STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE TEACHERS' EDUCATION ASSOCIATION (Substitute Teachers)	Case CXLIII No. 31006 DR(M)-287 Decision No. 20399-A

Appearances:

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Milwaukee Board of School Directors having, on January 14, 1983, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether certain proposals of the Milwaukee Teachers' Education Association relate to mandatory or permissive subjects of collective bargaining; and hearing with respect to said petition having been held before Peter G. Davis, a member of the Commission's staff, on March 16, 1983, in Milwaukee, Wisconsin; and the parties having submitted post-hearing briefs, the last of which was received on May 31, 1983; and the Commission having considered the record and the positions of the parties, makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee Board of Schools Directors, hereinafter referred to as the Board or the District, is a municipal employer operating a K-12 public school system in Milwaukee, Wisconsin; and that the Board maintains it principal offices at 5225 W. Vliet Street, P. O. Drawer 10K, Milwaukee, Wisconsin 53208.

2. That Milwaukee Teachers' Education Association, hereinafter referred to as the MTEA or the Union, is a labor organization which represents a bargaining unit consisting of "substitute teachers" employed by the District; and that the MTEA maintains its principal offices at 5130 W. Vliet Street, Milwaukee, Wisconsin 53208.

3. That on or about October 4, 1982, the Board and the MTEA exchanged proposals for a new contract to replace that which was to expire on December 31, 1982, setting forth the wages, hours and conditions of employment of the substitute teachers employed by the District and represented by the MTEA; that thereafter a dispute arose between the parties as to whether certain of those proposals made by the MTEA were mandatory subjects of bargaining; and that the parties were unable to resolve their dispute and ultimately the District filed the instant petition for declaratory ruling.

4. That the proposals in dispute are the following:

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 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 representative, 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 negotiatons with the MTEA. 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.

PART II

(4) 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 substitute teachers employed by the Board, 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.

(5) E. BULLETIN BOARDS

The MTEA shall be free to use one mailbox for the distribution of its communications. Materials for posting on bulletin boards shall be submitted to the principal at the same time they are posted; and, provided they are professional in

approach and do not deal with a personal attack or reflect unfavorably on the teaching profession or constitute a political endorsement or rejection of a candidate, no interference will be made with the posting. Such items should not occupy more than one-quarter of the board and be not more than 16" x 20" in size. If the principal feels that the above standards for posting on bulletin boards have been violated, he/she shall, within two (2) working days, ask the appropriate assistant superintendent for clarification. If the assistant superintendent feels that the material is inappropriate, he/she shall arrange a conference with the representatives of the MTEA within three (3) working days. The material, if favorably ruled upon by the assistant superintendent, will be reposted. Persistent violation of the above procedure in any building may result in the revocation by the Superintendent of the use of the bulletin boards in that building.

PART III

(6) G. HEALTH INSURANCE

1. Those regular substitutes receiving Blue Cross-Blue Shield as of January 1, 1975, on a self-pay basis and who will not qualify for the below provision shall be able to continue with the Blue Cross-Blue Shield Program on a self-pay basis.

No additional substitutes beyond those described above shall be able to have the Blue Cross-Blue Shield on a self-pay basis.

2. In any school year, where a substitute works eighty (80) days or more, he/she shall be provided without cost either the single or family Blue Cross-Blue Shield plan for the following school year, if continuing as a substitute teacher. The 1974-75 school year shall be used as the first qualifying year.

3. The present health insurance coverage shall include the following:

a. Hospital coverage shall provide for a private room ordered by a physician as a medical necessity.

b. The Major Medical shall be fifty thousand dollars ($50,000) with a Major Medical deductible of fifty dollars ($50)/one hundred fifty dollars ($150).

c. 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.

PART IV

(7) A. 9. Substitute teachers shall be called if any are available for a regular teacher absence of a half-day or more.

(8) G. ORIENTATION PROGRAM

The Board shall provide an orientation program for newly employed substitute teachers.

PART V

(9) E. HIRING AS A REGULARLY APPOINTED TEACHER

Service as a regular substitute teacher shall be given consideration for hiring as a regularly appointed teacher, provided service as a substitute teacher has been satisfactory, credentials are acceptable and in order, and eligibility for appropriate certification is on file.

A list of vacancies shall be posted on the office bulletin board in each school in May and December. Regular substitute teachers shall be granted an interview, upon request, to review and update their employment folder and to discuss existing job opportunities.

