STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and THE MILWAUKEE TEACHERS EDUCATION ASSOCIATION	Case CXXXVII No. 30319 DR(M)-241 Decision No. 20093-B

Appearances:

Mr. James B. Brennan, City Attorney, by Mr. Grant F. Langley, and Ms. Susan D. Bickert, Assistant City Attorneys, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, 53202, for Milwaukee Board of School Directors.

Perry, First, Reiher, and Quindel, S.C., Attorneys at Law; by Mr. Richard Perry, Attorney at Law, 200 East Mason Street, Milwaukee, Wisconsin, 53202 for Milwaukee Teachers Education Association.

SUPPLEMENTAL FINDING OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On February 28, 1983 the Wisconsin Employment Relations Commission issued a declaratory ruling which determined whether 82 proposals made during collective bargaining by the Milwaukee Teachers Education Association to the Milwaukee Board of School Directors were or were not mandatory subjects of bargaining. In that declaratory ruling, the Commission stated that it was unable to resolve the status of 4 proposals based upon the record which then existed. The parties were unable to voluntarily resolve their dispute over those four proposals and the Milwaukee Board of School Directors subsequently requested that the Commission conduct further hearing. Pursuant to that request, hearing was convened by the Commission on June 22, 1983 at which time the parties presented further evidence and argument with respect to the unresolved issues. Post-hearing briefs on one of the issues were submitted by the parties and received by the Commission on July 11, 1983. Having reviewed the record and the briefs of the parties and being fully advised in the premises, the Commission makes and issues the following Finding of Fact, Conclusion of Law and Declaratory Ruling, supplementing those issued in this matter on February 28, 1983.

SUPPLEMENTAL FINDING OF FACT

6a. That the proposals of the MTEA as set forth in Finding of Fact 4 and identified as proposals 78, 81, 82, and 84 primarily relate to the formulation or management of educational policy and not to wages, hours and conditions of employment of teachers who are in the employ of the District and represented by the MTEA.

SUPPLEMENTAL CONCLUSION OF LAW

3. That the proposals of the MTEA identified as 78, 81, 82 and 84 in Finding of Fact 4 are permissive subjects of collective bargaining within the meaning of Section 111.70(1)(d) and 111.70(3)(a)4 of the Municipal Employment Relations Act.

SUPPLEMENTAL DECLARATORY RULING 1/

1. That the Milwaukee Board of School Directors has no duty to bargain collectively with the Milwaukee Teachers Education Association with respect to the proposals noted in Supplemental Finding of Fact 6a.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of August, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a

(Footnote 1 continued on Page 3)

petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures) and the dates of petition service and filing are the date the rehearing petition is actually received by the Commission and the date the judicial review petition is actually received by the Commission and Court.

MILWAUKEE TEACHERS EDUCATION ASSOCIATION, Case CXXXVI, Decision No. 20093-B

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

When resolving the issues herein the Commission must determine whether the provision involved primarily relates to wages, hours, and conditions of employment or to the formulation or management of public or educational policy. Where the former relationship predominates, the provision is mandatory; where the latter relationship predominates, the provision is permissive. Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976); Racine Unified School District v. WERC, 81 Wis. 2d 89 (1977).

PROPOSALS 78, 81 and 82: DATES AND TIMING OF REPORT CARD DISTRIBUTION AND PARENT-TEACHER CONFERENCES

The Nature of the Issues:

As identified previously in our February 28, 1983 decision in this matter, the proposals at issue are as follows:

(78) KINDERGARTEN TEACHERS

1. If the criteria of the Department of Public Instruction allows, parent-teacher conferences for kindergarten shall continue to be conducted during A.M. session the day prior to the regular conference day and the P.M. after the full conference day.

. . .

(81) SCHOOL CALENDAR

Particularly that portion thereof establishing the dates on which:

Parent conference dates are held.

(82) Dates on which report cards shall be issued

The parties agreed at the June 22 hearing that the only matters for Commission decision as regards proposals 78, 81, and 82, above, are whether the dates on which parent-teacher conferences and report card distributions occur are mandatory subjects of bargaining. 2/ The MTEA made it clear at the hearing that its proposals were not intended to require that parent-teacher conferences be held or to determine the number of parent-teacher conference days in the school year. MTEA also made it clear that its proposals were not intended to require that report cards be distributed or to establish the number of times during the school year that such distribution would occur. Finally, and quite significantly, the parties further agreed that the proposals constitute only an attempt to designate which dates--from among a previously identified group of dates for teaching and parent conference days--the report cards would be distributed and parent-teacher conferences would be held.

