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 Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE TEACHERS' EDUCATION ASSOCIATION (Accountants)	Case CXLII No. 31005 DR(M)-286 Decision No. 20398-A

Appearances:

Mr. James B. Brennan, City Attorney, by Ms. Susan D. Bickert, Assistant City Attorney, City of Milwaukee, 800 City Hall, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Board of School Directors.

Perry, First, Reiher, Lerner and Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, and Ms. Elizabeth Wright, 1219 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Teachers' Education Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The Milwaukee Board of School Directors filed a petition for a declaratory ruling on January 14, 1983, pursuant to Sec. 111.70(4)(b), Stats., wherein it sought a determination as to whether certain proposals made by the Milwaukee Teachers' Education Association on behalf of certain accountants were mandatory subjects of bargaining. Hearing on said petition was held on March 16, 1983, in Milwaukee, Wisconsin, before Peter G. Davis, a member of the Commission's staff. The parties elected to file post-hearing written argument, the last of which was received on May 31, 1983. Having considered the record and the parties positions, the Commission makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee Board of School Directors, hereinafter referred to as the District or the Board, is a municipal employer having its offices at 5225 West Vliet Street, P.O. Box Drawer 10K, Milwaukee, Wisconsin 53208, which operates a K-12 public school system.

2. That the Milwaukee Teachers' Education Association, hereinafter referred to as MTEA, is a labor organization having its offices at 5130 West Vliet Street, Milwaukee, Wisconsin 53208, which represents certain accountants employed by the District.

3. During bargaining between the District and the MTEA over a contract which was to succeed the parties 1980-82 agreement setting forth the wages, hours and conditions of employment of certain accountants employed by the District and represented by the MTEA, a dispute arose as to whether certain proposals made by the MTEA were mandatory subjects of bargaining. The parties were unable to resolve their dispute and ultimately the Board filed the instant petition. The disputed proposals are as follows:

Part I

(1) F. AGREEMENT, RULES, AND PROCEDURES

1. AGREEMENT AND EXISTING RULES. This contract shall, wherever the same may be applicable, include existing rules of the Board at the time the agreement is entered into. Where the contract requires changes in rules, "existing rules" shall mean the rules as amended as required by the contract.

(2) 2. AMENDMENTS TO RULES OR BOARD POLICIES. Where any rule or Board policy is in conflict with any specific provision of the contract, the contract shall govern. Where there is any new rule or Board policy or amendment to any rule or Board policy or amendment to any rule or Board policy which will have a major effect on wages, hours, and working conditions of the members of the bargaining unit and the contract is silent, no such rule or Board policy shall be effective until after negotiations with the MTEA. If, after a reasonable period of negotiations with the Board or its representatives, no agreement has been reached, the MTEA may immediately proceed to mediation prior to the implementation of such rule or Board policy. The MTEA may immediately proceed to mediation prior to the implementation of such rule or Board policy. The MTEA may proceed to advisory fact finding if the matter is not resolved in mediation. In an emergency situation which would interfere with the orderly operations of the schools, the administration may temporarily implement emergency action prior to mediation.

(3) 3. ADMINISTRATIVE PROCEDURES

b. If during the term of the contract, any administrative procedure is changed by amendment or by a new procedure, on which the contract is silent, which has a major effect on wages, hours, working conditions of the members of the bargaining unit, no such procedure shall be effective until after negotiations. If, after a reasonable period of negotiations, no agreement has been reached, the MTEA may proceed to mediation prior to the implementation of such procedure. The MTEA may proceed to advisory fact finding if the matter is not resolved in mediation. In an emergency situation which would interfere with the orderly operations of the schools, the administration may temporarily implement emergency action prior to mediation.

(4) G. NEGOTIATIONS OF POSITION DESCRIPTIONS

During the term of this contract, the Board shall retain the right to establish or change position descriptions. Where new position descriptions or changes in existing position descriptions have a major effect on the wages, hours and conditions of employment of members or the bargaining unit, said changes or aspects of new descriptions dealing with wages, hours, or working conditions shall be negotiated.

Part II

(5) A. RECOGNITION

The Board of School Directors (hereinafter referred to as the Board) recognizes the Milwaukee Teachers' Education Association (hereinafter referred to as the MTEA) as the duly certified, exclusive, collective bargaining representative for all school accountants (hereinafter referred to as accountants) employed by the Board, excluding supervisors and confidential employes, as defined in the appropriate "Certification of Representatives" promulgated by the Wisconsin Employment Relations Commission, and pursuant to the provisions of Section 111.70, Wisconsin Statutes. The MTEA shall represent all such employes for the purposes of conferences and negotiations on questions of wages, hours, and conditions of employment.

Part III

(6) B. HEALTH AND DENTAL INSURANCE

a. The S-M 100 surgical care program shall be increased to a maximum of twenty-five thousand dollars ($25,000) for any one illness for employes and their covered dependents effective January 1, 1981.

(7) F. PROTECTION OF SCHOOL ACCOUNTANTS

e. In schools where there is a record of danger to the accountants or students, the Board shall provide appropriate additional personnel to help in building control.

PART IV

WORKING CONDITIONS

(8) A. REQUIRED WORKING HOURS

2. Authorized overtime worked by accountants over eight (8) hours per day and forty (40) hours per week shall be compensated at the rate of one and one-half (1-1/2) times the hourly rate in cash or compensatory time off. Each accountant shall be authorized the same hours of overtime per calendar year that has previously existed, without prior authorization of the Division of Personnel. The overtime allocation shall be applicable to services rendered outside the regular work hours. Where the accountant chooses compensatory time off instead of cash, he/she may accumulate not more than a total of forty (40) hours, and, before taking such time off, shall get the approval of the principal. Principals shall authorize overtime only upon receiving permission from the Division of Personnel.

(9) E. SUBSTITUTES

Where a school accountant is absent, other than for vacations or holidays, for more than three (3) days, every effort will be made by the Divisions of Accounting and Personnel to provide a substitute to carry out the duties. Where the accountant is absent, he/she shall not be held responsible for funds collected in his/her absence.

(10) F. MISCELLANEOUS

4. The Board shall develop a uniform job description. A manual of procedural guides to carry out the duties within the job description shall be developed by March 1, 1971. Copies of these documents shall be furnished to the school accountants. Additional duties that may be added to the job description shall be limited to system-wide changes approved by the Director of Accounting.

(11) 5. Bargaining unit employes shall not be assigned to perform clerical duties if not regularly performed in the past. The parties acknowledge that union employes have on occasions typed, operated a copy machine and answered their own telephones. The parties further agree that the union employes shall not be required to operate the telephone switchboard or to use the copy machine or type. Filing shall be done in accordance with past practice.

(12) 8. During the life of this contract, accountants will be allowed an additional forty (40) hours of overtime prior to December 31, 1977, twenty-five (25) additional hours prior to December 31, 1978, and twenty (20) additional hours prior to December 31, 1979.

(13) I. ALLEGATION OF MISCONDUCT

1. a. The principal or supervisor shall promptly notify the accountant on a form memo that an accusation has been made against the accountant, which if true, could result in proceedings under Part IV, Section G, of the contract. The memo will also indicate that it will be necessary to confer on the matter and that at such conference that 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 personal conference during which the accountant will be informed of the nature of the charges of alleged misconduct in an effort to resolve the matter. Resolution of "day-to-day" problems which do not have a reasonable expectation of becoming serious will not necessitate a written memo.

PART VI

(14) A. PURPOSE

The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this contract, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of an accountant with some aspect of employment.

B. DEFINITIONS

2. A complaint is any matter of dissatisfaction of an accountant with any aspect of his/her employment which does not involve any grievance as defined above. It may be processed through the application of the third step of the grieance procedure.

3. A continuing grievance or complaint is a situation where the time limits have been exceeded, but the condition continues to exist. Each day may constitute a new grievance or complaint. However, there shall be no retroactivity prior to the date of the filing of the written grievance or complaint, except that in the case of errors having a monetary impact not occurring as a result of accountant negligence, corrected payment shall be made retroactive for a period not to exceed one year.

C. RESOLUTION OF GRIEVANCE OR COMPLAINT

If the grievance or complaint is not processed by the MTEA or the grievant within the time limits at any step of the grievance or complaint procedure, it shall be considered to have been resolved by previous disposition. Failure by the administration or the Board to communicate their disposition in writing within the specified time limit shall permit the MTEA to appeal the grievance or complaint to the next step of the grievance procedure or arbitration. Any time limits in the procedure may be extended or shortened by mutual consent.

D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

FIRST STEP-- Where a complaint is involved, an accountant shall, within five (5) working days after he/she knew or should have known of the incident, submit the same to the principal orally. Where a grievance is involved, the

accountant shall promptly, but in no case longer than thirty (30) working days after he/she knew or should have known of the incident, submit the same to the principal orally. The principal shall orally respond to the grievance or complaint within five (5) days. If the grievance or complaint is not adjusted in a satisfactory manner orally, the grievant or complainant shall, within two (2) working days, submit the same in writing to the principal. The principal shall advise the grievant or complainant of his/her disposition in writing within five (5) working days after receipt of the written grievance or complaint. A copy of the disposition shall be sent to the MTEA, the grievant or complainant, and the Office of Superintendent.

SECOND STEP--If the grievance or complaint is not adjusted in a manner satisfactory to the employe or the MTEA within five (5) working days after receipt of the written answer, then the grievance or complaint may be set forth in writing by a representative of the MTEA. The grievance shall set forth the particular section of the contract under which the grievance is brought. Either the grievant and the MTEA shall sign the grievance or complaint or the MTEA shall sign the grievance or complaint naming the individual(s) affected. Copies of the same shall be transmitted to the Chief Negotiator, who will transmit them to the proper assistant superintendent for discussion. Such discussion shall be held within ten (10) working days at a mutually convenient time arranged by the assistant superintendent.

Within ten (10) working days after the discussion, the assistant superintendent shall advise the Superintendent or his/her designee in writing of his/her disposition of the grievance or complaint, with a copy for the MTEA and the grievant or complainant.

Part VI, Section E

E. PRESENCE OF COMPLAINT OR GRIEVANT

1. The person taking the action may be present at every step of the procedure and shall be present at the request of the MTEA, the assistant superintendent or his/her designee, the Superintendent or the Committee as the case may be.

2. Grievances or complaints at the second step and grievances at the third step may be processed during the day at the grievant's school. If impossible to schedule a meeting at the grievant's school, the accountant may be released without loss of pay or sick leave to meet with the appropriate party. Every effort shall be made not to absent an accountant from his/her assignment.

(15) APPENDIX B

EMPLOYE PROMOTIONS

The Board will recommend to the City Service Commission the establishment of the following recruitment-promotional program:

1. Separate titles shall be created of School Accountant I and II to designate those accountants who are employed in the schools from those employed in the central office.

2. Future vacancies in the School Accountant II positions shall be filed at the I level. Promotions to the II level shall be subject to the following requirements:

a. at least two (2) years as a School Accountant I with the Board;

b. the written recommendation of the Director of Accounting; and

c. passage of a qualifying City Service examination.

3. All existing Accountant I positions in the schools shall be reclassified as School Accountant II, with incumbents underfilling these positions, except that existing Senior Accountants I in the school shall become School Accountants II.

4. If the accountant hired does not have a major in accounting at the time of employment and should receive his/her accounting majors requirement at a later date, he/she shall be automatically moved to the third step of the range. Credits are subject to approval by the City Service Commission and the Division of Personnel.

4. That disputed proposals 5 (second sentence), 9 (second sentence), 11 and 13 as set forth in Finding of Fact 3, primarily relate to wages, hours and conditions of employment.

5. That disputed proposals 1-4, 7-8, 9 (first sentence), 10, 14 and 15 as set forth in Finding of Fact 3, primarily relate to the formulation or management of public or educational policy.

6. That during the course of the hearing the District withdrew its challenge to proposal 6 and the MTEA withdrew proposal 12 from its bargaining proposals as set forth in Finding of Fact 3.

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

CONCLUSIONS OF LAW

1. That the proposals referenced in Finding of Fact 4 are mandatory subjects of bargaining within the meaning of Sec. 111.70(3)(4), Stats.

2. That the proposals referenced in Finding of Fact 5 are permissive subjects of bargaining within the meaning of Sec. 111.70(3)(a)(4), Stats.

