher seeks to have a student excluded from a class because of chronic disruption, the teacher shall at least:

1) Conduct a conference with the student, and

2) Contact the student's parents by letter or telephone and discuss the problem.

d. A teacher may use reasonable and appropriate means, including the use of physical restraint, to prevent a threatened or continuing breach of discipline that is endangering the safety of others. Physical restraint will be used only when other means of preventing a breach of discipline or stopping its continuance have been ineffective.

e. Self defense means the use of such force as is necessary to protect oneself. Self defense is permissible when a teacher finds it necessary to guarantee his/her safety.

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Article XXII

ENTIRE AGREEMENT

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2. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject as provided by Wisconsin Statute 111.70 and that the understandings arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.

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5. That on January 5, 1982, Fritchen wrote to Ennis as follows:

I am writing to inform you that the District is facing a shortfall in anticipated State Aid for Exceptional Education programs for the current fiscal year.

In reviewing financial problems caused by this anticipated shortfall there is a strong possibility that selected Exceptional Education aides will have their work week reduced by approximately seven and one-half hours per week (one (1) day) starting with the second semester of the current school year.

I would be happy to meet with you to hear any concerns the Racine Education Association might have concerning the impact of such change should this decision be implemented.;

that on or about January 20, 1982, Ennis wrote to Superintendent Nelson as follows:

Please take notice that the Racine Education Association hereby demands immediate impact bargaining over the wages, safety, working conditions, hours and other terms of employment effected by the announced policy of January 18, 1982 to reduce the number of hours of each teacher (sic) involved in exceptional education duties in the Racine Unified School District.;

and that on January 22, 1982, Fritchen replied to Ennis by letter in these words:

The District notified you on January 5, 1982, that it was considering possible reduction in hours for Exceptional Education aides because of a shortfall in anticipated state aide for Exceptional Education Programs. Your letter, received January 20, 1982, demands immediate impact bargaining of wages, safety, working conditions, hours and other terms of employment.

At your request, a meeting has been set for Monday, January 25, 1982, at 10:00 a.m. in the IMC Preview Room to meet with the Racine Education Association concerning this matter.

6. That on January 25, 1982, a meeting was held between the District and Association, at which Ennis requested to negotiate concerning both the decision to reduce aides' hours and the impact of such a decision; that Ennis further requested specific information concerning the reduction; that Fritchen stated that at that time a decision had not been reached; that Fritchen stated that the alternatives available to the District in order to reduce expenditures appeared to consist of either a reduction in aides' hours or a reduction in the program, and that a reduction in the program appeared to him not to be feasible; that Ennis proposed methods of saving money other than by reducing aides' hours, but that when requested by Fritchen to specify impact proposals the Association might have, Ennis made none; that subsequent to said meeting, the Association has requested no further meeting and has made no impact proposals to the District; and that at the hearing herein, in testimony, Ennis stated that the Association had no specific proposals it would make at that time with respect to the impact of the decision to reduce aides' hours other than that said decision be rescinded.

7. That by letter on February 2, 1982, Fritchen formally advised Ennis that "full-time exceptional educational teacher aides in the District will be reduced one hour per day effective Wednesday, February 3, 1982."

8. That although the reduction in aides' hours has resulted in a degree of greater work being required of teachers, no new types of duties were added to teachers' workload as a result of said reduction; that the reduction in hours occurred during hours when students are not present; and that there is no evidence that safety of teachers has been affected by said reduction in aides' hours.

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

CONCLUSIONS OF LAW

1. That Racine Unified School District has no duty to bargain collectively with Racine Education Association, within the meaning of Section 111.70(1)(d), Wis. Stats., with respect to the impact of its decision to reduce the hours of certain teacher aides on the wages, hours and working conditions of teachers represented by Racine Education Association, since provisions relating to the impact of said decision are included in the 1979-82 collective bargaining agreement between the parties.

