STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of RACINE EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and RACINE UNIFIED SCHOOL DISTRICT	Case LXXVI No. 31432 DR(M)-301 Decision No. 20652-A
In the Matter of the Petition of RACINE UNIFIED SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and RACINE EDUCATION ASSOCIATION	Case LXXVII No. 31468 DR(M)-302 Decision No. 20653-A

Appearances:

Schwartz, Weber & Tofte, Attorneys and Counselors, 704 Park Avenue, Racine, Wisconsin 53403, by Mr. Robert K. Weber and Mr. Mark F. Nielsen, appearing on behalf of the Association.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701, by Mr. Jack D. Walker, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The Racine Education Association and the Racine Unified School District having, on April 11, 1983 and April 18, 1983, respectively, filed petitions with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to their duty to bargain with each other over certain matters; and the petitions having been consolidated for the purposes of hearing pursuant to ERB 10.07; and hearing on said petitions having been held in Madison, Wisconsin, on May 18 and 19, 1983, before Peter G. Davis, a member of the Commission's staff 1/; and the parties having submitted written post-hearing argument, the last of which was received on September 6, 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 Racine Unified School District, herein the District, is a municipal employer having its offices at 2220 Northwestern Avenue, Racine, Wisconsin 53404.

1/ In its September 6, 1983 brief, the District made a motion to correct transcript. The Association informed the Commission that it agrees said motion should be granted and same hereby is granted by the Commission. A corrected transcript page will be sent to the parties.

2. That the Racine Education Association, herein the Association, is a labor organization having its offices at 701 Grand Avenue, Racine, Wisconsin 53403.

3. That at all times material herein, the Association has been the exclusive collective bargaining representative of certain individuals employed by the District as teachers and related professionals; and that the District and the Association have been parties to a series of collective bargaining agreements covering the wages, hours and conditions of employment of said employes, the last of which had a term of August 25, 1979 through August 24, 1982.

4. That during collective bargaining between the parties over the terms of an agreement which would succeed their 1979-1982 contract, a dispute arose as to their duty to bargain over certain matters; that the parties were unable to resolve said dispute voluntarily and subsequently filed the petitions for declaratory ruling at issue herein; that the parties thereafter resolved the status of certain proposals which were contained in their respective petitions; but that certain proposals remain at issue.

5. That the status of the following District proposals, which are the subject of the Association's petition, remains unresolved:

ARTICLE III - TEACHER RIGHTS

. . .

(1) 6. The Association shall be informed in writing of any change in policy affecting the working conditions in order that the Association may present its views regarding any impact on working conditions of such change in policy to the Board.

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

ARTICLE VIII - STAFF UTILIZATION AND WORKING CONDITIONS

. . .

(2) 3.a. Every effort will be made to limit the teaching assignment within the teacher's area of certification and/or qualifications in subject or grade level.

. . .

(3) 4. Every teacher is professionally obligated to participate in a number of functions (such as open house) which, although not necessarily part of the regular teaching day, are expected of him/her as a professional teacher.

5. It is valuable and essential that teachers associate with children in a number of functions such as special interest clubs, dances, chaperoning children on buses, and athletic activities. Attendance shall not be required in chaperoning unless assigned on an equitable or volunteer basis.

(4) 6.a. It is recognized that an effective instructional program requires the participation of teachers in meetings and conferences outside the students day in school. The teachers regular day is deliberately kept to minimum in order to provide teachers - as professionals - with the greatest opportunity for freedom and flexibility. With this freedom and flexibility goes the responsibility of attending such meetings as conferences with parents and/or students, staffings on students, multi-disciplinary team meetings, team and unit meetings, committee meetings, and so forth.

b. Therefore to insure that educational objectives of the District are met, teachers shall, unless excused by the person calling the meeting, attend the following meetings outside their regularly scheduled day:

1. Building staff meetings called by the principals, and subject area meetings called by the Directors of Instruction shall not exceed a total of thirty-eight (38) hours per school year nor fall on Saturday or after 5:30 p.m. weekdays.

2. Special meetings called by a department head, unit leader, team leader or area coordinator.

3. Unscheduled meetings called from time to time dealing with specific issues.

. . .

(5) 9. A teacher shall receive a daily thirty (30) minute duty-free lunch period, except that the District may contract with a teacher for service during such lunch period at the rate of up to seventeen (17) cents per minute payable annually. In the event enough teachers do not contract to provide such lunchroom supervision and it is not feasible to utilize aides or to alter the school day, the building principal may assign teachers to such lunchroom duty.

. . .

(6) 11. The principal working with the teaching staff will decide whether to conduct home visits and when to schedule them.