3. That there is no "dispute" within the meaning of Sec. 111.70(4)(b), Stats., between the parties as to proposals 6 or 12, as set forth in Finding of Fact 3.

4. That the first sentence of proposal 5 referenced in Finding of Fact 3 is a non-mandatory subject of bargaining within the meaning of Sec. 111.70(3)(a)4, Stats.

Based upon the above and foregoing Findings of Fact, Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

1. That the Board has a duty to bargain collectively with the MTEA as to those proposals referenced in Finding of Fact 4.

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 (Continued on Page seven)

2. That the Board has no duty to bargain collectively with the MTEA as to the proposals referenced in Findings of Fact 5 and 6 and Conclusion of Law 4.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

I dissent as to proposal 1 and fully concur as to the remaining proposals.

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

I have participated only as to proposals 1, 5, 8-11, 13 and 15 and fully concur as to said proposals.

_____
Marshall L. Gratz, Commissioner

1/ (Continued)

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 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); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

When resolving the status of the proposals at issue 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).

For the sake of expeditious issuance of this decision, Commissioner Gratz has not participated herein with respect to proposals 2, 3, 4, 7 and 14. Commissioners Covelli and Torosian had previously joined in the Commission's disposition of the status of parallel teacher unit proposals in Milwaukee Board of School Directors, 20093 (2/83), hereinafter referred to as Milwaukee Board II, and neither of them has altered his views with respect to the language at issue herein. Accordingly, the discussion of those issues herein essentially parallels that set forth in the previous decision concerning the teacher unit noted above. In addition, proposals 1 and 5 parallel language previously ruled upon by the Commission in Milwaukee Board of School Directors, 20979 (9/83), hereinafter referred to as Milwaukee Board III. Accordingly, the discussion of those issues herein essentially parallels that set forth in that previous decision concerning the substitute teachers unit.

THE DISPUTED PROVISIONS

Before proceeding further, the Commission is presented with the issue of the status of proposal 12, which the MTEA has indicated has been withdrawn from the bargaining table. The MTEA believes the withdrawal removes the proposal from the scope of the declaratory ruling inasmuch as there is no longer a "dispute" within the meaning of Sec. 111.70(4)(b), Stats., that warrants a declaratory ruling by the Commission, citing Milwaukee Board of School Directors, (17508) 12/79, hereinafter referred to as Milwaukee Board I. The District contends that although the language is obsolete, it is nonetheless contained in the parties collective bargaining agreement and thus is not simply an MTEA proposal. The District asserts that the MTEA has not agreed to remove this language from the contract and that until such time as it does so, a dispute exists as to whether it is mandatory or permissive. The District further contends that the language is interrelated to proposal 8 and requests that the Commission issue a declaratory ruling as to the mandatory or permissive nature of the proposal. The District urges that the Commission utilize its discretion to issue a declaratory ruling even if it is determined that the proposal is not in dispute, citing Milwaukee Board I, supra.

In Milwaukee Board I, supra, the Commission was confronted with the question of whether it should issue a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to certain proposals over which the District had waived its right to object during the course of the parties negotiations. In that decision the Commission made the following comments:

> 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 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 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.

We believe that the rationale quoted above is applicable to the resolution of the status of proposal 12. When a party withdraws an existing proposal and thereby expresses its desire not to include same in a successor collective bargaining agreement, we do not believe that there can thereafter be a "dispute" within the meaning of Sec. 111.70(4)(b), Stats., because the labor organization is not demanding that the employer bargain over the subject. We cannot concur with the District's argument that a dispute exists until the proponent of a proposal agrees to its removal from a prior expired contract. A contrary conclusion would, as our prior above quoted holding indicates, subject the mediation-arbitration process to delays which we do not believe were intended by the legislature when it passed Sec. 111.70(4)(cm)6.g., Stats., which incorporates Sec. 111.70(4)(b), Stats., by its terms. Such questions can be addressed to the Commission in the form of a Sec. 227.06, Stats., petition for declaratory ruling. As the instant petition before the Commission was not filed under that section, we need not conclude whether we would exercise our discretion under that statutory provision and determine the status of the contract language.

We would also note that in School District of Menomonee Falls, 21199 (11/83), we fully discussed the nature of the term "dispute" as used in Sec. 111.70(4)(b), Stats. Our conclusion herein is in harmony with the discussion in Menomonee Falls.

(1) Part I, Sec. F(1)

The disputed contractual provision contains the following language:

. . .

> This contract shall, wherever the same may be applicable, include existing rules of the Board at the time the agreement is entered into.

The District asserts that its rules contain matters which are primarily related to educational and public policy. As such matters are permissive subjects of bargaining, the District contends that a proposal which requires that such permissive rules be deemed incorporated in the collective bargaining agreement is not a mandatory subject of bargaining. The District maintains that under the rationale in the Commission's City of Wauwatosa, 15917 (11/77), such a proposal must be limited to the inclusion of Board rules which primarily relate to wages, hours and conditions of employment. The District further argues that the MTEA's

claim that the word "applicable" refers to the parties' contract is not persuasive under a reasonable reading of the phrase. Given this ambiguity, the District asserts that the Commission should reject the MTEA's interpretation of the disputed language.

The Union counters by arguing that this contractual provision only applies to existing Board rules which impact or are "applicable" to wages, hours and conditions of employment which are contained in the bargaining agreement. Therefore, the Union asserts that the clause in question should be found to be a mandatory subject of bargaining.

The proposal as written is a permissive subject of bargaining even if it is interpreted narrowly as incorporating only rules that bear some relationship to provision(s) of the agreement.

The Commission has previously expressed the view "that any work rule or amendment of a work rule which primarily relates to wages, hours or conditions of employment is a mandatory subject of bargaining, and that any such rule which does not so primarily relate is not a mandatory subject of bargaining." 2/

MTEA has not listed the subgroup of Board rules that it considers incorporated by this provision. Hence, the Commission is not in a position to determine the mandatory/permissive status of those rules directly. It is undisputed that the Board's rules currently in existence consist of both mandatory and permissive subjects. Moreover, the Board asserts that some rules that relate to provisions of the agreement are nonetheless permissive subjects in that they relate primarily to educational policy. The Board objects to the inclusion (by reference) in the agreement of such permissive subject rules.

Even under the narrow interpretation of the proposal language adopted by Commissioner Torosian in his dissenting opinion, the proposal at issue would have the effect of incorporating into the agreement all Board rules that bear some relationship to provision(s) of the agreement--whether the rule in and of itself is mandatory or permissive in nature.

There is no way, on this record, to assure that the rules thereby incorporated into the agreement would all primarily relate to wages, hours and conditions of employment. On the contrary, there may well be permissive subject rules that apply to (i.e., bear some relationship to) provisions of the agreement of a mandatory or permissive nature. Nor can the Board be deemed to have waived objection to inclusion of the permissive subject rules that bear some relationship to the provision(s) of the agreement. For the Board is expressing its objection to the inclusion of any such rules in the agreement by its declaratory ruling petition in the instant proceeding.

Accordingly, the objected-to provision at issue cannot, as written, be deemed a mandatory subject of bargaining. 3/ However, if it were modified so as to clearly provide that the rules incorporated by it into the agreement were only those primarily related to wages, hours and conditions of employment, then we would hold the provision to be a mandatory subject of bargaining. 4/

We would emphasize that it is the mandatory/permissive nature of the proposal (here Board rules) sought to be included in the agreement that is the focus of our majority holding, not the fact that the item sought to be included could or would relate to a portion of the agreement that upon independent review would be held to constitute a permissive subject of bargaining. Once a provision is included in

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2/ City of Wauwatosa, supra, at 14, citing:

See Southern Transport, Inc., 145 NLRB No. 69, 55 LRRM 1023 (1963), enforced 343F.2d 558, 58 LRRM 2882 (8th Cir. 1965); See Murphy Diesel Co. v. NLRB, 454 F.2d 303, 78 LRRM 2992 (7th Cir. 19710; NFL Players Assoc. v. NLRB, 503 F.2d 12, 87 LRRM 2118 (8th Cir. 1974).

3/ See, City of Wauwatosa, supra; cf. Sewerage Commission of the City of Milwaukee, 17025 (5/79) at p. 10, herein Sewerage I.

4/ See, City of Wauwatosa, supra, at p. 14.

the agreement (and in a pre-agreement final offer not objected to), it is treated as a mandatory subject of bargaining for the purposes of that bargain (and hence for the term of the agreement). Sec. 111.70(4)(cm)6.a., Stats., ("... final offers may be include only mandatory subjects of bargaining. Permissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject.") Hence, there is no viable mandatory/permissive distinction applicable to the provisions of an existing agreement during its term or to the provisions of a pre-agreement final offer not objected to in a timely fashion.

Commissioner Torosian - Dissent

I believe the language in question, may reasonably be interpreted as requiring inclusion of rules in the contract only where those rules relate to or are "applicable" to provisions of the contract. Thus, while it is clear that certain portions of the Board rules relate to permissive subjects of bargaining, the language in question only requires the inclusion of said rules in the contract if they relate to existing contractual clauses. Inasmuch as the contract may include permissive subjects of bargaining, it is clear that permissive Board rules may well be applicable to provisions of the contract. As one of the purposes of a collective bargaining agreement is to allow the union to meet its statutory obligation to represent employes by informing bargaining unit members as to their rights, responsibilities and benefits, and as inclusion of rules which relate to or are "applicable" to provisions of a bargaining agreement will enhance the contract's ability to fully inform unit members, I would conclude that the clause in question is primarily related to wages, hours and conditions of employment and thus is a mandatory subject of bargaining. In reaching this conclusion, it is noted that the City of Wauwatosa decision cited by the Board related to a proposal which would require that the employer bargain over work rules or regulations which may not have been mandatory subjects of bargaining. The proposal at issue herein, which does not require such bargaining but merely requires the listing of rules which the Board has chosen to adopt which relate to contractual provisions, is distinguishable from the proposal confronted by the Commission in City of Wauwatosa, supra.

Needless to say, I disagree with the majority's broader finding that under no circumstances will the Commission find that permissive rules may be incorporated into a collective bargaining agreement. For instance, the parties could contractually agree that "class size shall remain the same as last year's class size." Further, the District could have a rule that specifically states class sizes for the prior year. Given the contractual agreement pertaining to class size and appropriate incorporation language, I would find that the Union could thereby bargain inclusion of said class size numbers in the agreement.

(2) Part I, Sec. F(2)

The disputed contractual language states:

. . .

> Where there is any new rule or Board policy or amendment to any rule or Board policy or amendment to any rule or Board policy which will have a major effect on wages, hours, and working conditions of the members of the bargaining unit and the contract is silent, no such rule or Board policy shall be effective until after negotiations with the MTEA.

This provision provides, that, with respect to a rule or Board policy which has a "major effect" on wages, hours or conditions of employment, the MTEA may, after a reasonable period of negotiations, proceed to mediation and ultimately to advisory fact finding if no agreement (on the effect) is reached. The provision also provides that in emergency situations the administration may temporarily implement a rule or policy prior to mediation. The Board argues that as the disputed contractual language is not limited to those Board rules or policies which primarily relate to wages, hours and conditions of employment, the language requires bargaining prior to implementation of rules or policies which are permissive subjects of bargaining. The Board asserts that in both Sewerage Commission of the City of Milwaukee, 17302 (9/79), herein Sewerage II, and City of Appleton, 17034 (5/80), the Commission concluded that a municipal employer can implement a permissive rule or policy without first bargaining either over the

rule or policy itself or the impact of that rule or policy upon wages, hours and conditions of employment. Citing these decisions, the Board argues that it cannot be required to bargain prior to implementation as required by the proposal in question. It further argues that it need not establish that an emergency exists before it can implement a decision regarding a permissive subject of bargaining. The Board argues that the distinction drawn by MTEA between the right to establish a rule or policy and the right to implement a rule or policy is not a meaningful one because it effectively precludes the Board from taking actions which primarily relate to public or educational policy.