2/ The parties clarified the meaning and application given the language of proposal 78 over the years at the hearing on June 22. In essence, the parties appear to have applied that language as if it read ". . . shall continue to be conducted for the A.M. session on the day prior to the regular conference day and for the P.M. session on the day of the full conference day." In other words, the half day kindergarten pupils did not have school on either of those days and the morning kindergarten pupils' parents' conference day was the day before the system-wide conference day and the afternoon kindergarten pupils' parents' conference day was the same day as the system-wide conference day.

Contentions of the Parties:

The parties elected not to file additional written argument at the conclusion of the June 22, 1983, hearing as regards these three proposals. The following summaries of the parties' positions are based in part on the parties' prior briefs and in part on the parties' statements and oral arguments presented at the June 22, 1983 hearing.

The Board contends that proposal 78 and the school calendar contained in the parties' collective bargaining agreement are permissive insofar as they specify the dates on which parent-teacher conferences will be held, as well as the dates on which report cards will be issued to students. The Board contends that said determinations primarily relate to the Board's ability to communicate most effectively with parents and to assure the greatest possible participation in parent conferences. It contends that these are matters of educational and public policy which need not be bargained. The Board asserts that as long as teachers are properly and timely notified as to the dates on which conferences will be held and report cards issued, the effect on teachers' hours is minimal. The Board further argues that the responsibilities regarding conferences and report cards are duties fairly within the scope of a teacher's responsibilities and that it thus should be able to expect that teachers are fulfilling these basic responsibilities on an ongoing basis. The Board contends that negotiatiating a "school calendar" certainly does not mean that it must negotiate the days on which teachers will fulfill their various job responsibilities. Citing Oak Creek Franklin Joint City School District No. 1, 11827-B, (9/74) aff'd Dane County Circuit Court (11/75). The Board therefore contends that it need not bargain over the dates on which these activities occur.

MTEA submits that negotiation of the calendar for parent conferences and report cards is a mandatory subject of bargaining. It contends that the determination as to whether to hold conferences or whether to issue report cards are management's, but that the question of when those events should occur is a matter of calendar, which is a mandatory subject of bargaining under Beloit. The MTEA further argues that the scheduling of conferences and report card distribution affects working conditions in that teachers must plan in order to have the necessary work done by the conference or report card date. The MTEA further argues that if report cards are distributed on or close to the same date conferences are held, teachers may face substantial time pressures to prepare properly for both events, and that the parties have, in the past, bargained acceptable solutions which have met those teacher concerns while providing the Board with sufficient flexibility as to when to schedule the events in question. The MTEA thus argues that the two subjects in question be found to be mandatory subjects of bargaining.

Discussion:

Following the adoption of Secs. 111.70(1)(d) and (3)(a)4, Stats., in 1971 the Commission in Beloit Schools, 11831-C (9/74), was confronted with the issue of a municipal employer's duty to bargain over a school calendar which established the length of the school year, teaching days, inservice days, vacation periods, holidays and convention dates.

The Commission therein noted, "it is to be emphasized that our determination of each of the proposals involved herein is based on the specific proposal presented for inclusion in the collective bargaining agreement which was being negotiated by the parties." 11831-C at page 20.

When specifically ruling on the proposal therein at issue the Commission stated:

> School Calendar
>
> We conclude that the school calendar is a mandatory subject of bargaining, since it establishes the number of teaching days, in-service days, vacation periods, convention dates, and the length of the school year directly affecting "hours and conditions of employment."
>
> With respect to the Association's proposal pertaining to In-Service Days, we determine that the number of such days and

> the day of the week on which such days will fall are mandatory subjects of bargaining because, with the teaching days, they comprise the teachers' work days. However, we conclude that the type of programs to be held on such days, and the participants therein are not subjects of mandatory bargaining, since we are satisfied that such programs and the participants therein have only a minor impact on working conditions, as compared to the impact on educational policy.

111831-C at page 22.

The Supreme Court affirmed the Commission's ruling in each of the foregoing respects. 73 Wis. 2d 43 (1976). However, the Court framed its holding in terms more narrowsly drawn than the "all aspects of the school calendar" designation that appeared at one point in the statement of the issue before the Commission. Specifically, the Court expressed its holding as follows: "the board . . . is required to . . . bargain as to any calendaring proposal that is primarily related to wages, hours and conditions of employment." 73 Wis. 2d at 62.