ARTICLE XIX - FIVE YEAR CREDIT REQUIREMENT CYCLE

(7) 1. Each teacher shall be required to complete a five year credit requirement cycle by obtaining five semester hours of college credit each five years. This cycle begins on September 1st of the school year employment begins, including teachers who begin employment after September 1st. The credits must be obtained from a North Central accredited institution or from one accredited by an equivalent agency. (In meeting this requirement, a teacher may substitute eight credits earned toward Board of Education sponsored workshops and/or a combination of workshop and college credits.) Board of Education workshop credits cannot be used for placement on the salary schedule. Where a combination of credits is used, each Board of Education workshop credit, based on the presently established format, shall be equivalent to 2/3 of the acceptable college credit.

2. Failure to meet this requirement will result in a teacher's placement on the salary schedule one step below where he/she would otherwise be placed for each year he/she has been deficient in meeting the requirement. Thereafter, when the requirement is fulfilled, the teacher will regain the step placement he/she would have been on had no deficiency occurred.

ARTICLE XXI - MISCELLANEOUS

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(8) 3. Within thirty (30) days after the beginning of the school year, the Association shall notify the Superintendent in writing of the teacher's holding the positions of

building representative for the purpose of handling first level written grievances. Thereafter, the Association will inform the Superintendent in writing of any changes.

. . .

(9) 5. Under no circumstances are individual pupils to be sent on errands outside the school or released from school to an unauthorized individual.

. . .

(10) 7. A student treasury advisor shall work without additional compensation the time necessary at the close of the school session in order to properly close the account books.

6. That the status of the following Association proposals, which are the subject of the District's petition, remains unresolved:

VIII - STAFF UTILIZATION AND WORKING CONDITIONS

(1) 1.a. The parties recognize that the number of students assigned to a teacher is a matter of basic educational policy and that the District may assign any number of students it so desires to a teacher's class. The parties also recognize that the number of students assigned to a teacher directly affects the conditions of employment and workload of that teacher.

(2) b. Teachers in grades Pre-K-3 who are assigned thirty (30) or fewer students per school day, in academic subjects, shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Teachers in grades 4-5 assigned thirty-two (32) or fewer students per school day, in academic subjects, shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Teachers with the exception of department chairpersons in grades 6-12 assigned one hundred seventy-five (175) or fewer students per school day in academic subjects, or student supervision (e.g. study halls, laboratories, or other supervision) shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Teachers who are department chairpersons in grades 9-12 assigned one hundred and forty (140) or fewer students per school day in academic subjects of student supervision shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. However a department chairperson given an additional period of academic subjects or student supervision in lieu of his preparation period who has been compensated as provided elsewhere in this agreement for loss of preparation period shall be treated as a teacher in grades 7-12 for purposes of work overload compensation. Teachers in Pre-K-5 teaching split grades who are assigned eighteen (18) or fewer students per school day, in academic subjects, shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule.

c. In the event the District chooses to assign more students to a teacher per school day than the class size workloads set forth above, the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation each semester in accordance with the following rates:

1. Grades Pre-K-3: Additional compensation at the rate of two percent (2%) of the teacher's daily base salary for each student in excess of thirty (30) per school day.

2. Grades 4-5: Additional compensation at the rate of two percent (2%) of the teacher's daily base salary for each student in excess of thirty-two (32) per school day.

3. Grades 6-12: Additional compensation at the rate of two-fifths percent (0.40%) of the teacher's daily base salary for each student in excess of one hundred seventy-five (175) per school day.

4. Department Chairpersons Grades 7-12: Additional compensation at the rate of two-fifths of one percent (0.40%) of the teachers daily base salary for each student in excess of one hundred and forty (140) per school day.

5. Split-Grades Pre-K-6: Additional compensation at the rate of two percent (2%) of the teacher's daily base salary for each student in excess of eighteen (18) per school day.

d. For teachers with less than full-time contracts with the District, the class size workloads described above in paragraph b., and the additional compensation provided for in paragraph c., shall be prorated according to the precentage of a full-time contract held by such teachers.

(3) e. The provisions of subsections 8 (1)(b)(c) shall not apply to physical education, music and art, where instructional needs and/or legal requirements dictate a modification in the class size workloads referred to above.

(4) f. Teachers in arts, music and physical education who are assigned no more than the number of students per class period established as the maximum for such subject per class period under the policies of the District in effect on August 26, 1982, shall receive wage compensation in accordance with the provision of the Basic Salary Schedule.

g. In the event that the District chooses to assign more students to a teacher in art, music or physical education than the class size work load set forth above in VIII (f), the teacher so affected shall receive, as work overload compensation in addition to his/her scheduled salary, additional compensation each semester at the rate of two-fifths percent (0.40%) of the teacher's daily base salary for each student in excess of the class size overload.

h. Speech pathologists who are assigned no more than thirty (30) clients per school day on a per semester average shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Psychologists who are assigned no more than sixty-five (65) cleints per school day on a per semester average shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule.

i. In the event that the District chooses to assign more clients to a speech pathologist or a psychologist than the client load set forth above in VIII (h), the employee so affected shall receive, as client overload compensation in addition to his/her scheduled salary, additional

compensation each semester at a rate of one percent (1%) of the employee's yearly base salary for each client in excess of said client load.