2. That Racine Unified School District has not violated Section 111.70(3)(a)(4) by refusing to bargain concerning the impact on teachers' wages, hours and working conditions of its decision to reduce aides' hours.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner renders the following

ORDER 1/

That the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 2nd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition (Continued on Page six)

1/ (Continued from Page five)
with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the District violated Section 111.70(3)(a)(4), Wis. Stats., by refusing to bargain concerning the impact of a decision to reduce the hours of teacher aides on the wages, hours and working conditions of teachers.

The essential facts are set forth above in the Findings of Fact, and need not be repeated here. The parties' contentions are as follows:

The Complainant contends that teachers in the Exceptional Education field in the District have been subject over the years to a series of assaults by students, and that the safety of teachers in this area is consequently of major concern. Both for this reason and because more work was required of teachers themselves once the availability of aides was reduced, the Complainant contends that bargaining as to the impact of this decision is required at any time upon request by the Association, and that requests to bargain were properly made by Ennis' original letter to Fritchen, by Ennis' statements at the meeting of January 25, 1982, and by the complaint itself. The Association contends that the District flatly refused to bargain concerning the impact, but does not contend that the District failed to follow the contractual mandate for a meeting to discuss the Association's position. The Association argues that although teacher safety is a subject addressed in the contract, the clauses contained therein do not address the question of prevention of assaults, but are all "after-the-fact" provisions, and that the unforeseen drop in funding which occasioned the cut in aides' hours therefore requires further changes in the contract to deal with safety problems not considered by either party at the time agreement was reached.

The Association contends further that no waiver of impact bargaining exists in the Agreement, and that Examiner Fleischli in his 1978 decision 2/ concerning these parties' bargaining in a prior context does not so state. The Association contends that the District indicated that it would bargain impact by its letters of January 5 and 22, and that in any event Article III, Sections 6 and 7 should not be given effect because they were not voluntarily agreed to but rather imposed as the result of an adverse decision in mediation-arbitration. The Association also contends that under the Deerfield decision 3/ provisions such as those embodied in Article III, Sections 6 and 7 are permissive subjects of bargaining and should not be given effect for this reason. Furthermore, the Association argues, no advance knowledge of the possibility of the reduction in aides' hours existed at the time this contract was signed, and there is therefore no knowing waiver. In support of this contention the Association cites State of Wisconsin 4/, as stating that blanket waivers will not be given effect by the Commission unless the specific item involved in the case at bar is shown to have been waived with foreknowledge. Finally, the Association contends that the decision to reduce hours was not a Board decision but an administrative decision and that even if provisions of the contract are found to constitute a waiver of impact as it applies to Board decisions, no such waiver could be found concerning administrative decisions' impact.

The District contends that impact bargaining as to all subjects is waived specifically by Article III, Sections 6 and 7 of the parties' Agreement, and cites a prior Examiner's decision 5/ in support of this argument. The District contends that by attempting to remove this language from the successor contract to that in effect at the time of Examiner Fleischli's decision (i.e. the present agreement) the Association made clear both to the mediator-arbitrator and to the Commission

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2/ Decision No. 13696.

3/ Deerfield Community School District, (17503) 12/79.

4/ Decision No. 13017-D.

5/ Decision No. 13696, supra, pp. 77-78.

that this language is in fact a broad waiver. In support of this contention the District cites, among other documents, the Association's brief to the mediator-arbitrator. The District contends that the argument of the Association that the language should not be given effect because it was not voluntarily agreed to is meritless, and further contends that the Association was well aware of the possibility of budget cuts and associated layoffs, citing arguments of the Association to the mediator-arbitrator in support of the Association's then position that the contract should have only one year's duration instead of the three years proposed by the District (and ultimately accepted by the mediator-arbitrator as part of the preferred final offer). The District further contends that since the Agreement addresses such matters as teacher-student ratios, provision of aides, and teacher safety, including provisions intended to deal with prevention of assaults, there is no duty to bargain impact even in the absence of Article III, Sections 6 and 7. Furthermore, the District argues, the Association has shown no impact concerning which there could be bargaining: the teachers continue to do the same work, although perhaps somewhat more of it, there has been no change in their safety according to records of numbers of assaults before and after the reduction, and addition of duties is not a mandatory subject of bargaining.