Based on the foregoing, we conclude that school calendaring issues beyond those involved in the specific proposal held mandatory by the Commission and Court in Beloit must be analyzed case-by-case to determine whether they are primarily related to wages, hours and conditions of employment or, instead, primarily related to the formulation or management of educational policy.

Such an analysis is required with respect to both the subjects of the dates for parent-teacher conferences and the dates for report card distribution because the dates of parent-teacher conferences and report cards were not a part of the calendar proposal which was before the Commission or the Courts in Beloit.

The evidence reveals that the District has historically identified the dates of the end of a grading periods, i.e., the period as to which a student's performance is graded in the next report card. The parties then bargained about the date on which report cards would be issued, but always with an understanding that there was a usual and customary period of processing time that the administration would need to have the grades in its hands in order to have the cards ready for issuance or mailing on the agreed-upon distribution date. Thus, while the parties' agreement contained the date of report card distribution, that agreement also represented the base date upon which the parties mutually understood that the teachers' deadline for submission of grades would be established. As a result of the foregoing, bargaining about the report card dates in relation to the District-determined end of grading period dates had the practical effect of determining approximately how much time the teachers would have after the end of the grading period to prepare and submit the students' grades as regards that period.

It appears from the foregoing and from the record as a whole, that, apart from their concerns as professional educators about the most effective timing of student evaluation and teacher-parent conferences, the MTEA's wage, hour and conditions of employment concerns in the matter include the following: having sufficient notice of the date report cards will be distributed (and of the date in advance thereof on which grades must be turned in for processing) to permit the teacher to fulfill that duty without undue haste or stress; having sufficient time after the end of the period during which the student is being evaluated to reflect on the student's performance during that period and to formulate the grading information by the submission deadline without undue haste or stress; setting the day of the week on which the grades be required to be submitted, e.g., will there be a weekend after the close of the evaluation period and before the date for submission of grades to the administration; having sufficient notice of the date of parent-teacher conferences to permit the teacher to gather materials, prepare comments and ready the classroom, etc., to effectively communicate with the parents; and having sufficient separation in time between the date for submission of grades and the date of the following parent-teacher conference to permit preparation for the conference without undue haste or stress.

The District contends that the dates in question reflect educational policy choices as to when students and parents should receive information as to the student's progress during the school year. More specifically, the District's educational policy concerns would appear to include: when best to evaluate and motivate students; how to do so in a manner that permits effective and timely processing and distribution of grade reports; when and how best to communicate

with parents both in the form of report cards and in the form of parent-teacher conferences; and how best to coordinate the grade-reporting and parent-teacher conferencing to maximize the value of each to the educational process. The District contends that when parent-teacher conferences are held may depend on the policy choices regarding the purpose of the conference. For instance, if conferences are used as a vehicle to distribute report cards and to discuss student progress, the conferences may be best scheduled around the end of the grading period. However, if the conferences are utilized to acquaint the parents with the teachers and the school, then the conferences would be scheduled early in the semester. The District also argues that the day of the week on which conferences are held has an impact on the participation level of the parents. Conference days scheduled for Monday and Friday tend to have less participation. The District further notes that the scheduling of parent-teacher conferences on the same day report cards are distributed has led to increased parental participation.

We reject MTEA's contention that the interest of teachers in having sufficient time to prepare for conferences and for the submission of grade information requires a conclusion that the dates of conferences and card distribution are mandatory subjects. As the District argues, MTEA's legitimate interest in teachers having sufficient notice for preparation can be met by mandatory "impact" bargaining concerning the amount of advance notice required as to such dates. In our view, then, periods of required advance notice of the dates of parent-teacher conferences, report card distribution (and grade information submission) are mandatory subjects of bargaining.

We are also persuaded that--as regards the proposals we have before us herein--the educational policy dimensions of decisions as to dates for parent-teacher conferences and report cards outweigh the wage, hour and condition of employment dimensions including the legitimate teacher concerns that those dates could be scheduled in combinations that would present teachers with severe time pressures as regards their preparations for parent conferences and their submission of grades information. However, by so concluding, we are not deciding whether some future proposal for a minimum spacing between such dates could be developed as to which the wage, hour and condition of employment dimensions rather than the educational policy dimensions would predominate.

For the foregoing reasons, we have ruled that the specific proposals at issue herein constitute permissive subjects of bargaining.