j. High School Counselors who are assigned responsibility for three hundred and twenty-five (325) or fewer students per school day average on a per semester basis shall receive wage compensation in accordance with the provision of the Basic Salary Schedule. Counselors and Junior High Student Counselors who are assigned responsibility for three hundred and fifty (350) or fewer students per school day average on a per semester basis shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule.

k. In the event the District chooses to assign more students to a counselor per school day than the responsibility work loads set forth above, the counselors so affected shall receive, in addition to their scheduled salaries, additional compensation each semester in accordance with the following rates:

1. High School Counselors: Additional compensation at the rate of one quarter of one percent (0.25%) of the counselor's yearly salary for each student in excess of three hundred and twenty-five (325) per school day, average on a per semester basis.

2. Counselors and Junior High Counselors: Additional compensation at the rate of one quarter of one percent (0.25%) of the employee's yearly base salary for each student in excess of three hundred and fifty (350) students per school day averaged on a per semester basis.

l. 1. For the purpose of determining the number of students or clients assigned to an employee "per school day" or "per school day average on semester basis", the first ten (10) school days of the semester and the number of students or clients assigned to an employee during that period of time, shall be excluded from the calculation.

2. For purposes of calculating the total number of students assigned per school day to teachers in grades 6-12, the total shall be the sum of the number of students assigned per period without regard to whether the same student(s) is (are) assigned to the teacher for more than one (1) period.

3. The total additional compensation earned by an employee pursuant to subsection 8 (1) shall be separately itemized and paid at the end of each semester.

4. The workload provisions of subsections VIII (1)(b)(f)(h)(j) shall be effective with the beginning of the first semester of the 1983-84 school year.

(5) m. Every reasonable effort shall be made so that the number of students per class shall not exceed the number of pupil stations available in specialized areas, i.e., science laboratory, industrial arts, art and home economics.

. . .

(6) 3.a. No teacher may be assigned to a subject area or grade level which is outside the teacher's area of certification and/or license.

(7) b. The teacher day at the High School level shall not exceed a continuous period of seven (7) hours and twenty-one (21) minutes. The teacher day at the Junior High Level shall not exceed a continuous period of seven (7) hours and ten (10) minutes. The teacher day at the Elementary School level shall not exceed a continuous period of six (6) hours and fifty (50) minutes. The teacher day for teachers who are unassigned shall not exceed a continuous period of seven (7) hours and thirty (30) minutes with a thirty (30) minute duty-free lunch or, in the alternative, not to exceed a continuous period of eight (8) hours with a sixty (60) minute duty-free lunch. The Board shall advise the REA in writing and by posting in the individual schools, the starting time of the teacher work day at each school. Said notification and posting shall be completed by the first returning teachers day of each school year.

(8) c. 1. Teachers shall be compensated in accordance with the provisions of the Basic Salary Schedule for duties within the normal scope of teacher's employment.

2. Elementary teachers Pre-K-5 to whom the District does not provide two and one-third (2 1/3) hours of preparation time per week shall receive compensation, in addition to their scheduled salaries, as provided in Article VIII(3)(c)(5).

3. Teachers in grades 6-12 to whom the District does not provide five and one-half (5 1/2) hours of preparation time per week, shall receive compensation in addition to their scheduled salaries as provided in Article VIII(3)(c)(5).

4. Departmental Chairpersons to whom the District does not provide nine and one-half (9 1/2) hours of preparation time per week shall receive compensation, in addition to their scheduled salaries, as provided in Article VIII(3)(c)(5).

5. Teachers to whom the district does not provide the hours of preparation time specified in VIII (3)(c)(2)(3) or (4) shall receive compensation in addition to their scheduled salaries, in the amount of one-fourth (1/4) of the teacher's regular hourly pay for each such quarter hour (or any portion thereof) less than the preparation time specified.

d. As used herein, preparation time provided by the District shall not include any unassigned time after the regular teacher workday begins but before the student school day begins, or after the student school days ends but before the regular teacher workday ends.

. . .

(9) 5.a. Except as provided elsewhere in this agreement, attendance at after school day events will not be required without additional compensation. Teachers required to attend after school day events shall be compensated at the rate of $10.20 per hour for each hour or any fractional portion thereof. All work assignments scheduled for performance outside the regular teacher workday shall be considered overtime assignments. Unless compensation for such overtime assignments is provided

for elsewhere in this Agreement, teachers assigned such overtime assignments shall be compensated, in addition to their scheduled salaries, at the hourly rate as established in Professional Compensation Section 1.d, with a one (1) hour minimum payment per assignment.

. . .

Teachers may be required to attend one meeting per week on a regularly scheduled work day without additional compensation provided that proper written notice is prominently posted or individually transmitted, and the starting time for said meeting is directly contiguous to the teacher's normal work day. If the weekly meeting described herein exceeds one (1) hour in length, teachers shall be compensated at the hourly rate as established in Professional Compensation, Section 1.d., with a one (1) hour minimum payment.