The MTEA initially argues that a proposal requiring an employer to bargain regarding the impact of a decision upon employe's wages, hours and conditions of employment is a mandatory subject of bargaining. The MTEA contends that while the language in question refers to a "major effect" on wages, hours and working conditions, the term "effect" has the same meaning as impact, and thus the proposal must reasonably be interpreted in that fashion. The MTEA asserts that the Board must negotiate the impact of a permissive decision before that decision, rule or policy is implemented. It asks the Commission to note that the proposal does not require that agreement be reached prior to implementation and further allows for implementation under certain circumstances, even prior to the conclusion of the contractual negotiations procedure. MTEA argues that the slight delay in implementation, which the clause in question might require, cannot be seen as any substantial interference with the Board's right to establish educational policy. It further notes that as a practical matter, the MTEA and the Board generally negotiate impact prior to implementation and that the contractual provision at issue requires nothing more than that. The MTEA further asserts that it has not abused its right to negotiate under the language in question and that the potential for abuse should not become the basis for a conclusion that the language is permissive. The MTEA urges that as long as management ultimately has the ability to implement permissive rules or policies, the intent of the statute establishing the duty to bargain is not violated.

Initially we should state that we agree with MTEA's interpretation of the term "effect" and find it to be synonymous with impact. Thus, the Commission is confronted with a clause which requires that the Board negotiate over the impact on wages, hours and conditions of employment which a permissive rule or policy may have prior to the Board's implementation of said rule or policy. In Sewerage II, supra, we concluded that a union may not insist that negotiations commence before the employer implements a permissive decision, and we noted therein that an opposite conclusion would result in the imposition of an unwarranted restriction upon an employer's right to unilaterally implement a change over which it is not required to bargain. We have reaffirmed the continuing validity of this conclusion in City of Appleton, supra. As the proposal in issue requires that the Board negotiate on the impact prior to implementation, we must conclude that the proposal is a permissive subject of bargaining. We find the distinction offered by the MTEA between the right to decide and the right to implement to be a meaningless one. If the scope of the proposal were limited to a requirement that the Board bargain over any new rule or policy, or an amendment to any rule or policy, which primarily relates to wages, hours and conditions of employment, the proposal would be found to be mandatory. We would also note our statement in Sewerage II, supra, that the union has the right to obtain copies of permissive decisions, rules or policies taken or enacted by the employer, in order that it may bargain on the impact thereof. We believe that this right serves to protect the union from unknowingly waiving its right to bargain over the impact, while at the same time leaving the employer free to implement the decision policy or rule. We would also note that if a union is informed of a permissive decision prior to its implementation, the union's statutory right to bargain over impact "at reasonable times" under Sec. 111.70(1)(d), Stats., may require that bargaining over impact commence prior to implementation.

(3) Part I, Sec. F(3)

The disputed contractual language states:

. . .

> If during the term of the contract, any administrative procedure is changed by amendment or by a new procedure, on which the contract is silent, which has a major effect on wages, hours, working conditions of the members of the

bargaining unit, no such procedure shall be effective until after negotiations with the MTEA.

The District argues that the section in issue requires that it negotiate with the MTEA over permissive subjects of bargaining which may impact on wages, hours and conditions of employment. It notes that the clause requires that such permissive matters be submitted to the MTEA in order that negotiations may take place, and that the clause further provides that if negotiations are not completed prior to the Board's consideration of the permissive nature, the Board may approve a policy or rule in principle, subject to further negotiations. The Board thus argues that the proposal improperly interjects the MTEA into the Board's decision-making process, as well as requiring bargaining once a permissive decision is approved. The Board asserts that the clause is clearly permissive because it has no duty to bargain over permissive subjects. The Board also argues that even if one were to assume that the scope of the clause is limited to bargaining over the impact of a permissive decision, the clause would still be permissive in that it requires bargaining prior to implementation Sewerage II, supra; City of Appleton, supra.

The MTEA asserts that the provision is a mandatory subject of bargaining because it provides an efficient procedure for addressing the impact of Board decisions while the decision is being discussed and made. It contends that the provision does not prevent the Board from making policy choices and argues that the bargaining requirements are not unduly burdensome.

The language of the provision reveals that it, in essence, requires that the Board bargain with the MTEA over permissive management decisions and, while not precluding the Board from ultimately making a decision, it also requires that the negotiations process be exhausted prior to the implementation of the permissive subject. As the Board has no duty to bargain with the MTEA with respect to a decision on a permissive matter, and as the Board may not be required to delay implementation of decisions until it has bargained the impact of such decisions on wages, hours and conditions of employment, the clause is clearly permissive.

(4) Part I, Sec. G

The objectionable contractual language is as follows:

> Where new position descriptions or changes in existing position descriptions have a major effect on the wages, hours and conditions of employment of members of the bargaining unit, said changes or aspects of new descriptions dealing with wages, hours or working conditions shall be negotiated.

The Board contends that the objected to portion of the contractual provision in question does not limit the scope of bargaining to the impact of changes in position descriptions on wages, hours and conditions of employment. The Board further contends that although it has a duty to bargain over a change in position description which adds a duty which is not fairly within the scope of responsibilities applicable to accountants, the language in question is not limited to such a circumstance and thus must be found to be permissive. Sewerage I, supra.

MTEA contends that the language in this contractual provision does not prevent the Board from altering job descriptions and only requires that the Board bargain the impact on wages, hours and conditions of employment of changes in position descriptions. As the MTEA asserts that the clause is limited to impact bargaining, it contends that it should be found to be a mandatory subject of bargaining. Beloit, supra.

The language in question can most reasonably be interpreted as requiring that the Board bargain over the change in the job description itself, even where that change does not involve the addition of duties or responsibilities which are normally within the scope of those required of accountants. As the Board need not bargain over such changes, the clause as written must be found to be permissive. Sewerage I and II, supra. If the clause were modified to reflect that the impact of any change was to be bargained, it would be mandatory, as it would be if it were modified to only include bargaining over those changes which were not fairly within the scope of duties normally assigned to accountants.

(5) Part II, Sec. A

A. RECOGNITION

> The Board of School Directors (hereinafter referred to as the Board) recognizes the Milwaukee Teachers' Education Association (hereinafter referred to as the MTEA) as the duly certified, exclusive, collective bargaining representative for all school accountants (hereinafter referred to as accountants) employed by the Board, excluding supervisors and confidential employes, as defined in the appropriate "Certification of Representatives" promulgated by the Wisconsin Employment Relations Commission, and pursuant to the provisions of Section 111.70, Wisconsin Statutes. The MTEA shall represent all such employes for the purpose of conferences and negotiations on questions of wages, hours, and conditions of employment.

The District argues that, as the Commission held in Milwaukee Board II, supra, and for the reasons noted by the Commission in Sauk County 5/, a standard recognition clause 6/ as contained in at least one sentence of the MTEA proposal, and the MTEA proposal as a whole, is a non-mandatory subject of bargaining and not a provision that the District is obligated to include in the agreement where, as here, the Union fails to expressly limit the clause to serving the sole purposes of describing the bargaining representative and bargaining unit covered by the terms of the agreement.

MTEA argues that Sauk County, supra, unnecessarily and illogicially requires a rewriting of the standard recognition clause in use state-wide. MTEA urges instead adoption of the rationale of Commissioner Torosian's dissent in Milwaukee Board II, supra, wherein he stated on page 41:

> ... a standard recognition clause ... should be reasonably interpreted on its face and not interpreted on the basis of what one of the parties might argue it to mean or what an arbitrator might decide it to mean. Here the recognition clause ... on its face only describes the bargaining representative and the bargaining unit covered by the terms of the agreement. On said basis, I would find the employer cannot refuse to include the recognition clause ... in the collective bargaining agreement.

MTEA asserts there are no cases in Wisconsin indicating that arbitrators have interpreted standard recognition clauses to resolve unit and work jurisdiction claims differently than WERC would have. MTEA also asserts that there is no showing herein that the instant recognition clause has been interpreted "beyond its clearly intended purpose to describe the bargaining unit." Moreover, MTEA asserts, WERC retains the ultimate authority to clarify bargaining units even if an arbitrator renders a determination on the subject that WERC later deems inconsistent with WERC policies in a unit clarification proceeding. Finally, MTEA asserts that the addendum language required by Commissioners Slavney and Covelli does not in any way relate to public or educational policy, is superfluous, and should not be necessary to render the standard recognition clause as written a mandatory subject of bargaining in this case.

5/ 18565 (3/81), aff'd Dane Co. Cir. Ct. 5/82.

6/ In the context of a certified representative presented in the instant case, the term "standard recognition clause" as used herein means a provision that on its face specifies the name of the representative as certified by the WERC, the description of the bargaining unit as set forth in the WERC certification or an incorporation by reference of that description, and an express and unqualified statement that the municipal employer recognizes the representative as the exclusive representative of the employes in the specified bargaining unit for purposes of collective bargaining as defined in MERA.

We have taken this opportunity to carefully reconsider the Commission's prior decisions in Sauk County, supra, and Milwaukee Board II, supra, as regards the status of proposals for inclusion of union recognition clauses in collective bargaining agreements. As a result of that reconsideration, we are of the unanimous opinion that the Commission's rulings in those prior decisions were worded in unnecessarily restrictive terms insofar as they convey the notion that inclusion of an express proviso such as the District has referred to herein is the only way a standard recognition clause can be included in a collective bargaining agreement over municipal employer objections or opposition. Rather, as the Circuit Court aptly noted in affirming Sauk County, supra, "Since it is a separate breach of duty for an employer to exclude the certified representative of the employes from the contract, a clause to that effect must be inserted into the labor agreement. Apparently the Commission felt the easiest way of doing so was to just use the original recognition clause and add a phrase that further explains the purpose of including the expanded clause in the contract." While it was the "easiest way" in the rather complicated procedural posture of the cases at issue in Sauk County, supra, we are satisfied that the inclusion by the union of jsuch an express proviso is not the only way a standard recognition clause can be included in an agreement over municipal employer opposition. Our rationale for this clarification/modification of the Commission's prior holdings in Sauk County, supra, and Milwaukee Board II, supra, follows:

In Sauk County, supra, Commissioners Slavney and Covelli (Commissioner Torosian did not participate in the decision) were faced with an employer declaratory ruling petition claiming that the union's standard recognition clause was not a matter primarily related to wages, hours and conditions of employment such that it was a non-mandatory subject of bargaining which the County had no obligation to bargain about it with the union and no obligation to include it in the agreement. The County cited the US Supreme Court's decision in Borg-Warner 7/ wherein that Court stated, in part, "the 'recognition' clause ... does not come within the definition of mandatory bargaining." 8/

The union argued that its proposal was essential to entitle the union to enforce the other terms of the agreement and hence was a matter primarily related to wages, hours and conditions of employment. The union cited Borg-Warner for the proposition that the duty to bargain prohibits an employer from refusing to include in a collective bargaining agreement an express recognition of the representative as identified in the NLRB certification. On that theory, the union had filed a prohibited practice complaint against Sauk County alleging that the County violated its duty to bargain by proposing not to carry forward the recognition clause in the new agreement. That complaint was also addressed by the Commission in its Sauk County decision. 9/

The County defended its right to refuse to include the recognition clause involved on the additional ground that the clause as proposed was susceptible to interpretations by grievance arbitrators (1) as authority for their issuance of determinations of whether certain positions are within or outside the bargaining unit (a matter that the County asserted is statutorily reserved exclusively to the WERC) and (2) as bases on which to conclude that the municipal employer has limited its right to subcontract or otherwise have bargaining unit work performed by non-bargaining unit personnel. Thus, the County contended, the union ought not have the right to automatic inclusion of a provision that has those additional potential implications for the parties' relationship.

The union asserted, at least in support of its petition for reconsideration, that to the extent the recognition clause might provide some support for concurrent arbitral jurisdiction on unit clarification questions or for protecting

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7/ 356 U.S. 342, 42 LRRM 2034 (1958).

8/ 42 LRRM at 2037.

9/ The Commission also had before it a County petition for unit clarification and a County complaint that the union's complaint noted above was filed merely to harrass the County and to frustrate the bargaining process. The Commission's decision and its denial of the Union's petition for rehearing/ reconsideration (Decision No. 18570-A, 5/81) also addressed and disposed of those cases.

the bargaining unit employes' interests in avoiding erosion of the bargaining unit by subcontracting or other means, that provision is--for those additional reasons as well--primarily related to wages, hours and conditions of employment and hence a mandatory subject of bargaining.