We note that the MTEA is free to bargain over the impact of the dates selected by the District for the events in question upon the wages, hours and conditions of employment of teachers. It should also be emphasized again that our conclusions flow from a context in which the MTEA seeks to bargain dates from among a group of dates already identified generally as those for teaching and parent-teacher conferences.

PROPOSAL 84: COACHES

The Language at Issue:

At issue is the following MTEA proposal:

> 3. PROCEDURES FOR ASSIGNMENT AND TERMINATION OF COACHES FOR INTERSCHOLASTIC ATHLETES
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> . . .
>
> b. VACANCIES. In the event a head coaching vacancy exists:
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> 1) Except as provided in (2) below, such vacancy shall be advertised in the Staff Bulletin. The principal shall give first consideration to the applications of teachers on his/her teaching staff.
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> 2) A head coaching vacancy occurring for emergency reasons ten (10) days or less prior to the beginning of or at any time during the WIAA season shall be

filled by the principal with a teacher from within the system for the remainder of the WIAA season. In such emergency cases, the principal shall give first consideration to teachers on his/her teaching staff.

The Parties Contentions:

As previously summarized in our February 28, 1983 decision, the parties' positions following the initial hearing were as follows:

> The Board contends that these provisions require that teachers already within the school system, and in particular, teachers already on the staff at a particular school, must be hired to fill coaching vacancies, regardless of the individuals qualifications in comparison to other applicants. The Board contends that the provision prohibits it from determining what qualifications a coach must possess in order to best serve a student's educational needs. The Board contends that para. 2) is especially restrictive since it requires that a vacancy "shall be filled" by a teacher from within the system. The Board contends that this provision prohibits it from concluding that a non-bargaining unit individual is the only qualified candidate for the vacancy or is better qualified than an available teacher. The Board cites the Commission's decision in School District of Rhinelander (19761) 6/82, for the proposition that the decision as to what types of persons (teachers or non-teachers) will direct extra-curricular activities and what qualifications they should possess are permissive subjects of bargaining. The Board contends that MTEA's effort to distinguish Rhinelander, supra, on the facts is unpersuasive, and notes that there is no assurance under the instant contractual language that a qualified teacher would be available to fill the vacancy especially from the same school's staff. Thus, the Board requests that the Commission find the disputed language to be permissive.
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> MTEA contends that the clauses are mandatory subjects of bargaining. It suggests that the contractual language does not say anything about the Board's ability to determine the qualifications for coaching positions. Rather, the MTEA suggests that the disputed language relates primarily to the assignment of work historically performed by bargaining unit employes and does not interfere with the Board's right to determine employe qualifications. The MTEA does not believe that the Commission's decision in School District of Rhinelander, supra, is a definitive ruling applicable to this dispute. It contends that unlike the Rhinelander School District, the instant District has a large number of qualified teachers to choose from in filling coaching vacancies. It contends that, as mandatory permissive decisions are decided on a case by case basis, Beloit, supra, the Commission's decision is not determinative. In its reply brief, the MTEA submitted an affidavit which identifies the Wisconsin Interscholastic Athletic Association (WIAA) procedures for approval of coaches. Said affidavit specifies that coaches of sports for students in grades 7-12 should be certified teachers, except when permission is obtained in emergency situations. The MTEA contends that this WIAA requirement, coupled with the fact that historically coaches have been teachers, clearly renders the provisions mandatory subjects of bargaining. The MTEA also cites the Commission's decision in Sheboygan, (County Handicapped Children's Education Board, 16843 (2/79)) as support for its position that a clause which only sets forth the procedure to be used when filling vacancies where one or more bargaining unit members are applicants should be found to be mandatory.

In its brief filed following the June 22, 1983 hearing, the District supplemented its initial arguments. The District contends that it is now clear from MTEA's position as stated on June 22 that MTEA views the disputed language as

precluding the District from unilaterally establishing minimum qualifications for a coaching position. The District notes that MTEA argued on June 22 that the only existing and permissible qualifications for any coaching position are certification as a teacher and bargaining unit membership inasmuch as the parties have not agreed on any other set of qualifications. The District asserts that educational policy choices regarding the desired quality of the athletic program and level of student participation as well as the concern over the safety of students who participate, all require a finding that the District is entitled to hire coaches who have knowledge of and ability to instruct students in the proper and safe techniques of the sport. For instance, the District argues that it must be able to determine that the applicants for a position of high school gymnastics coach possess prior experience as a gymnast or as a gymnastics coach. To the extent the MTEA relies upon WIAA standards as support for its position on the allowable minimum qualifications, the District notes that the WIAA is a voluntary association to which the District need not belong and which has no involvement in the District's educational policy choices. It also points out that WIAA grants of relief from its "certified teacher" requirement are becoming increasingly common and routine.