(10) Teachers shall be provided with the supplies necessary to meet daily instructional needs.

. . .

SECURE STORAGE SPACE

(11) Each teacher shall be provided with a lockable storage space at his/her home building.

DRUG AND ALCOHOL ABUSE

(12) 1. Teachers on Unified School District premises are prohibited during the hours of work from the use or possession of alcohol and/or other controlled substances not prescribed by a physician.

ENTIRE AGREEMENT

. . .

(13) 3. Board decisions, rules or policies which affect the wages, hours or conditions of employment shall be transmitted to the REA in writing and the impact thereof shall be subject to negotiations between the parties at reasonable times during the term of this agreement. When said negotiations are required, this agreement shall be amended or modified to incorporate the agreement(s) reached in said negotiations.

4. If said negotiations result in an impasse, the impasse shall be resolved pursuant to provisions of section 111.70(4)(cm), Wis. Stats.

EXTRA-CURRICULAR WORK ASSIGNMENTS

(14) 1.a. All extra-curricular work assignment shall be assigned on a voluntary basis, unless the District can demonstrate that there are no reasonable alternatives available in the bargaining unit, in order to provide the extra-curricular activity, other than the involuntary assignment of the activity to an employee in the bargaining unit. The District shall make every reasonable effort to obtain qualified bargaining unit volunteers for all extra-curricular work assignment. This section shall not be interpreted to limit the District's ability to subcontract such assignments to non-bargaining unit personnel when necessary for purposes of furthering the educational policy of the District.

"Extra-curricular work assignment" as used in this Article means those responsibilities which are set forth in Article XII(6) and (11) of the parties 1979-1982 contract, the Schedule of Compensable Extra Duty Assignments agreed to by the parties on 3/2/83, and Junior High School Intramural Supervisors, the Timer and the I.B. Coordinator.

b. In the event that two or more qualified teachers apply for the same position, the assignment shall be by seniority.

c. In the event that the District, after reasonable effort, is unable to secure a qualified bargaining unit volunteer for an extra-curricular work assignment the District then may make an involuntary assignment of the extra-curricular work to a qualified bargaining unit member. All such involuntary assignments shall be to the least senior, qualified employee on the roster of employees for the extra-curricular work assignment involved; provided, that employees once assigned to an involuntary duty shall not be assigned a second time until all qualified employees have been assigned.

d. No employee shall be involuntarily assigned more than one (1) extra-curricular work assignment per year unless the District can demonstrate that there are no reasonable alternatives in the bargaining unit available in order to provide the extra-curricular activity.

e. No employee shall be assigned more than two (2) years total of involuntary extra-curricular work activity unless the District can demonstrate that there are no reasonable alternatives available in the bargaining unit in order to provide the extra-curricular activity.

2. ROSTER -- For each extra-curricular work assignment, the District shall prepare and maintain a roster of all bargaining unit employees who the District has determined are qualified to perform the work assignment. The qualification standards shall be reasonable and uniformly applied. The roster shall be updated annually. The District shall furnish a copy of the current roster to the Association and shall post the roster in a conspicuous place in each school building. Disputes over the placement of employees on the roster shall be subject to the Grievance Procedure commencing at Level III and shall be filed no later than twenty (20) days after the posting of the roster.

3.a. Within a reasonable time after the District becomes aware that a vacancy in an extra-curricular work assignment will occur, notices of vacancies will be posted on the official bulletin board in each school and sent to the Association.

b. Notices shall contain such information necessary for timely and proper application.

c. Teachers who desire a change in extra-curricular assignment may file a written statement of such desire with the Superintendent or his/her designee not later than April 1. Such statement shall include the extra-curricular assignment to which the teacher desires to be assigned.

d. On or before the last day of each school term the Executive Director of the Association shall be notified in writing of the names of all teachers who have been reassigned or transferred to new or different positions.

4. No extra-curricular work assignment may be voluntarily or involuntarily assigned by the District nor subcontracted unless the notice announcing the vacancy in that assignment has been posted for at least fifteen (15) work days. This requirement shall not be interpreted to prevent the District from immediately filling a vacant extra-curricular work assignment on a temporary emergency basis.

7. That disputed proposals 1, 4 (in part), 7, 8 and 10, as set forth in Finding of Fact 5 and disputed proposals 1 (in part), 2-4, 8-9, 11, 13 and 14 (in part) as set forth in Finding of Fact 6 are primarly related to wages, hours, and conditions of employment.

8. That disputed proposals 2, 3, 4 (in part), 6 and 9 as set forth in Finding of Fact 5 and disputed proposals 1 (in part), 5, 6, 10, 12, and 14 (in part) as set forth in Finding of Fact 6 primarly relate to the formulation or management of educational or public policy.

9. That disputed proposal 5 as set forth in Finding of Fact 5 expressly conflicts with a statutory command.

10. That as to disputed proposal 7 as set forth in Finding of Fact 6, the Commission lacks an adequate record to determine the status of said proposal.