The Sauk County decision, as affirmed in the Commission's denial of the union's petition for reconsideration and in the Circuit Court's affirmance, resolved the recognition clause related matters in the cases before the Commission, as follows:

> -union recognition is an obligation imposed on the municipal employer by MERA and not a proper subject for mandatory bargaining between the parties.
>
> -providing for union recognition in the agreement does not involve any wage, hour or condition of employment; and a standard recognition clause, for whatever purpose proposed, does not primarily relate to wages, hours and conditions of employment and therefore cannot be a mandatory subject of bargaining. 10/
>
> -the representative has a right, upon request, to have included in a new collective bargaining agreement a clause that expressly extends it the statutorily required recognition by setting forth an accurate description of the bargaining unit and the proper identity of the certified representative.
>
> -the County did not violate MERA by refusing to include the standard recognition clause proposed by the Union, however, because, as the County notes, that clause has potential implications beyond recognition that the County is not required by MERA to include in the agreement upon union request.
>
> -if the union were to modify its standard recognition clause request to include a statement expressly limiting its purposes to describing the representative and the bargaining unit it represents, then the County would be required to include that provision in the agreement, but only in the event of such a modification.

As noted, upon consideration we are satisfied that the above rationale is unduly restrictive as regards the circumstances in which a standard recognition clause can be included in the collective bargaining agreement over municipal employer objection/opposition.

We share the general view that express written recognition in collective bargaining agreements of the exclusive representative and of the unit for which the representative has been certified is something that MERA requires of a municipal employer, upon the request of the exclusive representative. Whether the municipal employer will fulfill that statutory duty is not a matter for mandatory bargaining. Rather, the municipal employer is prohibited by MERA from refusing

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10/ Thus, in denying the petition for reconsideration, the Commission stated,

> "... a recognition clause does not establish any wage, hour or condition of employment. To the extent that a party seeks to include such a clause in an agreement for any other purpose (than recognition of the representative for the unit) such as to grant 'concurrent jurisdiction' to an arbitrator to make determinations as to who is properly included or excluded from the bargaining unit or to create "implied obligations,' such purpose is insufficiently related to wages, hours and conditions of employment to be found to be a mandatory subject of bargaining."

Decision No. 18570-A at 3.

upon request to so acknowledge its recognition of the certified representative as the exclusive collective bargaining representative of the unit as described in the WERC certification. 11/ Violations of that prohibition are subject to affirmative WERC remedial orders requiring such recognition pursuant to a prohibited practice complaint proceeding. The municipal employer or the union may propose as a permissive subject of bargaining that the unit description be modified from that previously certified; and the parties may negotiate on a permissive subject basis alterations in the way they are named in the agreement. But the exclusive representative is not required to bargain for or to bargain to retain a basic written acknowledgement by the municipal employer in a collective bargaining agreement as to the identity of the representative, and the identity of the bargaining unit as to which the representative is certified or voluntarily recognized as the exclusive bargaining representative for purposes of collective bargaining within the meaning of the MERA.

We also hold that the majority representative is not required to add a limiting proviso to its proposed standard recognition clause as a condition precedent to inclusion of an exclusive recognition clause (in some statutorily-sufficient form) in the agreement. The municipal employer has the right to insist to impasse that any recognition clause include a proviso that it is not to be interpreted as a limitation on assignment to others of work historically performed by the bargaining unit or as authority for arbitral determinations of unit clarification matters. The union has the right to resist to impasse inclusion in the agreement of such a proviso.

In the specific case before us herein, we have concluded that the second sentence of MTEA's proposal is a mandatory subject of bargaining, but that the standard recognition clause contained in the first sentence of the proposal is not a mandatory subject of bargaining.

Since union recognition is a matter guaranteed by MERA and a duty which the municipal employer is required by MERA to fulfill upon request, it is not and ought not be deemed a subject for mandatory bargaining between the parties. We are persuaded that our Legislature, like Congres, has seen fit to remove the question of whether the municipal employer will acknowledge in writing that it recognizes the certified representative as the exclusive collective bargaining representative of the unit described in the certification.

The United States Supreme Court, in discussing the status of the subject of union recognition held both that "the 'recognition' clause ... does not come within the definition of mandatory bargaining" and that since "The statute requires the company to bargain with the certified representative of its employees" it would be an evasion of that duty to refuse to include in a collective bargaining agreement a clause recognizing the certified representative as exclusive bargaining representative. 12/ It would seem that by so holding, the Supreme Court was concluding that not only the recognition clause at issue therein (identifying other than the certified representative) but also the general subject of union recognition is not "a subject within the phrase 'wages, hours and other terms of conditions of employment' which defines mandatory bargaining." 13/

We share that view that a recognition clause involves no wage, hour or condition of employment, and we note that such was the view of both the majority and dissent in Milwaukee Board II, supra, proposal 4, the view of the Commission and the affirming Circuit Court in Sauk County, as well as the apparent view of the NLRB and Supreme Court in Borg-Warner.

In its decision in Borg-Warner, the NLRB noted at 36 LRRM 1439, 1441:

> "It is well settled by numerous Board and Court authorities that under the Act the employer is obligated upon request to accord exclusive and unequivocal recognition to the statutory representative, to bargain with it, and to

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11/ See Note 13, infra.

12/ Borg-Warner, supra, 42 LRRM at 2037.

13/ Ibid.

incorporate any agreement reached in a written contract signed by both parties; and that fulfillment of this duty is not a subject of obligatory bargaining. 8/

8/ See McQuay-Norris Manufacturing Co. v. NLRB, 20 NLRB 709, 716, 6 LRRM 122, enforced, (116 F.2d 748, 7 LRRM 534 (CA 7 1940), cert. denied 313 U.S. 565, 8 LRRM 458,) where the Board "... the question of recognition has long possessed a peculiar significance in labor relations. And we think it was the intention of the Act to eliminate controversy over issues of this sort by requiring employers, as part of the practice and procedure of collective bargaining, to recognize and deal with the majority representative as exclusive bargaining agent. This purpose can be achieved only if such recognition is fully and frankly given rather than half withheld. See also ..." (citations omitted).

In the McQuay case, noted above, the Board held, with Court approval, that the company had violated its duty to bargain by refusing to include an exclusive recognition clause. The Company had agreed, instead, to recognize the union only as a representative of employes in the unit who were members of the union. Even though the union had ultimately agreed to the company's recognition clause at the bargaining table, the Board held that the Company's refusal to include an exclusive recongition clause when requested had violated the Act. In remedying the violation, the Board ordered the company to bargain with the union as exclusive representative; to embody any understandings reached in a signed agreement; "and, if requested to do so by Local 226, incorporate in the signed agreement a clause granting to Local 226 exclusive recognition as collective bargaining agency for all employes in the appropriate unit; ...". That remedy its notable in that it did not require the employer to embody either the precise wording of the clause previously proposed in bargaining by the union or the precise wording of any other recognition clause that the union might thereafter propose. Nor did it require the employer to bargain with the union about the precise wording of the recognition clause to be embodied in the agreement. Rather, the Board's order merely specified the elements to be included in the clause and left it to the company to fashion the clause to be included in the agreement consistent with those requirements.

We have adopted the same approach to recognition herein.

MTEA has not pointed to any legal authorities or policy considerations that would warrant the conclusion that, in addition to being entitled to inclusion of a statutorily-sufficient exclusive recognition clause in the agreement at its request, it is also entitled to mandatory bargaining as to the precise wording of the language embodying the required recognition of MTEA by the District.

Hence, the bargaining process ought not be burdened by disputes as to whether or by what precise terms the municipal employer will, upon request, include in the certified representative as exclusive collective bargaining representative of the bargaining unit described in the certification.

Rather, unless the parties agree otherwise (through permissive subject negotiations), a municipal employer must respond to a certified bargaining representative's proposal or request for written recognition by offering to include in the collective bargaining agreement a written exclusive recognition clause which (1) identifies the representative as it is named in the WERC certification, (2) describes the bargaining unit as it is described in the WERC certification and (3) states that the municipal employer recognizes the representative as the exclusive representative of the unit for purposes of collective bargaining. 14/

14/ The specifics of the municipal employer's response required by MERA to a voluntarily recognized representative's proposal or request for written recognition are not matters before us in this case. They would not, of course, entail references to a WERC's certification.

Once the municipal employer fulfills its obligation to respond with a clause meeting those requirements, the language so proposed will become a part of the parties' agreement, without any mandatory bargaining whatever. A union claim that the municipal employer's language does not meet its statutory duty would be resolved not through mandatory bargaining, but rather through a prohibited practice complaint preceeding for refusal to bargain.

Also, once the recognition clause required by statute has been requested and provided, either party is free to propose additions to the language thereof. Such proposed additions would be permissive subjects if they seek to alter any of the three requisite elements noted above. However, if the municipal employer merely seeks to expressly limit the clause to serving the purpose of the statutory recognition and no other, it could propose such a limitation, and bargaining about same would constitute a mandatory subject of bargaining. The union could resist to impasse the inclusion of any such proviso. Similarly, the union could propose to expand upon the status and rights of representation of the union as representative of the certified unit and such would--within limits--also constitute mandatory subjects of bargaining.

Significantly, then, MERA requires the municipal employer, upon request of a certified representative of its employes, to include in the agreement a recognition clause incorporating the three basic elements of a standard recognition clause noted above. It is that statutory duty imposed on the municipal employer and not any relation of union recognition to wages, hours and conditions of employment that results in a standard recognition clause being included in the agreement. Hence, so long as the municipal employer offers to include a recognition clause that incorporates those three basic elements, that will be the only form of the basic recognition language that the union has a right to have included in the agreement. It does not have the right to insist to impasse upon its own preferred form of the language since union recognition is not a matter for mandatory bargaining.

Accordingly, we conclude that the standard recognition clause in sentence one of MTEA's recognition proposal is not a mandatory subject of bargaining. Rather, it serves as a request that the District include in some statutorily-sufficient form the three elements of an exclusive recognition clause noted above. As noted, the sufficiency of the District's response will be subject to a refusal to bargain complaint if insufficient, but not to mandatory bargaining or MED/ARB.

The second sentence of the MTEA recognition proposal at issue is, in our view, a proposal for an addition to and enhancement of the MTEA's status as exclusive collective bargaining representative. As such, the second sentence of the proposal is, for reasons noted above, a mandatory subject of bargaining.

(6) Part III, Section B. 1. a.

Settled

(7) Part III, Section F. e.

The disputed language is as follows:

. . .

> e. In schools were there is a record of danger to the accountants or students, the Board shall provide appropriate additional personnel to help in building control.

The District contends that the language is permissive because it requires hiring of additional personnel and the use of employes to provide assistance. The District contends that the Commission has held previous language to be permissive in Milwaukee Board I, issue. The District also believes that the use of the phrase record of danger in quotes removes the language from any relationship to an immediate threat to employes physical safety and thus removes it from the parimeters of the language in Beloit, supra; and Milwaukee Board I, supra. It contends that whether an incident occurred in the past at a particular school is wholly unrelated to the present working conditions of accountants at that school. The District therefore requests that the proposal be found to be permissive.

The MTEA contends that the language is mandatory and does not require the Board to hire additional personnel, but merely requires that they provide help in building control where there is a record of danger to accountants. As the maintenance of a safe working place is a condition of employment and as a "record of danger" requirement is a reasonable and prudent standard for requiring precautionary measures, the MTEA believes that the proposal is mandatory. It further argues that the language in question was drafted in response to the Commission's holding in Milwaukee Board I, supra, in an attempt to meet the Commission's concerns as expressed therein. MTEA contends that the language does not restrict the Board to utilizing any particular personnel or employes of the District nor does it require the Board to hire additional personnel. It believes that the specification that appropriate personnel be utilized merely relates to some assurance that safety will be considered when the Board determines how it should provide the assistance in question. Citing Manitowoc County, 18994 (9/81), the MTEA believes that where the local conditions and experience relating to safety demonstrate a past record of danger, it should be able to mandatorily bargain about protection of employes in those circumstances. Therefore, the MTEA requests that the language be found to be mandatory.