The District argues that School District of Rhinelander 19761 (7/82) allows it to determine whether a teacher or a non-teacher will be used to fill a coaching vacancy. In response to MTEA concerns about maintaining unit work, the District argues that coaching responsibilities are not exclusively bargaining unit work, citing past and present use of non-unit members, some of whom are certified teachers, to fill coaching positions. It argues that the MTEA's arguments regarding coaching positions as promotional opportunities are unpersuasive. It contends such considerations have already been rejected by the Commission in Rhinelander. The District also contends that existing contract language preceding that at issue herein 3/ establishes that coaching appointments are unrelated to the employes rights as a teacher. The District therefore submits that the language in question should be found to primarily relate to educational policy decisions and thus to be a permissive subject of bargaining.

The MTEA also supplemented its initial arguments. It begins by noting that the clause in question does not preclude the District from hiring non-unit coaches but merely limits the exercise of that option to situations in which no unit employes apply for the position. The MTEA then argues that the disputed language is mandatory because it reflects the mandatory right to bargain over (1) qualifications necessary for advancement into unit position, citing Milwaukee County Sewerage Commission 17302 (9/79); City of Madison 16590 (10/78), and (2) the protection of unit work from subcontracting, citing Unified School District No. 1 of Racine County v. WERC, 83 Wis. 2d 89 (1977) (herein Racine) and City of Oconomowoc 19724 (6/81).

The MTEA contends that the record reflects the District's historical use of unit teachers to fill the vast majority of coaching positions. Whether viewed as promotional opportunities or lateral transfers, the MTEA views coaching positions as employment opportunities for unit members the qualifications for which must be bargained.

Given the MTEA's need to protect unit work and employment opportunities for unit members, the MTEA asserts the District's preference for assigning the best qualified applicant from among unit and non-unit applicants is one which the District must attempt to acquire at the bargaining table. It argues that the substitution of non-unit employes for unit employes in coaching positions does not represent a policy or service level choice which might under Racine overcome the MTEA's interest in preventing the subcontracting of unit work.

3/ The language referred to reads as follows:

> a. APPOINTMENT. All coaches shall be appointed by the principal for a specific coaching assignment on a yearly basis, and such assignment shall continue from year to year unless the coach is given notice in accordance with c(2) below. These assignments are independent of basic employment and tenure rights. (emphasis added).

The MTEA argues that if the proposal in question is found permissive, the Commission would thereby grant the District the unilateral power to dictate the qualifications for unit vacancies and the consequent unrestricted freedom to hire non-unit persons to perform coaching duties. It notes that the record reflects the District has rejected the bargaining process as the legitimate means for seeking to acquire that power and freedom.

For those reasons, MTEA submits that its proposal is mandatory.

Discussion

The language at issue, as characterized by the Association on June 22 and as it has been applied in the past, could require the District to assign coaching work opportunities to bargaining unit applicants who do not meet certain job performance related minimum qualifications that the District considers necessary for particular coaching assignments. For that reason, we have ruled that the proposal as written is permissive.

In Rhinelander the Commission was confronted with a proposal which gave the teachers the right to refuse the extra-curricular assignment (including coaching) which that teacher held during the preceding school year. In resolving the status of that proposal the Commission reasoned:

> . . . the question of what qualifications are necessary to direct the activity remains a matter of public or educational policy 8/ which need not be bargained. Having determined what qualifications are appropriate, the District, as indicated by the Court in Beloit in its discussion of a layoff proposal, retains the right to insist that qualified individuals be available to direct an activity. Here if the incumbent teacher were the only qualified individual available for the assignment, the proposal in question would interfere with the District's right to have qualified employes inasmuch as the District, under the Association's proposal, could not insist that the qualified incumbent take the assignment. Given this potential infringement due to the lack of an assurance that a qualified teacher would be available, the proposal in question is found to be permissive. 9/
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> . . . the Commission must conclude that where, as here, a proposal may prevent the District from providing students with qualified direction of extra-curricular activities, the educational policy dimensions of such a proposal predominate over the effect upon hours. It is also clear that the Association has the right to bargain over the impact which extra-curricular assignments have upon hours of work.