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 7 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

2. That the proposals referenced in Finding of Fact 8 are permissive subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

3. That the proposal referenced in Finding of Fact 9 is a prohibited subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

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

DECLARATORY RULING 2/

1. That the District and the Association have a duty to bargain under Sec. 111.70(1)(d), Stats., over disputed proposals referenced in Conclusion of Law 1.

2. That the District and the Association have no duty to bargain under Sec. 111.70(1)(d), Stats., over disputed proposals referenced in Conclusions of Law 2 and 3.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

2/ (Continued on page 11)

2/ (Continued)

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

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

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

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

Before entering into specific consideration of each proposal, it is useful to set forth the general legal framework within which the issues herein must be resolved. In Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977) and City of Brookfield v. WERC, 87 Wis. 2d 819 (1979), the court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy", respectively. The court also concluded that the impact of the formulation or management of public policy upon wages, hours and conditions of employment is also a mandatory subject of bargaining. When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express statutory command, the court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will it be found to be a prohibited subject of bargaining. Board of Education v. WERB, 52 Wis. 2d 625 (1971); WERC v. Teamsters Local No. 563, 75 Wis. 2d 602 (1977). Otherwise mandatory proposals which limit but do not eliminate statutory powers remain mandatory subjects. Glendale Professional Policeman's Association v. City of Glendale, 83 Wis. 2d 90 (1978); Professional Police Association v. Dane County, 106 Wis. 2d 303 (1982); Fortney v. School District of West Salem, 108 Wis. 2d 169 (1982).

The District argues that when utilizing the foregoing framework the Commission should be aware of court's admonition in Beloit that the employer need not bargain over union attempts to control policy by indirection or pretext. In that regard the District cites the following discussion from Beloit:

> The difficulty encountered in interpreting and applying sec. 111.70(1)(d), Stats., is that many subject areas relate to "wages, hours and conditions of employment," but not only to such area of concern. Many such subjects also have a relatedness to matters of educational policy and school management and operation. What then is the result if a matter involving "wages, hours and conditions of employment" also relates to educational policy or school administration? An illustration is the matter of classroom size, subsequently discussed. The number of pupils in a classroom has an obvious relatedness to a "condition of employment" for the teacher in such classroom. But the question of optimum classroom size can also be a matter of educational policy. And if a demand for lowered classroom size were to require the construction of a new school building for the reduced-in-size classes, relatedness to management and direction of the school system is obvious. Would such required result of a new building not be a matter on which groups involved, beyond school board and teachers' association, are entitled to have their say and input?

Citing the foregoing language, the District argues that the court in Beloit would not have permitted a union to force building of new schools by requiring bargaining over monetary impact or penalty clauses which, if payable to teachers, would exceed the price of a school building. The District asserts that in Beloit the court was already guarding against union's crowding out other interests based merely on the pretext of a relationship to employment conditions. The District contends that under Beloit, a union must prove that its proposal primarily relates to wages, hours and conditions of employment and that such a relationship cannot be assumed. Thus, when the Commission examines the Association's "impact" proposals, the District asserts that the Commission must require that the Association prove that there is, in fact, an impact upon wages, hours and conditions of employment and further that their "penalty" is material to the claimed impact.

The District also notes that when Beloit was decided, interest arbitration provided now by Sec. 111.70(4)(cm), Stats., did not exist. Thus, the District argues that the content of a bargaining agreement was then established through collective bargaining and that "the elected employer had the right to say no." The District believes that that right was significant to the court in Beloit and quotes the following language in support of that assertion:

> "The school calendar and in-service days are subject to negotiation with the bargaining agent under sec. 111.70(2), Stats." Given this applicable ruling by this court, we affirm the trial court holding that, while the school board cannot be required to agree or concede to an association demand as to calendar days, it is required to meet, confer and bargain as to any calendaring proposal that is primarily related to "wages, hours and conditions of employment." (footnote omitted, emphasis added)

In contrast, the District contends that the elected employer can no longer say no when confronted with interest arbitration. The District argues that the interest arbitration statute possibly intends, and certainly produces, the result that a union may leave an irrational proposal in an offer because said proposal will become part of the new agreement if the Union's final offer is selected. Therefore, even assuming all interest arbitrators can detect irrational proposals on any issue, the District alleges that there is no protection for educational policy in the interest arbitration process. The District therefore asserts that such protection must come from the Commission. In that regard the District argues that the concern of the court in Beloit with the employer's right to say no, when combined with the concern of the legislature in prohibiting non-mandatory subjects from being included in final offers, demonstrate that greater attention should now be paid to whether a proposal is mandatory. The District thus contends that the Commission should not assume that class size has an impact upon wages, hours and conditions of employment or that an impact proposal is necessarily primarily related to conditions of employment rather than educational policy. The District argues that there should be a preponderance of the evidence on the record as a whole to support such conclusions. The District asserts that the Commission is the only agency with authority to take the close look which good policy requires, and that the Commission should not pass these threats to educational policy on to interest arbitrators by lightly dismissing them as mandatory but arguably unreasonable proposals.