Initially the Commission wishes to note that it sees no meaningful distinction between a record of danger requirement and a "danger requirement" as contained in the Milwaukee Board I proposal, cited by both parties. Clearly, a union can seek to bargain protection of its employes in situations where safety has in the past been threatened and need not wait until an actual threat is presented to a teacher. Obviously, a proposal requiring an actual threat would have little or no meaningful impact upon the safety threat as the need for protection would have passed before protection would be provided. However, as we found in Milwaukee Board III, our rationale in Milwaukee Board I, especially that which goes to the use of the word "appropriate" requires that this proposal be found to be permissive. That prior rationale is as follows:

> 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 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. 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. (Footnote Omitted).

(8) Part IV, Section A. 2.

The disputed language is as follows:

> Each accountant shall be authorized the same hours of overtime per calendar year that has previously existed, without prior authorization of the Division of Personnel. The overtime allocation shall be applicable to services rendered outside the regular work hours.

The District contends that this language provides that an accountant is authorized to work the same number of overtime hours as existed in the previous calendar year without obtaining prior authorization from management. The District asserts that its need to have accountants work overtime clearly may vary from year to year depending upon workload and technological advances. Thus, while overtime may have been needed in a prior year in order to provide the level of

services the District deems necessary at a particular site, the same level of services may be unnecessary in another year. The District contends that as this language prohibits it from deciding that it will reduce the level of services needed at a particular site, it must be found to be permissive.

The District also contends that the MTEA's interpretation of the language is unreasonable and should be rejected. However, the District argues that even if one were to accept the MTEA's interpretation that the language only removes the requirement of authorization for overtime work which is actually needed by the District, the language is still permissive. The District argues that the provision still provides the employe with the discretion to determine what overtime work or level of service is necessary. It contends that this is a management decision over which it need not bargain. The District contends that just as the allocation of an employes' time and energy during the work day is a basic policy decision, so is the decision as to whether certain overtime work is necessary, citing Oak Creek-Franklin City School District No. 1, 18827-D (9/74), aff'd Dane Co. Cir. Ct. 11/75.

The MTEA believes that the Board's interpretation of the language is not correct. It argues that the language in question primarily relates to hours and working conditions of accountants. It asserts that the language in this section allows accountants to work their normal and necessary overtime hours without prior authorization. The MTEA contends that the language does not remove the right of the District to determine the number of hours to be worked. Rather, the MTEA believes that the language only removes the necessity of making requests for prior authorization to work hours that have previously been required to carry out accountants' duties. Thus, the MTEA contends that the provision does not guarantee accountants overtime hours regardless of the amount of work to be done. It asserts that hours are only worked if necessary. Indeed, it notes that the hours in question are not vested with the employe but rather with the accountant position at each school. As the MTEA believes the language leaves the employer free to decide that no overtime is necessary and as it believes that the language only removes the burden for accountants of going through an extra administrative procedure which may be unnecessary, it believes that the language should be found to be mandatory.

We believe that the proposal can most reasonably be interpreted as allowing accountants the discretion to determine when they need to work overtime in order to provide the services which the Board has directed them to provide, as well as allowing them to be assured of payment for such services at overtime rates up to the limit specified in the contract. Clearly such a clause does impact upon employes wages and hours. However, it is also clear that it has a substantial impact upon the Board's ability to determine and control the level of service which it chooses to provide. As we believe that this impact upon management prerogatives predominates over the impact on wages and hours, we must conclude that this clause is permissive.

(9) Part IV, Sec. E.

The disputed language is as follows:

> Where a school accountant is absent, other than for vacations or holidays, for more than three (3) days, every effort will be made by the Divisions of Accounting and Personnel to provide a substitute to carry out the duties. Where the accountant is absent, he/she shall not be held responsible for funds collected in his/her absence.

The District contends initially that the clause is permissive because the language precludes it from determining that a substitute is not needed during the specified periods of absence. It argues that it may well be able to provide an adequate level of service without providing such a substitute. Citing the Commission's discussion of a similar clause in Milwaukee Board II, supra, the District urges that the Commission find the language to be permissive.

The District also believes that the clause is permissive because it excuses the accountant from a basic job responsibility which is fairly within the scope of an accountants duties. It believes the last sentence of the clause renders the District unable to insure the accuracy of its financial records. The District contends that the MTEA is incorrect when it attempts to link this language with

disciplinary concerns. The District therefore urges that this portion of the clause also be found to be permissive.

The MTEA submits that the existing contract language is a mandatory subject of bargaining. It believes the first sentence of the provision deals primarily with an accountants working conditions in that it makes certain that work does not accumulate during an accountant's extended absence. The MTEA argues that such a substitution requirement is not onerous and can be met through use of existing "floating" accountants or through the recall of those employes who are on layoff. The MTEA also notes that the clause does not require that a substitute work a full day in the absence of an accountant and asserts that it has not grieved the Board's use of supervisors to perform such tasks in the absence of an accountant. The MTEA argues that this provision is distinguishable from that held permissive in Milwaukee Board II because while the Board may determine that it is sound educational policy not to replace a teacher, an accountants job requires that services be maintained at a current status for the sake of accuracy. As to the second sentence of the contractual language, the MTEA argues that this language only ensures that an accountant shall not be disciplined for errors committed or losses caused by individuals who have performed the accountants duties during an absence. It contends that the District completely misinterprets the sentence. As it believes that disciplinary provisions are clearly mandatory subjects of bargaining, the MTEA argues that this portion of the clause is clearly mandatory.

As to the first sentence of the proposal, while employes have an interest in not having work accumulate during an absence, we find the general question of workload to be a matter more closely related to public policy interests at stake in determinations of the leve of staffing to be utilized and hence the level of services to be provided. 15/ To be sure, the municipal employer's productivity may well suffer if employes are either swamped upon return from an absence or if their work is left unperformed for a time. However, the choice of providing substitutes or accepting the potentially adverse productivity consequences of a failure to do so is a matter of public policy more than a matter of wages, hours and conditions of employment. Employe concerns about disciplinary consequences of failure to meet what the union considers to be an unreasonable or inequitable workload can be addressed, within limits, in mandatory subject proposals limiting management's rights to discharge and discipline employes for failure to achieve productivity standards. Thus we find the first sentence to be a permissive subject of bargaining.

As to the second sentence, the parties differ over the manner in which the language should reasonably be interpreted. We believe that the MTEA has the better of the argument. We do not view the language as authorizing the accountant to refuse to perform his duties as to such monies or to refuse to check for errors made in his absence and correct same. Rather the language is an effort to limit the employes' disciplinary exposure for errors made by someone else during periods of the employe's absence. Given this primary relationship to discipline, we find this portion of the clause is mandatory.

(10) Part IV, Sec. F,4

The disputed language is as follows:

. . .

> 4. The Board shall develop a uniform job description. A manual of procedural guides to carry out the duties within the job description shall be developed by March 1, 1971. Copies of these documents shall be furnished to the school accountants. Additional duties that may be added to the job description shall be limited to system-wide changes approved by the Director of Accounting.

The District argues that this clause restricts the ability to assign duties to accountants that are fairly within the scope of an accountants responsibilities. The District also contends that it may add additional duties to accountants' existing responsibilities on other than a system-wide basis so long

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15/ City of Brookfield, 11500-B (4/75); City of Manitowoc, 18333 (12/80).

as the responsibilities are fairly within the scope of an accountants' duties. As it believes that the Commission's decision in Sewerage I, supra, indicates that infringements upon these prerogatives are permissive subjects of bargaining, it urges that the Commission find this language also to be permissive. The District finally argues that it cannot be required to develop uniform job descriptions or procedural guides. The MTEA took no specific position with respect to this proposal.

We concluded in Sewerage I that an employer is obligated to furnish the Union with the duties and responsibilities of each unit position. The instant proposal appears to be aimed, in part, at acquiring that type of information. However, the proposal also dictates that job description developed be "uniform" and that subsequently added duties be limited to system-wide changes. As these requirements would preclude the District from determining that different accountants should have different responsibilities or that duties fairly within the scope of an accountant should be added to some but not all of the accountant's responsibilities, we find the proposal to be permissive.

(11) Part IV, Sec. F, 5.

The disputed language is as follows:

. . .

> 5. Bargaining unit employes shall not be assigned to perform clerical duties if not regularly performed in the past. The parties acknowledge that Union employes have on occasions typed, operated a copy machine and answered their own telephones. The parties further agree that the union employes shall not be required to operate the telephone switchboard or to use the copy machine or type. Filing shall be done in accordance with past practice.

The District contends that this language is permissive as it prohibits the assignment of certain duties to accountants which are fairly within the scope of their responsibilities. The District contends that there are certain duties which may be considered clerical in nature (i.e., use of an adding machine, printing in and posting to a ledger, filing, entry of data into a computer terminal, typing, use of a copy machine and switchboard operation) which, while clerical, remain well within an accountant's job responsibilities. Of particular concern to the District is the manner in which it believes the language restricts its ability to require accountants to use data entry skills. As technological changes occur, the District believes that it must be able to require that accountants utilize that new technology to perform the same functions previously performed, albeit at a computer terminal instead of on an adding machine or in a ledger. The District argues that the MTEA's position as expressed during the hearing indicates that the District would not, under this language, be able to assign such data entry functions to accountants. Indeed it notes that a reasonable interpretation of the contract places an absolute ban on typing and would prohibit the Board from requiring accountants to use data entry skills on even a sporadic basis. The District notes that it has a right to assign new duties to employes even if not previously performed as long as that duty is fairly within the scope of the employes responsibilities. Sewerage I, supra. The District, therefore, argues that the language in question is also permissive because it would prohibit the assignment of any new "clerical" duties to accountants even if those duties are fairly within the scope of an accountant's responsibilities.

The MTEA contends that this section only limits assignments of clerical duties which are not fairly within the scope of an accountant's employment. It argues that the language does allow the Board to assign accountants clerical duties necessary to their profession and even to perform those clerical tasks which may be assigned as a matter of occasional convenience. The MTEA notes the historical development of this proposal and suggests that the current contract language clearly does acknowledge that accountants do perform some clerical tasks. At the same time, the MTEA asserts that the Commission must recognize the realities of the need to coordinate work with a clerical staff which is represented by a different union. As it believes that the clerical duties described specifically in the clause are not fairly within the job responsibilites of an accountant, the MTEA argues that it has a mandatory right to bargain with the District over whether accountants will perform other clerical tasks. City of Wauwatosa, 13109-A (6/75), aff'd Milwaukee Co. Cir. Ct. 3/76; Oak Creek, supra.

In Milwaukee Board I, supra, the Commission was presented with the following proposal.

> 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.

In that dispute the parties' presented the following arguments and the Commission commented thereupon as follows:

> 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 accountant's 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 furnsh 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 case and the Wauwatosa 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 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 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:

. . .

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".

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.

(Footnotes Omitted)

Further hearing was never conducted as the parties successfully resolved their dispute in part by agreeing to the language now at issue.

During hearing on the instant proposal, the District presented testimony demonstrating its view of the types of "clerical" activity which are fairly within the scope of the school accountants responsibilities and necessary for the performance of the following current position description.

BOARD OF SCHOOL DIRECTORS

MILWAUKEE, WISCONSIN

POSITION DESCRIPTION

TITLE:	School Accountant
REPORTS TO:	Manager, Accounting Systems
COORDINATES:	Clerical and/or Student Staff
BASIC FUNCTION:	Accountants will, guided by Board Rules, procedures, policies and administrative directives, provide professionally sound accounting services, judgements and/or information related to their assigned responsibilities.

MAJOR DUTIES AND RESPONSIBILITIES:

1. Responsible for the operation of the school bookstore and related functions in assigned schools.

2. Performs functions related to the regular banking procedures at assigned schools.

3. Is responsible for bookkeeping and/or accounting functions and reporting at assigned Milwaukee Public Schools locations.

4. Provides information and advice to staff members including administrators/supervisors in regard to student, Board or other related funds and financial activities.

5. Maintains, directly and with assistance, inventories of Board equipment furniture or other assets pursuant to procedures established in the accounting manual.

6. Prepares or assists in the consolidation and preparation of data, schedules, statements or other school related financial information.

7. Under the direction of the Manager, Accounting Systems reviews and suggests changes to accommodate updates in Statutes, Board rules or procedures affecting accounting principles and methods used by Milwaukee Public Schools.

8. Performs other accountant duties as assigned by the Manager of Accounting Systems or his designee.

The District also presented testimony as to the impact which technological changes may have upon the manner in which accountants perform their job. Thus, the District's concerns about the contractual language focus upon a belief that the provision prevents the assignment of "clerical" duties which are currently or will in the future be fairly within the scope of an accountant's responsibilities.