PART VI

(10) GRIEVANCE AND COMPLAINT PROCEDURE

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 employe with some aspect of employment.

B. DEFINITIONS

2. A complaint is any matter of dissatisfaction of a substitute teacher 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 grievance 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, except that in the case of errors having a monetary impact not occurring as a result of substitute teacher negligence, corrected payment shall be made retroactive for a period not to exceed one year.

C. RESOLUTION OF GRIEVANCE OR COMPLAINT

If the grievant or complaint is not processed by the step of the grievance or complaint procedure, it shall be considered to have been resolved by previous MTEA or the grievant within the time limits at any disposition. Failure by the administration or 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 PROCEDURE

Grievances or complaints shall be processed as follows:

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

E. PRESENCE OF COMPLAINANT 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 substitute teacher may be released without loss of pay or sick leave to meet with the appropriate party. Every effort shall be made not to absent a substitute teacher from a class assignment.

APPENDIX B

(11) 8. The Board shall attempt to obtain from traffic control authorities permission for extended parking during times of emergencies.

5. That during the hearing the parties resolved their dispute as to the status of proposal (6) relating to insurance coverage.

6. That disputed proposals 4 (sentence two), 9 (second paragraph) and 11 as set forth in Finding of Fact 4 are primarily related to wages, hours and conditions of employment.

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

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

CONCLUSIONS OF LAW

1. That proposals 4 (sentence two), 9 (second paragraph) and 11 as set forth in Finding of Fact 4, are mandatory subjects of bargaining within the meaning of Sec. 111.70(3)(a)4, Stats.

2. That proposals 1-3, 5, 7, 8, 9 (first paragraph) and 10 as set forth in Finding of Fact 4 are permissive subjects of bargaining within the meaning of Sec. 111.70(3)(a)4, Stats.

3. That sentence one of proposal 4 as set forth in Finding of Fact 4 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 and Conclusions of Law, the Commission makes the following

DECLARATORY RULING 1/

1. That the Board has a duty to bargain collectively about disputed proposals 4 (sentence two), 9 (second paragraph) and 4 as set forth in Finding of Fact 4.

2. That the Board has no duty to bargain collectively about disputed provisions 1-3, 4 (sentence one), 5, 7, 8, 9 (first paragraph) and 10 as set forth in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of September, 1983

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Herman Torosian, Chairman

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

Gary L. Covelli, Commissioner

I have participated only as to proposals 1, 4, 7-9, and 11 and fully concur as to said proposals.

Marshall L. Gratz, Commissioner

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

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

(Footnote 1 Continued on Page 7)

(Footnote 1 continued)

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 ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

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

For the sake of expeditious issuance of this decision, Commissioner Gratz has not participated herein with respect to proposals 2, 3, 5 and 10. 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, herein 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, our discussion of proposal 11 parallels that contained in Milwaukee Board of School Directors (20979) 9/83, herein Milwaukee Board III, wherein we discussed an identical proposal.

THE DISPUTED PROVISIONS

(1) Part I - Section 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 upon 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 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 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

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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 343 F.2d 558, 58 LRRM 2822 (8th Cir. 1965); See Murphy Diesel Co. v. NLRB, 454 F.2d 303, 78 LRRM 2992 (7th Cir. 1971); 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.

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 - Section F. 2.

The disputed contractual language states:

> Where there is any new 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 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 employes' 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 or effect 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 - Section F. 3.

The disputed portions of this provision are similar to those just discussed except that the clause refers to administrative procedure rather than rules or policies. The parties have made identical arguments with respect to this provision, the same analysis of those arguments applies, and the language involves a permissive subject of bargaining.

(4) Part II - Section A.

The language at issue is MTEA's proposal to carry forward the "Recognition" clause which reads as follows:

PART II

A. RECOGNITION

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 sentence one 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 illogically 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.

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 such 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.

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.

In Sauk County, supra, Commissioners Covelli and Slavney (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 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

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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 (Dec. No. 18570-A, 5/81) also addressed and disposed of those cases.

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 reconsideration 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 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. 10a/ 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 identify 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 MERA.

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."

Dec. No. 18570-A at 3.

10a/ See Note 13, infra.

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 Congress, 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 US 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. 11/ 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 and conditions of employment' which defines mandatory bargaining." 12/

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 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

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 recognition 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 is 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 collective bargaining agreement its statutorily-required recognition of 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 negotiatons), 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. 13/

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 proceeding 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.