If the Commission were, on a case by case basis, to require substantial proof of an "actual impact" and further proof of a substantial relationship between that impact and the monetary "penalty" proposal of the Union, the District contends that there would be no flood of case by case declaratory rulings. It believes that this is so because before interest arbitration, no unions seriously pursued penalty proposals like the Associations. Under collective bargaining, the District asserts that a union would not hold up a bona fide settlement merely to have the unilateral control over the school day, class size, school professional meetings or other matters which the Association seeks to acquire with its "impact" proposals herein. The District contends that under interest arbitration, no union would long hold up a bona fide settlement for these purposes, if that union first had to prove "impact" and then had to demonstrate a substantial relationship between its proposal and that "impact". The District argues that a ruling favorable to it on the impact proposals presented by the Association herein would establish the foregoing assertions and would allow interest arbitration to focus on discerning the proper professional salary to be paid for the performance of a professional job.

The District also directs the Commission's attention to the arguments made on behalf of the School District of Janesville in DR(M)-276, which is part of the record herein by stipulation of the parties. In the Janesville case, the employer argued that an impact proposal becomes mandatory only where the school district changes an existing policy and the union demonstrates that: (1) the change has an actual impact on the workload of a teacher; (2) there is a primary correlation between that impact and the specific proposal; and (3) the impact predominates over the educational policy involved.

Our analysis of the monetary impact proposals at issue herein (Association proposals (1-4) setting forth the compensation receivable for varying student loads; Association proposal (8) specifying the compensation receivable for varying amounts of weekly preparation time; and Association proposal (9) establishing a compensation level for time worked outside the regular teacher workday) differs from that proferred by the District. We initially conclude that, in general, proposals which specify varying wage levels for teachers and related professionals who, if ever, perform different types and amounts of work are primarily related to wages. Although the Association's compensation proposals differ from the traditional forms for setting teacher wages, they are nonetheless merely a method for determining the compensation level to be received by an employe.

Equally unpersuasive is the District's argument that compensation proposals such as the Association's are nonetheless permissive because, despite their wage relationship, they serve to inhibit the District from making educational policy choices which will increase compensation levels. Even the most basic of wage proposals--base salary for teachers, for instance--if increased enough would probably cause a District to decide to reduce the size of its employe complement and the level of its services to the public. The statutory scheme leaves judgments as to the reasonableness of proposals for compensation in the form of base salary increases to be resolved at the bargaining table and, if necessary, through the mediation-arbitration process, in light of a variety of factors including the impact which implementation of the proposal would have on the welfare of the public and the District's ability to pay. See Sec. 111.70(4)(cm)7.c., Stats. Thus, arguments about the impact of a proposed increase in base teacher salary on District level of services decision-making go to the merits of the proposal and not to whether the proposal is a mandatory or permissive subject of bargaining. Similarly, the numerous District arguments herein concerning the potential impact of Association compensation proposals tied to District decisions regarding class size, preparation time, etc., go to the merits of the proposed compensation rather than to the mandatory or permissve subject nature of the compensation proposals involved. District concerns as to whether the levels of compensation specified in the proposals are warranted because teachers may not be working harder or may not be exerting sufficient additional effort to justify the additional compensation are appropriate for discussion at the bargaining table or before a mediator-arbitrator. They are not relevant when determining whether a proposal is mandatory or permissive. We do not find Beloit or any other existing Commission or court decision to be contrary to our conclusion in this regard.

Additional discussion of the parties' arguments and our analysis as to the compensation proposals is set forth elsewhere in this decision.

As to the District's assertions that the presence of binding arbitration under Sec. 111.70(4)(cm)6, Stats., yields some alteration of the standards by which proposals are adjudged mandatory or permissive, we reject same. Our review of the court's holdings in Brookfield, Glendale, Dane County, and Blackhawk Teachers' Federation v. WERC, 109 Wis. 2d 415 (Ct. App. 1982), all of which involved collective bargaining relationships where access to binding arbitration was available under Secs. 111.77 or 111.70(4)(cm)6, Stats., yields no indication of any judicial inclination to have differing standards depending upon the availability of interest arbitration. In that regard, we also note that the Legislature carried forward the definition of the scope of collective bargaining in Sec. 111.70(1)(d), Stats., unchanged when it introduced final offer municipal interest arbitration and mediation-arbitration.

The District's Proposals:

ARTICLE III - TEACHER RIGHTS

(1) The disputed language is as follows:

. . .

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

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

The Association argues that Sections 6 and 7 of Article III are "meet and confer" clauses which, standing alone, could be construed as being advantageous to employes of the District. However, the Association contends that within the historical context of Association-District relationship, the provisions have proved harmful to the process of collective bargaining. The Association asserts that this harmful impact, when coupled with the fact that it is the Association which is objecting to facially helpful language, should raise a "red flag" for the Commission as to the true nature of the clause.