Our review of the record demonstrates that accountants have and continue to perform certain of their job responsibilities by recording certain information by hand or by typewriter, by using an adding machine, etc. We do not view this proposal either on its face or as represented by the MTEA, as impacting in any way upon the continuing ability of the District to require that accountants perform those sorts of functions which are obviously at the heart of their responsibilities or fairly within the scope of their responsibilities. Nor do we see this proposal as preventing the District from utilizing technological advances which allow an accountant to perform three of his or her functions by making computer entries. Instead we see this proposal as focusing upon sporadically performed duties which the language itself defines as "clerical," i.e., typing, xeroxing and answering the switchboard. Given the historical context from which this language emerged, we recognize it as an imperfect effort by the parties to meet the MTEA's concerns that accountants not be utilized on a regular basis to perform the clerical tasks listed and the District's concerns that the realities of the workplace be recognized and that occasional clerical work be performed.

As the proposal does not preclude the District from requiring that accountants perform duties fairly within the scope of their responsibilities and does reflect the MTEA's mandatorily bargainable interest in placing some limitation upon the clerical tasks which accountant's can be required to perform, we find the proposal to be mandatory. City of Wauwatosa, supra.

(12) Part IV, Sec. F. 8.

8. During the life of this contract, accountants will be allowed an additional forty (40) hours of overtime prior to December 31, 1977, twenty-five (25) additional hours prior to December 31, 1978, and twenty (20) additional hours prior to December 31, 1979.

PROPOSAL WITHDRAWN

(13) Part IV, Sec. I. 1.a.

The disputed language is as follows:

. . .

> 1. a. The principal or supervisor shall promptly notify the accountant on a form memo that an accusation has been made against the accountant, which if true, could result in proceedings under Part IV, Section G, of jthe contract. The memo will also indicate that it will be necessary to confer on the matter and that at such 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 personal conference during which the accountant will be informed of the nature of the charges of alleged misconduct in an effort to resolve the matter. Resolution of "day-to-day" problems which do not have a reasonable expectation of becoming serious will not necessitate a written memo.

The District contends that this language is permissive because it has been interpreted by the MTEA as prohibiting more than one management representative from attending the "personal conference." Just as the Commission has concluded that the MTEA cannot bargain over the number of evaluators the Board will utilize, Milwaukee Board II, supra, or dictate the identity of the Board's representative during misconduct conferences, Milwaukee Board I, supra, the Board believes that the decision as to how many supervisory representatives are necessary to adequately represent the Board's interests during a conference is a permissive one over which it need not bargain.

MTEA argues that the purpose of a personal conference is simply to inform the employe of the nature of the charges, in an effort to resolve the matter. It contends that such a clause is a portion of the due process accorded to employes who are accused of misconduct. MTEA contends that such procedures are mandatory citing Milwaukee Board I, supra. MTEA argues that this language does not dictate who will represent the Board's interests and only represents the MTEA's concern that the employes personal conference be held without the trappings of a hearing with the supervisor who is most familiar with the situation at hand. As the conference is designed to avoid unnecessary exposure of the accountant during the initial exploration of accusations of misconduct, the MTEA believes that the interest of the employe must be found to predominate over any possible minimal infringement upon the District's ability to be represented during the conference. As disciplinary procedures are mandatory, the MTEA contends that this clause should be found as such by the Commission.

When confronted with this proposal in Milwaukee Board I, supra, the Commission commented as follows:

> We cannot accept the Board's claim that the procedure in question deals with the "evaluation" of accountings. 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 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 tha the objected to portions of this proposal relate primarily to working conditions and are, therefore, mandatory subjects of bargaining.

(Footnote Omitted)

Here the parties' dispute whether the District need bargain over a clause which allegedly restricts it to having one respresentative at the "personal conference." However, a review of the language satisfies us that the proposal cannot reasonably be interpreted as establishing any such restriction. Having rejected the District's arguments as to why the proposal is permissive, we find it to be mandatory.

(14) Part VI, Sec. A-B

The underlined portions of the provisions involved as set forth in Finding of Fact 3, which are objected to by the Board, set forth a specific procedure whereby an accountant can pursue a "complaint" regarding "any matter of dissatisfaction . . . with any aspect of his/her employment . . ." The Board asserts that as this clause allow accountants to pursue complaints which are not limited to matters which are primarily related to wages, hours or conditions of employment or to the impact of a permissive matter upon wages, hours or conditions of employment, the clause should be found to be permissive. The Board asserts that in Blackhawk, supra, the Commission found a similar definition of a complaint in a grievance procedure to be permissive. The Board argues that the language in question substantially dilutes its right to make educational policy decisions and intrudes on areas where the Commission and the courts have already determined there is no obligation to bargain. The Board contends that the absence of the ability to pursue such complaints to arbitration, unlike the clause in Blackhawk, supra, is irrelevant.

The MTEA contends that the procedure in question is mandatory, in that it provides an orderly outlet for employe complaints over matters other than contractual violations which might otherwise not be addressed. It notes that the administration has complete discretion to determine how it will address the complaint and that there is no appeal to the Board or to an arbitrator if the complainant is not satisfied with the administration's decision. MTEA argues that this complaint procedure does not restrict the Board's ability to manage the school system or to make educational policy. The MTEA further claims that the proposal here is distinguishable from that in Blackhawk, supra, in that here there is a separate procedure for complaints.

When determining whether a matter is a mandatory subject of bargaining, the Commission is obligated to consider whether the matter primarily relates to wages, hours and conditions of employment. Here, a complaint procedure which allows teachers to pursue dissatisfaction with respect to "any aspect" of employment is deemed to be so broad as to encompass matters which bear no primary relationship to wages, hours and conditions of employment or an impact thereon. As we held in Blackhawk, supra, a complaint procedure which does not focus upon violations of the agreement or upon matters which are primarily related to wages, hours or conditions of employment must be found to be permissive. In this regard, we note the Circuit Court's discussion in Blackhawk, supra, wherein the Supreme Court's holding in Beloit, supra, was set forth. That discussion indicates that as to matters which do not primarily relate to wages, hours and conditions of employment "the bargaining table is the wrong forum and the collective agreement is the wrong instrument." Thus our decision herein follows the court's admonition that

teachers have no greater standing to be heard on matters of school or educational policy than other groups or individuals similarly concerned. Thus, the language in the sections involved relates to permissive subjects of bargaining.

(15) Appendix B

During the hearing the Board withdrew its challenge to paragraphs 2 and 4 of Appendix B, but maintained that paragraphs 1 and 3 are permissive. These paragraphs provide as follows:

> APPENDIX B
>
> . . .
>
> The Board will recommend to the City Service Commission the establishment of the following recruitment-promotional program:
>
> 1. Separate titles shall be created of School Accountant I and II to designate those accountants who are employed in the schools from those employed in the central office.
>
> 2. Future vacancies in the School Accountant II positions shall be filled at the I level. Promotions to the II level shall be subject to the following requirements:
>
> a. at least two (2) years as a School Accountant I with the Board;
>
> b. passage of a qualifying City Service examination.
>
> 3. All existing Accountant I positions in the schools shall be reclassified as School Accountant II, with incumbents underfilling these positions, except that existing Senior Accountants I in the schools shall become School Accountants II.
>
> 4. If the accountant hired does not have a major in accounting at the time of employment and should receive his/her accounting majors required at a later date, he/she shall be automatically moved to the third step of the range. Credits are subject to approval by the City Service Commission and the Division of Personnel.

The District contends that these provisions require the Board to recommend to the City Service Commission that certain job titles be established for accountants. Citing Sewerage I, supra, and Brown County, (19042) 11/81, the District argues that the creation of job classifications is a permissive subject of bargaining over which the Board would not have to bargain if it were the decision-making body. Thus the Board argues that if it would not have to bargain over such a proposal, it need not bargain over a proposal which would require that it make a recommendation to a decision-making body regarding such a management policy decision.

The MTEA contends that the clauses in question are mandatory in that they primarily relate to accountants promotional opportunities and do not prevent the school district from taking actions that are essential to the fulfillment of its basic governmental mission. The MTEA contends that subsection 1 requires the District to recommend a new classification of accountants (School Accountants I and II) to distinguish between those accountants who are MTEA bargaining unit members and central office accountants who are members of the Administrators and Supervisors Council bargaining unit. It asserts that subsection 3 provides for the reclassification of existing Accountant I positions to School Accountant II. It argues that the "underfilling" reference means that incumbent Accountants I may serve as School Accountants II until the District has an opportunity to assess their qualifications and recommend the accountants for promotion to the School Accountant II position. The MTEA contends that ordinarily accountants must obtain

a Bachelors Degree in accounting and have two years experience as an Accountant I before they are eligible to be recommended to take a Civil Service exam for an Accountant II position. The MTEA contends that these clauses are mandatory as written.

It is not disputed that at least for the purposes of the subjects raised in Appendix B (1 and 3), accountants are subject to the jurisdiction of the Milwaukee City Service Commission established by Sec. 63.18, Stats. 16/ The clauses in question obligate the District to recommend to the Service Commission that certain changes be made in the existing accountant classification structure. The District correctly notes that the Commission has consistently found the subject of classification structure to be a matter of management prerogative which need not be bargained. Thus the District is also correct when it asserts that if the matter of classification structure were within the District's control, the MTEA could not insist on bargaining over the matter. In our view, it follows that MTEA cannot mandatorily bargain to obtain a District recommendation on the same subject. The public policy interest in having the District free of contractual constraints when deciding what position, if any, it will take as regards these matters which directly affect its organizational structure and operation predominates over the wage, hour and condition of employment dimensions of the objected to portions of the proposal. Therefore, paragraphs 1 and 3 are permissive subjects of bargaining.

Dated at Madison, Wisconsin this 9th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

I dissent as to proposal 1 and fully concur as to the remaining proposals.

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

I have participated only as to proposals 1, 5, 8-11, 13 and 15 and fully concur as to said proposals.

_____
Marshall L. Gratz, Commissioner

16/ As Secs. 63.27 and 63.53, Stats., indicate the District has the statutory right under Sec. 119.18(10)(c), Stats., to remove certain of its employes from coverage.

Once the municipal employer fulfills its obligation to respond with a clause meeting those requirements, the language so proposed will become a part of the parties' agreement, without any mandatory bargaining whatever. A union claim that the municipal employer's language does not meet its statutory duty would be resolved not through mandatory bargaining, but rather through a prohibited practice complaint preceeding for refusal to bargain.

Also, once the recognition clause required by statute has been requested and provided, either party is free to propose additions to the language thereof. Such proposed additions would be permissive subjects if they seek to alter any of the three requisite elements noted above. However, if the municipal employer merely seeks to expressly limit the clause to serving the purpose of the statutory recognition and no other, it could propose such a limitation, and bargaining about same would constitute a mandatory subject of bargaining. The union could resist to impasse the inclusion of any such proviso. Similarly, the union could propose to expand upon the status and rights of representation of the union as representative of the certified unit and such would--within limits--also constitute mandatory subjects of bargaining.

Significantly, then, MERA requires the municipal employer, upon request of a certified representative of its employes, to include in the agreement a recognition clause incorporating the three basic elements of a standard recognition clause noted above. It is that statutory duty imposed on the municipal employer and not any relation of union recognition to wages, hours and conditions of employment that results in a standard recognition clause being included in the agreement. Hence, so long as the municipal employer offers to include a recognition clause that incorporates those three basic elements, that will be the only form of the basic recognition language that the union has a right to have included in the agreement. It does not have the right to insist to impasse upon its own preferred form of the language since union recognition is not a matter for mandatory bargaining.

Accordingly, we conclude that the standard recognition clause in sentence one of MTEA's recognition proposal is not a mandatory subject of bargaining. Rather, it serves as a request that the District include in some statutorily-sufficient form the three elements of an exclusive recognition clause noted above. As noted, the sufficiency of the District's response will be subject to a refusal to bargain complaint if insufficient, but not to mandatory bargaining or MED/ARB.

The second sentence of the MTEA recognition proposal at issue is, in our view, a proposal for an addition to and enhancement of the MTEA's status as exclusive collective bargaining representative. As such, the second sentence of the proposal is, for reasons noted above, a mandatory subject of bargaining.