13/ 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.

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.

(5) Part II - Section E.

The objectionable contractual language is as follows:

> If the principal feels that the above standards for posting on bulletin boards have been violated, he/she shall, within two (2) working days, ask the appropriate assistant superintendent for clarification.

The Board contends that language in issue designates specific administrators to assume certain responsibilities regarding the standards for posting MTEA communications on bulletin boards. The Board contends that in Beloit, supra, the Commission held that naming which management official would evaluate an employe's job performance was a matter of management technique which need not be bargained. Similarly, the Board argues here that naming the precise individuals who will review bulletin boards relates to management's internal procedure, and should also be found to be permissive. The Board contends that this clause differs from that previously found to be permissive by the Commission in Milwaukee Board of School Directors, (17504) 12/79, herein Milwaukee Board I in two important respects. 14/ First, in the earlier decision the Commission determined that a due process procedure dealing with charges of misconduct was involved. The Board contends that the instant procedure does not involve such a due process procedure. The Board also contends that unlike the earlier disputed provision, the clause here does not provide the Board with any discretion in determining which management person will have the responsibilities in question. Thus, the Board argues that this language does not reflect an attempt by MTEA to assure that matters are handled at a supervisory level and reviewed at a higher level, but rather dictates specific tasks to be assumed by specific administrators. The Board thus contends that the language relates primarily to management's internal procedure and the job responsibilities of particular administrators.

14/ That clause provided the following:

> "Part IV, Section I, (1) (a)
>
> The principal or supervisor shall promptly notify the accountant on a form that an accusation has been made against the accountant which if true, could result in procedings (sic) under Part IV, Section G of the contract. The memo will also indicate that it would be necessary to confer on the matter
>
> Footnote 14 continued on Page 18)

Footnote 14 continued

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and that such a conference, the accountant will be allowed to be represented by the MTEA, legal counsel, or any other person of his/her choice. This notice shall be followed by a scheduled, personnel conference during which the accountant will be informed of the nature of the charges of the alleged misconduct in an effort to resolve the matter. Resolutions of day-to-day problems which do not have a reasonable expectation of becoming serious, will not necessitate a written memo. (Emphasis added)

. . .

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

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

MTEA contends that the clause in question is a mandatory subject of bargaining in that it deals with due process for the union where materials submitted for posting on the bulletin boards have been challenged by the administration. In this regard the Union notes that the clause in total provides for a penalty for persistent violation of the standards for posting on bulletin boards. The Union contends that the procedure is worded to insure that review is made at the highest level in the school and then subsequently reviewed at a higher level within the District. Thus, the MTEA contends that the clause is analogous to the accountant's proposal found to be mandatory in Milwaukee Board I, supra. MTEA does not find the greater flexibility accorded to the District in the substitute's proposal to be a distinction of substance which would warrant a different result, and thus it urges the Commission to find the objected to lanague to be mandatory.

We concur with the MTEA that it has a legitimate and bargainable interest in assuring itself of a viable procedure for the review of disputes over postings. However, we find that this clause goes beyond protecting that interest in that it specifies the management personnel to whom such disputes will be referred. This lack of management flexibility, which is unlike the flexibility accorded the District in the substitute's proposal discussed by the parties, requires that we conclude the clause to be permissive in that it unduly interferes with management's determination as to who within its organizational structure will respond to such dispute.

(6) Part III - Section G. - Health Insurance

RESOLVED

(7) Part IV - Section A. 9.

The disputed language is as follows:

> Substitute teachers shall be called if any are available for a regular teacher absence of a half-day or more.

The District argues that inasmuch as this language prohibits it from determining that in some instances a substitute is not needed or would be detrimental to students in particular educational programs, the proposal primarily relates to educational policy determinations and thus is a permissive subject of bargaining.

The MTEA took no specific position with respect to this proposal but seeks a determination from the Commission as to whether it is mandatory or permissive.

We find our resolution of proposal (10) in Milwaukee Board II, page 42, to be dispositive of the status of this issue. In that decision we concluded that language which precludes the District from making an educational policy decision as to whether to utilize a substitute teacher rendered a proposal permissive. As this clause precludes the District from deciding not to utilize substitutes in the specified circumstances, we conclude that it is permissive. We would note, however, that the MTEA can of course propose that where substitute teachers are utilized, that they be members of the substitutes bargaining unit.

(8) Part IV - Section G.