8/ See City of Madison, 16590 (10/78); Milwaukee Sewerage Commission, 17302 (9/79D); City of Waukesha, 17830 (5/80); and Brown County, 19041 (11/81) wherein we held tht the Employer need not bargain over the minimum qualifications for a job but must bargain over the selection criteria to be applied to qualified applicants.

9/ As the parties chose not to litigate the issue of whether certain extra-curricular assignments may be so far removed from an educational policy determination that a staffing decision would constitute a mandatory subject of bargaining, it is inappropriate and the record does not allow any comment as to whether any such assignments are found in Appendix C. Suffice it to say tht as the proposal in question applied to all such assignments and as the substantial majority of the listed activities unquestionaly relate to educational policy determinations, such an activity by activity analysis is also unnecessary.

As footnote 8 in the Rhinelander decision indicates, the Commission has consistently held that an employer need not bargain over the minimum qualifications for a job but must bargain over the selection criteria to be applied when choosing among qualified applicants. The right to establish such qualifications, as recognized by the Court in Beloit, flows from the need to insure that qualified individuals be available to direct any activity which is sufficiently related to the educational mission. We find that the District retains the right to set unilaterally certain minimum qualifications vis-a-vis the coaching positions in question, notwithstanding the existence of the WIAA. We note that the WIAA is a voluntary organization to which the District need not belong and that the WIAA does not purport to and does not in fact make educational policy judgments that foreclose the District from pursuing further educational objectives where extra-curricular athletics programming is concerned.

We find the proposal as written to be permissive because, as in Rhinelander, it may prevent the District from providing qualified direction of an extra-curricular activity (athletics) which activity bears a significant and sufficient relationship to fulfillment of the District's educational mission. (See our note 9 in Rhinelander, above). We so conclude because the language at issue here may require the District to hire a bargaining unit member who has no familiarity with the sport in question and who thus could lack minimum qualifications to perform the assignment.

It is our view however, that the District's right to set minimum qualifications is not without its limits. The educational policy dimensions predominate as regards such job performance related minimum qualifications as the professional certification, educational attainment, experience with and knowledge of a sport, knowledge of safety practices regarding the sport, and knowledge of first aid and/or sports injury training practices that will be required of applicants for each of its coaching work opportunities. However, minimum qualifications that do not primarily relate to educational policy or mangement of the district could not be imposed without fullfillment of the statutory bargaining requirements; examples might include a requirement that the applicants must be District residents, unmarried, etc.

It follows, therefore, that the Association is entitled to mandatorily bargain about provisions that would limit the minimum qualifications imposable by the District to job performance related qualifications primarily related to the formulation or management of education policy. Moreover, as among coaching applicants from within and outside the bargaining unit, the Association is entitled to mandatory bargaining about whether bargaining unit members meeting the minimum qualifications shall be given preference and how the District shall be required to select from among more than one bargaining unit member applying for the position (e.g., preference for opportunities in the employe's building, seniority, etc.). The District can of course attempt at the bargaining table to secure or maintain the right to fill all the positions with the most qualified applicant.

We also think it appropriate to clarify the application of the Rhinelander holding to the instant dispute. Where, as here, the District has historically utilized unit teachers to fill the vast majority of coaching positions, the positions become unit work which the MTEA can seek to protect from assignments thereof to non-unit personnel. As the Supreme Court indicated in Racine, absent evidence that the decision represents a choice among alternative social or political goals or values, the decision to substitute non-unit for unit personnel is a mandatory subject of bargaining. While, as stated in Rhinelander, it is theoretically possible that a district could show that use of non-unit personnel represented a choice among goals or values, such a showing remains a burden which must be met by the record before the Commission. Here, the District has not shown that any value choice is at stake, other than its expressed desire to have the

"best qualified" person in the job. Especially in view of the court's holdings in Beloit and Glendale, 4/ we do not believe that the foregoing District desire is sufficient to overcome the MTEA's legitimate interest in protecting what has historically been essentially unit work if qualified unit employes are interested in filling the position. If no qualified unit applicant timely applies for a given assignment, as the parties have interpreted the language, the District would be free to use non-unit personnel.

Dated at Madison, Wisconsin this 10th day of August, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

4/ In Beloit the Court found mandatory a layoff proposal which utilized seniority as a basis for determining order of layoff and recall. The Court rejected the claim that such a proposal interfered with the right of the District to detrmine needed staff qualifications. In Glendale Professional Policeman's Association v. City of Glendale, 83 Wis. 2d 90 (1978) the Court upheld the Union's right to bargain over the selection criteria to be applied when choosing among qualified applicants.