The Association asserts that the District has continually used language similar to that at issue herein to support arguments that the Association has waived its right to bargain over certain unilateral District actions. Although the Association notes that the scope of any such waiver was restricted by the Commission in Racine Unified School District, 19980-B, 19981-B (1/83), it nonetheless argues that even a "limited waiver" provision must be found to be permissive. In that regard the Association notes that in the private sector, interest arbitration clauses have been found to be permissive inasmuch as they vest a party's right to bargain in a third party arbitrator. Given the presence of compulsory interest arbitration under Sec. 111.70(4)(cm), Stats., the Association contends that the private sector analogy should be utilized when resolving the dispute herein. The Association also contends that this clause would curtail the Association's right to effectively bargain over unilateral changes during contract negotiations, because the Association would have to bargain mid-term to avoid the claim of a waiver.

The Association asserts that it was only through a mediator-arbitrator's award that language such as that in dispute herein was originally placed in the parties' contract, and that the final offer all or nothing approach makes it difficult for the Association to remove such a clause even though an arbitrator might find the clause, when viewed in isolation, to be unreasonable.

The District argues that its modified waiver clause is a mandatory subject of bargaining. It notes that the status of the parties' waiver clause as contained in the expired agreement was litigated in Racine Unified School District, supra, and believes that it has modified the earlier clause to meet the objections expressed by the Commission in that case. The District asserts that if this modified language were placed in the parties' contract, the District would, of course, continue to argue that it is an effective waiver clause. The District asserts that under Commission decisions, the scope of that waiver would continue to be policed by the Commission on a case-by-case basis.

In Racine Unified School District, supra, the Commission was asked to determine whether the following language was mandatory or permissive:

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

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

The Commission found the foregoing language to be permissive for the following reasons:

> Contrary to the contention of the Association, the Commission's decision in Deerfield does not support a conclusion that Article III, Sections 6 and 7 are permissive subjects. The language at issue herein does not require a waiver of bargaining on subjects relating to wages, hours, or conditions of employment which "may not have been within the

knowledge and contemplation of either or both of the parties" at the time of entering into an agreement, which was the case in Deerfield.

> Article III, Section 6 provides that the Association shall be informed of any "contemplated" changes in policy which affect working conditions in order that the Association may present its views to the Board. The changes in policy referred to in this clause include changes in educational policy which affect working conditions. 13/ Since the establishment of an educational policy is clearly a permissive subject of bargaining, 14/ it follows that a proposal requiring input by the Association as to the policy, prior to any changes thereof, would also constitute a permissive subject of bargaining.
>
> Article III, Section 7 provides that the Superintendent will meet and confer with the Association's representatives prior to a change in policy that has a substantial effect on the wages, hours and conditions of employment of teachers. Again, the policy referred to here is educational policy, a change in which has a substantial impact on the wages, hours and conditions of employment of bargaining unit employes. An employer has a duty to bargain with the representative of its employes with respect to the impact of a change in policy on wages, hours and conditions of employment during the term of an existing collective bargaining agreement, unless bargaining thereon has been clearly and unmistakably waived. 15/ However, the employer can determine to change educational policy, which is a permissive subject of bargaining, before being required to bargain over the impact of the change upon wages, hours, and conditions of employment. 16/ Inasmuch as Article III, Section 7 requires the parties to meet and confer prior to a change in educational policy, and, as the District cannot be required to do so, the provision is permissive. This does not mean that the Association does not have the right to obtain notice of any change in policy that may impact on wages, hours and working conditions once the actual decision is made, which may be either before or after the implemen tation of the decision, in order to bargain on the impact thereof. (Footnotes omitted)

The District has now modified Section 6 so as to clearly specify that the Association's right to "present its views" refers only to the impact on working conditions created by a policy change. Section 7 has been modified to eliminate the requirement that "the expression of views" occurs prior to the policy change. By making these changes, the District has dealt with the specific objections cited by the Commission when finding the prior language to be permissive, and we find it mandatory as so modified. We reiterate our prior conclusion that, in our view, this provision does not constitute a waiver of matters which "may not have been within the knowledge and contemplation of either or both the parties."

ARTICLE VIII - STAFF UTILIZATION AND WORKING CONDITIONS

(2) The disputed proposal is as follows:

> 3.a. Every effort will be made to limit the teaching assignment within the teacher's area of certification and/or qualifications in subject or grade level.

The Association asserts that the above language is a prohibited subject of bargaining. It contends that statutory provisions applicable to districts which receive State aid require that teachers possess the proper qualifications and license or certificate before entering into a teaching assignment. It argues that such a requirement is absolute and compulsory and is clearly applicable to the District herein inasmuch as the District received State aids in 1982-1983 and presumably will do so in 1983-1984. The Association therefore argues that the District's proposal has been superceded by conflicting State law and that the District is attempting to gain an escape clause so that it can ease problems created by a District-wide reorganization plan. Finally, the Association notes

that both parties' final offers contain a savings clause whereby it is agreed that contractual provisions are subject to amendment when they conflict with State law.