The disputed language is as follows:

> The Board shall provide an orientation program for newly employed substitute teachers.

believe that our discussion of issue (12) in Milwaukee Board III, requires that this clause be found to be permissive in that it appears to mandate the existence of an orientation day. However, as our decision indicated, the MTEA is free to mandatorily bargain proposals that new employes be provided with information regarding job expectations and requirements and that a clause mandating such action by the Board would clearly be mandatory.

(9) Part V - Section E.

The disputed proposal is as follows:

> Service as a regular substitute teacher shall be given consideration for hiring as a regularly appointed teacher, provided service as a substitute has been satisfactory, credentials are acceptable and in order, and eligibility for appropriate certification is on file.
>
> A list of vacancies shall be posted on the office bulletin board in each school in May and December. Regular substitute teachers shall be granted an interview, upon request, to review and update their employment folder and to discuss existing job opportunities.

The District argues that the first portion of the disputed language establishes satisfactory service as a substitute teacher as one criterion for the initial hiring decisions of regular teachers. The District further argues that inasmuch as the Commission has held that the criteria for initial hiring decisions, where the selection is exclusively from among non-bargaining unit members, are permissive subjects of bargaining, Sewerage I, supra this clause is permissive. The District rejects the MTEA claim that this section somehow involves procedures for promotional opportunities inasmuch as the MTEA fails to cite any case support for its position and as all of the positions in question are not within the substitute teacher bargaining unit. The District also argues that in Oconto County, (12970) 3/75, the Commission indicated that it is only promotions within the bargaining unit over which the qualifications and procedures are mandatory subjects of bargaining.

As to the second portion of the disputed language, the District argues that it relates to procedures for the initial hiring of regular teachers in a separate bargaining unit and that the requirements that it post teacher vacancies during certain months and grant interviews to substitutes upon request, interfere with management prerogatives and are unrelated to the wages, hours or conditions of employment of the substitute teachers. The District notes that even if the vacant positions in question were within the substitute teacher bargaining unit, the decision of whether to conduct interviews among prospective candidates is in itself a management prerogative which it need not bargain over City of Waukesha (Fire Department), (17830) 5/80.

The MTEA counters by arguing that the contractual language proposed does not determine criteria for a municipal employer's initial hiring decision. It contends that the language does not require that substitute teachers be hired and that the MTEA has never filed a grievance when the District has hired new teachers when substitute teachers were interested and available in the position. MTEA argues that full time appointment as a teacher is a promotion for substitute teachers and that this largely informational clause therefore relates to conditions of employment and is a mandatory subject of bargaining.

Contrary to the MTEA's contention, the language of the first paragraph appears clearly to have at least some effect on the District's selection criteria for hiring of regular appointment teachers--positions in the separate teacher unit represented by MTEA. While the District would be free to give "service as a regular substitute teacher" great or little weight in relation to whatever other considerations it chooses to consider in such hiring decisions, the language requires that it give at least some weight to service as a regular substitute teacher.

Prior Commission cases have held that criteria for selection from among qualified applicants including one or more member of the bargaining unit in which

the vacancy to be filled occurs are mandatory subjects of bargaining. 15/ The Commission has also held that where no member of the bargaining unit is vying for promotion or transfer into the vacancy being filled, the criteria for selection among qualified applicants is a permissive subject. 16/ None of those cases determined the status of a proposal that service in another bargaining unit (or any other proposed criterion) be given consideration or weight in selection from among qualified applicants for a vacancy in a position in another bargaining unit of the municipal employer's employes.

However, in City of Sheboygan, the Commission equally held that the representative in one bargaining unit cannot mandatorily bargain selection criteria as regards filling vacancies outside that bargaining unit. 17/ We are satisfied that the Commission's decision in that regard was an appropriate application of the primary-related test.

The substantial wage, hour and condition of employment interests in advancement or change in job that warrant mandatory bargaining about promotion and transfer to a vacancy in the same bargaining unit are similar in nature though perhaps somewhat greater in degree than those at stake with respect to movement to employment in positions in another bargaining unit of the municipal employer.

The municipal employer has all of the same interests at stake in other hiring decisions, and the additional concern that it not be subjected to conflicting requirements of labor contracts covering two or more separate barganing units. In other words, the District has a critically important policy interest in maintaining the ability to avoid selecting new regular appointment teachers in a manner that would violate the terms of one or more collective bargaining agreements.