(6) Part III, Section B. 1. a.

Settled

(7) Part III, Section F. e.

The disputed language is as follows:

. . .

> e. In schools were there is a record of danger to the accountants or students, the Board shall provide appropriate additional personnel to help in building control.

The District contends that the language is permissive because it requires hiring of additional personnel and the use of employes to provide assistance. The District contends that the Commission has held previous language to be permissive in Milwaukee Board I, issue. The District also believes that the use of the phrase record of danger in quotes removes the language from any relationship to an immediate threat to employes physical safety and thus removes it from the parimeters of the language in Beloit, supra; and Milwaukee Board I, supra. It contends that whether an incident occurred in the past at a particular school is wholly unrelated to the present working conditions of accountants at that school. The District therefore requests that the proposal be found to be permissive.

The MTEA contends that the language is mandatory and does not require the Board to hire additional personnel, but merely requires that they provide help in building control where there is a record of danger to accountants. As the maintenance of a safe working place is a condition of employment and as a "record of danger" requirement is a reasonable and prudent standard for requiring precautionary measures, the MTEA believes that the proposal is mandatory. It further argues that the language in question was drafted in response to the Commission's holding in Milwaukee Board I, supra, in an attempt to meet the Commission's concerns as expressed therein. MTEA contends that the language does not restrict the Board to utilizing any particular personnel or employes of the District nor does it require the Board to hire additional personnel. It believes that the specification that appropriate personnel be utilized merely relates to some assurance that safety will be considered when the Board determines how it should provide the assistance in question. Citing Manitowoc County, 18994 (9/81), the MTEA believes that where the local conditions and experience relating to safety demonstrate a past record of danger, it should be able to mandatorily bargain about protection of employes in those circumstances. Therefore, the MTEA requests that the language be found to be mandatory.

Initially the Commission wishes to note that it sees no meaningful distinction between a record of danger requirement and a "danger requirement" as contained in the Milwaukee Board I proposal, cited by both parties. Clearly, a union can seek to bargain protection of its employes in situations where safety has in the past been threatened and need not wait until an actual threat is presented to a teacher. Obviously, a proposal requiring an actual threat would have little or no meaningful impact upon the safety threat as the need for protection would have passed before protection would be provided. However, as we found in Milwaukee Board III, our rationale in Milwaukee Board I, especially that which goes to the use of the word "appropriate" requires that this proposal be found to be permissive. That prior rationale is as follows:

> 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 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. 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. (Footnote Omitted).

(8) Part IV, Section A. 2.

The disputed language is as follows:

> Each accountant shall be authorized the same hours of overtime per calendar year that has previously existed, without prior authorization of the Division of Personnel. The overtime allocation shall be applicable to services rendered outside the regular work hours.

The District contends that this language provides that an accountant is authorized to work the same number of overtime hours as existed in the previous calendar year without obtaining prior authorization from management. The District asserts that its need to have accountants work overtime clearly may vary from year to year depending upon workload and technological advances. Thus, while overtime may have been needed in a prior year in order to provide the level of

services the District deems necessary at a particular site, the same level of services may be unnecessary in another year. The District contends that as this language prohibits it from deciding that it will reduce the level of services needed at a particular site, it must be found to be permissive.

The District also contends that the MTEA's interpretation of the language is unreasonable and should be rejected. However, the District argues that even if one were to accept the MTEA's interpretation that the language only removes the requirement of authorization for overtime work which is actually needed by the District, the language is still permissive. The District argues that the provision still provides the employe with the discretion to determine what overtime work or level of service is necessary. It contends that this is a management decision over which it need not bargain. The District contends that just as the allocation of an employes' time and energy during the work day is a basic policy decision, so is the decision as to whether certain overtime work is necessary, citing Oak Creek-Franklin City School District No. 1, 18827-D (9/74), aff'd Dane Co. Cir. Ct. 11/75.

The MTEA believes that the Board's interpretation of the language is not correct. It argues that the language in question primarily relates to hours and working conditions of accountants. It asserts that the language in this section allows accountants to work their normal and necessary overtime hours without prior authorization. The MTEA contends that the language does not remove the right of the District to determine the number of hours to be worked. Rather, the MTEA believes that the language only removes the necessity of making requests for prior authorization to work hours that have previously been required to carry out accountants' duties. Thus, the MTEA contends that the provision does not guarantee accountants overtime hours regardless of the amount of work to be done. It asserts that hours are only worked if necessary. Indeed, it notes that the hours in question are not vested with the employe but rather with the accountant position at each school. As the MTEA believes the language leaves the employer free to decide that no overtime is necessary and as it believes that the language only removes the burden for accountants of going through an extra administrative procedure which may be unnecessary, it believes that the language should be found to be mandatory.

We believe that the proposal can most reasonably be interpreted as allowing accountants the discretion to determine when they need to work overtime in order to provide the services which the Board has directed them to provide, as well as allowing them to be assured of payment for such services at overtime rates up to the limit specified in the contract. Clearly such a clause does impact upon employes wages and hours. However, it is also clear that it has a substantial impact upon the Board's ability to determine and control the level of service which it chooses to provide. As we believe that this impact upon management prerogatives predominates over the impact on wages and hours, we must conclude that this clause is permissive.

(9) Part IV, Sec. E.

The disputed language is as follows:

> Where a school accountant is absent, other than for vacations or holidays, for more than three (3) days, every effort will be made by the Divisions of Accounting and Personnel to provide a substitute to carry out the duties. Where the accountant is absent, he/she shall not be held responsible for funds collected in his/her absence.

The District contends initially that the clause is permissive because the language precludes it from determining that a substitute is not needed during the specified periods of absence. It argues that it may well be able to provide an adequate level of service without providing such a substitute. Citing the Commission's discussion of a similar clause in Milwaukee Board II, supra, the District urges that the Commission find the language to be permissive.

The District also believes that the clause is permissive because it excuses the accountant from a basic job responsibility which is fairly within the scope of an accountants duties. It believes the last sentence of the clause renders the District unable to insure the accuracy of its financial records. The District contends that the MTEA is incorrect when it attempts to link this language with

disciplinary concerns. The District therefore urges that this portion of the clause also be found to be permissive.

The MTEA submits that the existing contract language is a mandatory subject of bargaining. It believes the first sentence of the provision deals primarily with an accountants working conditions in that it makes certain that work does not accumulate during an accountant's extended absence. The MTEA argues that such a substitution requirement is not onerous and can be met through use of existing "floating" accountants or through the recall of those employes who are on layoff. The MTEA also notes that the clause does not require that a substitute work a full day in the absence of an accountant and asserts that it has not grieved the Board's use of supervisors to perform such tasks in the absence of an accountant. The MTEA argues that this provision is distinguishable from that held permissive in Milwaukee Board II because while the Board may determine that it is sound educational policy not to replace a teacher, an accountants job requires that services be maintained at a current status for the sake of accuracy. As to the second sentence of the contractual language, the MTEA argues that this language only ensures that an accountant shall not be disciplined for errors committed or losses caused by individuals who have performed the accountants duties during an absence. It contends that the District completely misinterprets the sentence. As it believes that disciplinary provisions are clearly mandatory subjects of bargaining, the MTEA argues that this portion of the clause is clearly mandatory.

As to the first sentence of the proposal, while employes have an interest in not having work accumulate during an absence, we find the general question of workload to be a matter more closely related to public policy interests at stake in determinations of the leve of staffing to be utilized and hence the level of services to be provided. 15/ To be sure, the municipal employer's productivity may well suffer if employes are either swamped upon return from an absence or if their work is left unperformed for a time. However, the choice of providing substitutes or accepting the potentially adverse productivity consequences of a failure to do so is a matter of public policy more than a matter of wages, hours and conditions of employment. Employe concerns about disciplinary consequences of failure to meet what the union considers to be an unreasonable or inequitable workload can be addressed, within limits, in mandatory subject proposals limiting management's rights to discharge and discipline employes for failure to achieve productivity standards. Thus we find the first sentence to be a permissive subject of bargaining.

As to the second sentence, the parties differ over the manner in which the language should reasonably be interpreted. We believe that the MTEA has the better of the argument. We do not view the language as authorizing the accountant to refuse to perform his duties as to such monies or to refuse to check for errors made in his absence and correct same. Rather the language is an effort to limit the employes' disciplinary exposure for errors made by someone else during periods of the employe's absence. Given this primary relationship to discipline, we find this portion of the clause is mandatory.

(10) Part IV, Sec. F,4

The disputed language is as follows:

. . .

> 4. The Board shall develop a uniform job description. A manual of procedural guides to carry out the duties within the job description shall be developed by March 1, 1971. Copies of these documents shall be furnished to the school accountants. Additional duties that may be added to the job description shall be limited to system-wide changes approved by the Director of Accounting.

The District argues that this clause restricts the ability to assign duties to accountants that are fairly within the scope of an accountants responsibilities. The District also contends that it may add additional duties to accountants' existing responsibilities on other than a system-wide basis so long

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15/ City of Brookfield, 11500-B (4/75); City of Manitowoc, 18333 (12/80).

as the responsibilities are fairly within the scope of an accountants' duties. As it believes that the Commission's decision in Sewerage I, supra, indicates that infringements upon these prerogatives are permissive subjects of bargaining, it urges that the Commission find this language also to be permissive. The District finally argues that it cannot be required to develop uniform job descriptions or procedural guides. The MTEA took no specific position with respect to this proposal.

We concluded in Sewerage I that an employer is obligated to furnish the Union with the duties and responsibilities of each unit position. The instant proposal appears to be aimed, in part, at acquiring that type of information. However, the proposal also dictates that job description developed be "uniform" and that subsequently added duties be limited to system-wide changes. As these requirements would preclude the District from determining that different accountants should have different responsibilities or that duties fairly within the scope of an accountant should be added to some but not all of the accountant's responsibilities, we find the proposal to be permissive.

(11) Part IV, Sec. F, 5.

The disputed language is as follows:

. . .

> 5. Bargaining unit employes shall not be assigned to perform clerical duties if not regularly performed in the past. The parties acknowledge that Union employes have on occasions typed, operated a copy machine and answered their own telephones. The parties further agree that the union employes shall not be required to operate the telephone switchboard or to use the copy machine or type. Filing shall be done in accordance with past practice.

The District contends that this language is permissive as it prohibits the assignment of certain duties to accountants which are fairly within the scope of their responsibilities. The District contends that there are certain duties which may be considered clerical in nature (i.e., use of an adding machine, printing in and posting to a ledger, filing, entry of data into a computer terminal, typing, use of a copy machine and switchboard operation) which, while clerical, remain well within an accountant's job responsibilities. Of particular concern to the District is the manner in which it believes the language restricts its ability to require accountants to use data entry skills. As technological changes occur, the District believes that it must be able to require that accountants utilize that new technology to perform the same functions previously performed, albeit at a computer terminal instead of on an adding machine or in a ledger. The District argues that the MTEA's position as expressed during the hearing indicates that the District would not, under this language, be able to assign such data entry functions to accountants. Indeed it notes that a reasonable interpretation of the contract places an absolute ban on typing and would prohibit the Board from requiring accountants to use data entry skills on even a sporadic basis. The District notes that it has a right to assign new duties to employes even if not previously performed as long as that duty is fairly within the scope of the employes responsibilities. Sewerage I, supra. The District, therefore, argues that the language in question is also permissive because it would prohibit the assignment of any new "clerical" duties to accountants even if those duties are fairly within the scope of an accountant's responsibilities.

The MTEA contends that this section only limits assignments of clerical duties which are not fairly within the scope of an accountant's employment. It argues that the language does allow the Board to assign accountants clerical duties necessary to their profession and even to perform those clerical tasks which may be assigned as a matter of occasional convenience. The MTEA notes the historical development of this proposal and suggests that the current contract language clearly does acknowledge that accountants do perform some clerical tasks. At the same time, the MTEA asserts that the Commission must recognize the realities of the need to coordinate work with a clerical staff which is represented by a different union. As it believes that the clerical duties described specifically in the clause are not fairly within the job responsibilites of an accountant, the MTEA argues that it has a mandatory right to bargain with the District over whether accountants will perform other clerical tasks. City of Wauwatosa, 13109-A (6/75), aff'd Milwaukee Co. Cir. Ct. 3/76; Oak Creek, supra.