The District also argues that no timely request to bargain was received by the District since the Union has made no request since the decision to reduce aides' hours was made. Further, the District contends, the District has never refused to bargain concerning the impact of this decision. Finally, the District argues that Article III, Sections 6 and 7 have been admitted to be a waiver by the Association in its brief to the mediator-arbitrator, have been found to be a waiver by the Commission in a recent case 6/ and were originally entered into voluntarily by the Association in or before the 1974 collective bargaining agreement.

It is apparent to the undersigned that, contrary to the Association's assertion, Agreement provisions which relate to teacher safety are not limited to after-the-fact situations: provisions such as Article VIII, Sections 10 and 12, dealing with disruptive students and discipline of students, clearly address situations which may result in harm to teachers. It is also apparent that the Association has not shown any immediate impact on safety from the reduction in hours; the number of assaults in the school system during the 30 days after the reduction was in fact slightly lower than in the 30 days before the reduction, and there is no dispute that the reduction occurred essentially at times when students are not present anyway.

These facts lead inexorably toward a finding that the recent Commission decision in Case LXI, DR(M)-168, involving the same parties, essentially controls this case. The cited decision was issued after the hearing in this matter was closed, and in it the Commission found that the District was not required to bargain concerning the impact on teachers' wages, hours and working conditions of widespread and far-reaching changes in the operation of the school district, including closing of schools, relocation of at least 170 teachers, elimination of teaching positions, reduction in hours for a number of teachers, and other changes in working conditions, precisely because of the existence in the current agreement of provisions relating to these matters and because of the simultaneous existence in the agreement of the waiver provisions embodied in Article III, Sections 6 and 7. In so finding, the Commission stated inter alia as follows:

> Generally, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on such matters had been clearly and unmistakenly waived. (sic) 5/ The issue, herein as it relates to the impact of the reorganization plan on teacher wages, hours and working conditions, concerns itself with whether the Association has waived its right to bargain thereon, by virtue of any of the provisions existing in the 1979-82 collective bargaining agreement.
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> During the course of this proceeding the Association has failed to establish any particular "impact item" which is not included in the existing collective bargaining agreement. As set forth in the Findings

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6/ Decision No. 18848-A (6/82).

of Fact, various provisions relate to layoff, recall, transfers, and assignments of teachers and the impact thereof on wages, hours and working conditions. The fact that the Association, when such provisions were being negotiated, and/or the District were not aware that a particular managerial decision might have a greater impact than anticipated at the time, does not, in our opinion, constitute a valid basis for permitting the renegotiation of such provisions during the term of the agreement. We have concluded that under the circumstances herein, the District has no enforceable duty to collectively bargain on proposals relating to matters already included in the agreement, which matters pertain to the impact of the reorganization plan on wages, hours and working conditions of teachers.

5/ City of Brookfield vs. WERC, 87 Wis. 2d 819 (1979).

It is immediately evident that the impact of the reorganization plan discussed in Decision No. 18848-A is of a far greater magnitude than any impact that could conceivably result, or is even argued by the Association to result, from the reduction in aides' hours involved in this matter. The conclusion is inescapable that, as provisions of the existing collective bargaining agreement already address this subject, the rationale of the Commission's prior decision is fully applicable to the instant case. 7/ For this reason, the undersigned need not address the other arguments of the parties: the undersigned concludes that the District is not obligated to bargain concerning the impact of the decision to reduce aides' hours, and the complaint is accordingly dismissed.

Dated at Madison, Wisconsin this 2nd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

7/ The Association's argument that Article III, Sections 6 and 7 could only waive impact bargaining relative to Board changes in policy, whereas the instant case allegedly involves'administratrative'changes in policy, is not persuasive: it is evident that the administration acted at the behest of the Board and that ultimately it is the Board that is responsible for the changes in aides' hours.