If proposals as to selection criteria for employes in a given bargaining unit were a mandatory subject of bargaining in more than one bargaining unit, the potential for mutually incompatible obligations would be squarely presented. For example, a requirement that the District be required to give at least some consideration to qualified regular substitutes in filling regular appointment teacher positions might conflict with rights of teacher unit employes or with a provision that some other bargaining unit's representative might similarly seek to mandatorily negotiate that would require the District to give 100% weighting to selection criteria excluding service in the substitute or other bargaining units of District employes in selecting among qualified applicants for regular appointment teacher positions.

On balance, the policy dimensions at stake predominate as regards the proposal that the the District give at least some consideration to service as a regular substitute in hiring regular appointment teachers. For that reason, the first paragraph is a permissive subject of bargaining.

We view the second paragraph of the proposal to amount to an effort to require the District to provide bargaining unit employes with: (1) information via posting and via a personal discussion with a District representative, and (2) an opportunity to update and complete their employment folders with the presence and assistance of a District representative upon request.

We find inapposite the District's reliance on the City of Waukesha, supra, holding that proposals that requiring the employer to include an interview as a part of its hiring process are permissive. For, the proposal at issue herein requires the "interview" not as a required step in the hiring process, but only as a means of informing its employes as to the nature of existing vacancies in regular appointment teacher positions and of making certain that the substitute's employment folder is up to date and complete. The District is not required to base its hiring in any way on the interactions that occur at such an information interview; and it is not required to hold such an interview with members of the substitute bargaining unit who do not request same or with non-members of the substitute bargaining unit, as a condition precedent to hiring such an individuals for the vacancies involved.

15/ Oconto County supra; City of Madison, (16590) 10/78.

16/ Sewerage I supra; City of Madison.

17/ See, e.g. City of Sheboygan, (19421) 3/82.

On balance, the wage, hour and condition of employment dimensions of the employes' interests in attaining employment in their profession on a regularly appointed rather than regular substitute-basis appear to us to outweigh the negligible policy dimensions involved in paragraph two of the proposal as interpreted above. Hence, paragraph two is a mandatory subject of bargaining.

(10) Part VI, Sections A., B., C.

The underlined portions of the provisions involved, which are objected to by the Board, set forth a specific procedure whereby a teacher can pursue a "complaint" regarding "any matter of dissatisfaction . . . with any aspect of his/her employment . . ." The Board asserts that as this clause allows teachers 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 VTAE, (16640-A) 9/80, aff'd in part, 109 Wis. 2d.415 (Ct. App. 1982) 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 cluase in Blackhawk VTAE, 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 VTAE, 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 substitutes 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 VTAE, 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 VTAE, 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.

(11) Appendix B. 8.

The disputed contractual language is as follows:

> The Board will attempt to obtain from traffic control authorities permission for parking during times of emergencies.

The District contends that this clause is not mandatory because it in essence requires that it ask authorities who are charged with enforcing restrictions regarding parking to refrain from enforcing same against certain District employes. It asserts that this provision relates exclusively to a public policy decision unlike those in City of Milwaukee (19091) 10/81, wherein the parking privileges at issue were within the control of the employer. The District therefore requests that the language be found to be permissive.

The MTEA submits that the language is mandatory in that it does not require that the District provide parking facilities. The MTEA argues that it simply requires that the Board attempt to obtain permission from the City to use public space as a benefit for school aides. MTEA notes that the record does not support the District's contention that parking authorities lack the discretion to grant such a request. The MTEA cites the Commission's decision in City of Milwaukee, supra, as support for its position that parking privileges are mandatory subjects of bargaining.

The record does not definitively establish whether "traffic control authorities" possess discretion to waive emergency parking procedures. If such discretion exists, the proposal is mandatory as it only obligates the District to attempt to obtain what is in essence a fringe benefit. While we cannot assume that such discretion exists, the language at issue could not reasonably be interpreted to mean that the Board is required to ask traffic officials for any more than those traffic officials have lawful authority to do. Thus, we do not view this proposal as one that requires the Board to ask traffic officials to breach the law. Hence, we find the proposal as written to relate primarily to wage, hour and condition of employment matters and hence to be a mandatory subject.

Dated at Madison, Wisconsin this 30th day of September, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Herman Torosian, Chairman

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

Gary L. Covelli, Commissioner

I have participated only as to proposals 1, 4, 7-9, and 11 and fully concur as to said proposals.

Marshall L. Gratz, Commissioner