In Milwaukee Board I, supra, the Commission was presented with the following proposal.

> 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.

In that dispute the parties' presented the following arguments and the Commission commented thereupon as follows:

> 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 accountant's 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 furnsh 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 case and the Wauwatosa 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 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 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:

. . .

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".

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.

(Footnotes Omitted)

Further hearing was never conducted as the parties successfully resolved their dispute in part by agreeing to the language now at issue.

During hearing on the instant proposal, the District presented testimony demonstrating its view of the types of "clerical" activity which are fairly within the scope of the school accountants responsibilities and necessary for the performance of the following current position description.

BOARD OF SCHOOL DIRECTORS

MILWAUKEE, WISCONSIN

POSITION DESCRIPTION

TITLE:	School Accountant
REPORTS TO:	Manager, Accounting Systems
COORDINATES:	Clerical and/or Student Staff
BASIC FUNCTION:	Accountants will, guided by Board Rules, procedures, policies and administrative directives, provide professionally sound accounting services, judgements and/or information related to their assigned responsibilities.

MAJOR DUTIES AND RESPONSIBILITIES:

1. Responsible for the operation of the school bookstore and related functions in assigned schools.

2. Performs functions related to the regular banking procedures at assigned schools.

3. Is responsible for bookkeeping and/or accounting functions and reporting at assigned Milwaukee Public Schools locations.

4. Provides information and advice to staff members including administrators/supervisors in regard to student, Board or other related funds and financial activities.

5. Maintains, directly and with assistance, inventories of Board equipment furniture or other assets pursuant to procedures established in the accounting manual.

6. Prepares or assists in the consolidation and preparation of data, schedules, statements or other school related financial information.

7. Under the direction of the Manager, Accounting Systems reviews and suggests changes to accommodate updates in Statutes, Board rules or procedures affecting accounting principles and methods used by Milwaukee Public Schools.

8. Performs other accountant duties as assigned by the Manager of Accounting Systems or his designee.

The District also presented testimony as to the impact which technological changes may have upon the manner in which accountants perform their job. Thus, the District's concerns about the contractual language focus upon a belief that the provision prevents the assignment of "clerical" duties which are currently or will in the future be fairly within the scope of an accountant's responsibilities.

Our review of the record demonstrates that accountants have and continue to perform certain of their job responsibilities by recording certain information by hand or by typewriter, by using an adding machine, etc. We do not view this proposal either on its face or as represented by the MTEA, as impacting in any way upon the continuing ability of the District to require that accountants perform those sorts of functions which are obviously at the heart of their responsibilities or fairly within the scope of their responsibilities. Nor do we see this proposal as preventing the District from utilizing technological advances which allow an accountant to perform three of his or her functions by making computer entries. Instead we see this proposal as focusing upon sporadically performed duties which the language itself defines as "clerical," i.e., typing, xeroxing and answering the switchboard. Given the historical context from which this language emerged, we recognize it as an imperfect effort by the parties to meet the MTEA's concerns that accountants not be utilized on a regular basis to perform the clerical tasks listed and the District's concerns that the realities of the workplace be recognized and that occasional clerical work be performed.

As the proposal does not preclude the District from requiring that accountants perform duties fairly within the scope of their responsibilities and does reflect the MTEA's mandatorily bargainable interest in placing some limitation upon the clerical tasks which accountant's can be required to perform, we find the proposal to be mandatory. City of Wauwatosa, supra.

(12) Part IV, Sec. F. 8.

8. During the life of this contract, accountants will be allowed an additional forty (40) hours of overtime prior to December 31, 1977, twenty-five (25) additional hours prior to December 31, 1978, and twenty (20) additional hours prior to December 31, 1979.

PROPOSAL WITHDRAWN

(13) Part IV, Sec. I. 1.a.

The disputed language is as follows:

. . .

> 1. a. The principal or supervisor shall promptly notify the accountant on a form memo that an accusation has been made against the accountant, which if true, could result in proceedings under Part IV, Section G, of jthe contract. The memo will also indicate that it will be necessary to confer on the matter and that at such 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 personal conference during which the accountant will be informed of the nature of the charges of alleged misconduct in an effort to resolve the matter. Resolution of "day-to-day" problems which do not have a reasonable expectation of becoming serious will not necessitate a written memo.

The District contends that this language is permissive because it has been interpreted by the MTEA as prohibiting more than one management representative from attending the "personal conference." Just as the Commission has concluded that the MTEA cannot bargain over the number of evaluators the Board will utilize, Milwaukee Board II, supra, or dictate the identity of the Board's representative during misconduct conferences, Milwaukee Board I, supra, the Board believes that the decision as to how many supervisory representatives are necessary to adequately represent the Board's interests during a conference is a permissive one over which it need not bargain.

MTEA argues that the purpose of a personal conference is simply to inform the employe of the nature of the charges, in an effort to resolve the matter. It contends that such a clause is a portion of the due process accorded to employes who are accused of misconduct. MTEA contends that such procedures are mandatory citing Milwaukee Board I, supra. MTEA argues that this language does not dictate who will represent the Board's interests and only represents the MTEA's concern that the employes personal conference be held without the trappings of a hearing with the supervisor who is most familiar with the situation at hand. As the conference is designed to avoid unnecessary exposure of the accountant during the initial exploration of accusations of misconduct, the MTEA believes that the interest of the employe must be found to predominate over any possible minimal infringement upon the District's ability to be represented during the conference. As disciplinary procedures are mandatory, the MTEA contends that this clause should be found as such by the Commission.

When confronted with this proposal in Milwaukee Board I, supra, the Commission commented as follows:

> We cannot accept the Board's claim that the procedure in question deals with the "evaluation" of accountings. 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 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 tha the objected to portions of this proposal relate primarily to working conditions and are, therefore, mandatory subjects of bargaining.

(Footnote Omitted)

Here the parties' dispute whether the District need bargain over a clause which allegedly restricts it to having one respresentative at the "personal conference." However, a review of the language satisfies us that the proposal cannot reasonably be interpreted as establishing any such restriction. Having rejected the District's arguments as to why the proposal is permissive, we find it to be mandatory.

(14) Part VI, Sec. A-B

The underlined portions of the provisions involved as set forth in Finding of Fact 3, which are objected to by the Board, set forth a specific procedure whereby an accountant can pursue a "complaint" regarding "any matter of dissatisfaction . . . with any aspect of his/her employment . . ." The Board asserts that as this clause allow accountants to pursue complaints which are not limited to matters which are primarily related to wages, hours or conditions of employment or to the impact of a permissive matter upon wages, hours or conditions of employment, the clause should be found to be permissive. The Board asserts that in Blackhawk, supra, the Commission found a similar definition of a complaint in a grievance procedure to be permissive. The Board argues that the language in question substantially dilutes its right to make educational policy decisions and intrudes on areas where the Commission and the courts have already determined there is no obligation to bargain. The Board contends that the absence of the ability to pursue such complaints to arbitration, unlike the clause in Blackhawk, supra, is irrelevant.

The MTEA contends that the procedure in question is mandatory, in that it provides an orderly outlet for employe complaints over matters other than contractual violations which might otherwise not be addressed. It notes that the administration has complete discretion to determine how it will address the complaint and that there is no appeal to the Board or to an arbitrator if the complainant is not satisfied with the administration's decision. MTEA argues that this complaint procedure does not restrict the Board's ability to manage the school system or to make educational policy. The MTEA further claims that the proposal here is distinguishable from that in Blackhawk, supra, in that here there is a separate procedure for complaints.

When determining whether a matter is a mandatory subject of bargaining, the Commission is obligated to consider whether the matter primarily relates to wages, hours and conditions of employment. Here, a complaint procedure which allows teachers to pursue dissatisfaction with respect to "any aspect" of employment is deemed to be so broad as to encompass matters which bear no primary relationship to wages, hours and conditions of employment or an impact thereon. As we held in Blackhawk, supra, a complaint procedure which does not focus upon violations of the agreement or upon matters which are primarily related to wages, hours or conditions of employment must be found to be permissive. In this regard, we note the Circuit Court's discussion in Blackhawk, supra, wherein the Supreme Court's holding in Beloit, supra, was set forth. That discussion indicates that as to matters which do not primarily relate to wages, hours and conditions of employment "the bargaining table is the wrong forum and the collective agreement is the wrong instrument." Thus our decision herein follows the court's admonition that

teachers have no greater standing to be heard on matters of school or educational policy than other groups or individuals similarly concerned. Thus, the language in the sections involved relates to permissive subjects of bargaining.

(15) Appendix B

During the hearing the Board withdrew its challenge to paragraphs 2 and 4 of Appendix B, but maintained that paragraphs 1 and 3 are permissive. These paragraphs provide as follows:

> APPENDIX B
>
> . . .
>
> The Board will recommend to the City Service Commission the establishment of the following recruitment-promotional program:
>
> 1. Separate titles shall be created of School Accountant I and II to designate those accountants who are employed in the schools from those employed in the central office.
>
> 2. Future vacancies in the School Accountant II positions shall be filled at the I level. Promotions to the II level shall be subject to the following requirements:
>
> a. at least two (2) years as a School Accountant I with the Board;
>
> b. passage of a qualifying City Service examination.
>
> 3. All existing Accountant I positions in the schools shall be reclassified as School Accountant II, with incumbents underfilling these positions, except that existing Senior Accountants I in the schools shall become School Accountants II.
>
> 4. If the accountant hired does not have a major in accounting at the time of employment and should receive his/her accounting majors required at a later date, he/she shall be automatically moved to the third step of the range. Credits are subject to approval by the City Service Commission and the Division of Personnel.

The District contends that these provisions require the Board to recommend to the City Service Commission that certain job titles be established for accountants. Citing Sewerage I, supra, and Brown County, (19042) 11/81, the District argues that the creation of job classifications is a permissive subject of bargaining over which the Board would not have to bargain if it were the decision-making body. Thus the Board argues that if it would not have to bargain over such a proposal, it need not bargain over a proposal which would require that it make a recommendation to a decision-making body regarding such a management policy decision.

The MTEA contends that the clauses in question are mandatory in that they primarily relate to accountants promotional opportunities and do not prevent the school district from taking actions that are essential to the fulfillment of its basic governmental mission. The MTEA contends that subsection 1 requires the District to recommend a new classification of accountants (School Accountants I and II) to distinguish between those accountants who are MTEA bargaining unit members and central office accountants who are members of the Administrators and Supervisors Council bargaining unit. It asserts that subsection 3 provides for the reclassification of existing Accountant I positions to School Accountant II. It argues that the "underfilling" reference means that incumbent Accountants I may serve as School Accountants II until the District has an opportunity to assess their qualifications and recommend the accountants for promotion to the School Accountant II position. The MTEA contends that ordinarily accountants must obtain

a Bachelors Degree in accounting and have two years experience as an Accountant I before they are eligible to be recommended to take a Civil Service exam for an Accountant II position. The MTEA contends that these clauses are mandatory as written.

It is not disputed that at least for the purposes of the subjects raised in Appendix B (1 and 3), accountants are subject to the jurisdiction of the Milwaukee City Service Commission established by Sec. 63.18, Stats. 16/ The clauses in question obligate the District to recommend to the Service Commission that certain changes be made in the existing accountant classification structure. The District correctly notes that the Commission has consistently found the subject of classification structure to be a matter of management prerogative which need not be bargained. Thus the District is also correct when it asserts that if the matter of classification structure were within the District's control, the MTEA could not insist on bargaining over the matter. In our view, it follows that MTEA cannot mandatorily bargain to obtain a District recommendation on the same subject. The public policy interest in having the District free of contractual constraints when deciding what position, if any, it will take as regards these matters which directly affect its organizational structure and operation predominates over the wage, hour and condition of employment dimensions of the objected to portions of the proposal. Therefore, paragraphs 1 and 3 are permissive subjects of bargaining.

Dated at Madison, Wisconsin this 9th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

I dissent as to proposal 1 and fully concur as to the remaining proposals.

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

I have participated only as to proposals 1, 5, 8-11, 13 and 15 and fully concur as to said proposals.

_____
Marshall L. Gratz, Commissioner

16/ As Secs. 63.27 and 63.53, Stats., indicate the District has the statutory right under Sec. 119.18(10)(c), Stats., to remove certain of its employes from coverage.