The District asserts that its proposal is probably non-mandatory.

Initially we note that we have no evidence in the record as to whether the District did, in fact, receive State aid during the years cited by the Association. Furthermore, we conclude that the issue of the District's compliance or lack thereof with State aid requirements during those years is not one which impacts upon the status of the proposal in question. However, it is clear that pertinent statutory provisions do mandate the employment of teachers who are properly "qualified" and certified or licensed. Section 118.19(1), Stats., specifies that "any person seeking to teach in a public school or in a school or institution operated by a county or the state shall first procure a certificate or license from the department". Section 118.21(1), Stats., specifies that "the school board shall contract in writing with qualified teachers" and that "a teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void". Thus it is clear that the public policy of the State of Wisconsin is "that teachers must be qualified in the areas in which they teach", Grams v. Melrose-Mindoro Jt. School District No. 1, 78 Wis. 2nd 569, 576 (1977). However, it is also true that pursuant to Sec. 115.28(7), Stats., the State Superintendent of Schools possesses the statutory authority to make rules regarding the qualifications and certification or license to be possessed by teachers. Those rules establish various forms of licenses including "special licenses" which permit temporary employment of a teacher who does not meet the legal requirements for the teaching assignment, Wis. Adm. Code PI3.03 (4)(a). Thus, a district can, in certain limited circumstances, utilize teachers in assignments for which they are not "qualified" by subject or grade level.

If the District's proposal were to be interpreted as allowing the assignment of teachers to positions in violation of the statutes and administrative rules, we would agree with the Association's contention that the clause is a prohibited subject of bargaining because it would, in fact, conflict with the aforementioned mandate against such assignments. However, such an interpretation is not warranted. Instead, we believe that this clause is an attempt to both recognize the general prohibition which the law establishes against such assignments as well as the limited exceptions allowed by the law. Such an interpretation is both reasonable and meets our statutory obligation to attempt to harmonize proposals made pursuant to Sec. 111.70, Stats., with potentially conflicting statutory provisions. Thus, we do not find the proposal to be a prohibited subject of bargaining because it does not conflict with an express command of law. There remains the issue of whether the clause is mandatory.

In Blackhawk, supra, the court concluded that the bargaining table is a proper forum for employes to seek protection from discipline when exercising constitutional rights. The court thus found a proposal which sought to establish such protection to be a mandatory subject of bargaining because of its substantial impact upon employe conditions of employment (i.e. discipline). We have followed that holding when concluding that proposals requiring compliance with DPI class size regulations and with statutory procedures relating to compensation were mandatory subjects of bargaining. Milwaukee Board of School Directors, 20093-A (2/83) p. 64; Milwaukee Board of School Directors, 20979 (9/83) p. 10. In those instances, the impact upon employes' working conditions and wages, respectively, predominated over any policy choice implications because the law established the only policy choice available to an employer in those areas. Here, the proposal appears to seek compliance with pertinent statutory provisions and administrative rules which impact upon employe working condition concerns such as the job security implications of teaching a subject for which one is not "qualified". But for the presence of a legally mandated policy choice as to the assignments which may statutorily be given to a teacher, this working condition impact would clash with and fail to predominate over employer prerogatives to assign duties fairly within the scope of a teacher's responsibilities. No such clash and resultant balancing of impacts is present here because the legislature has spoken on the subject. Given the impact upon employe working conditions and the absence of any impact upon countervailing policy choices, we conclude that this proposal would be a mandatory subject of bargaining if it were worded either to mandate compliance with the statutory provisions and administrative rules or to make clear that it would be effective only so long as its requirements remained identical to those in the applicable statutes and administrative rules. However, as written it does not require compliance with sufficient specificity to be found mandatory.

(3) The disputed language is as follows:

> 4. Every teacher is professionally obligated to participate in a number of functions (such as open house) which, although not necessarily part of the regular teaching day, are expected of him/her as a professional teacher.
>
> 5. It is valuable and essential that teachers associate with children in a number of functions such as special interest clubs, dances, chaperoning children on buses, and athletic activities. Attendance shall not be required in chaperoning unless assigned on an equitable or volunteer basis.

The Association contends that the District's proposal is a permissive and/or prohibited subject of bargaining. It argues that to the extent that the duties covered by the language in question are fairly within the scope of a teacher's responsibilities, the Commission has held in City of Wauwatosa, 15917 (11/77) that a proposal regarding the assignment of such duties is a permissive subject of bargaining. The Association also argues that the language utilized in the proposal is so broad that it could be interpreted as encompassing requirements that teachers participate in activities which would infringe upon their constitutional rights to refrain therefrom. In this regard the Association notes that attendance at religious events or participation in community or charitable activities have traditionally been seen as part of the image of moral leadership "expected" of teachers. This imposition upon life-style choices of employes renders the clause a prohibited subject of bargaining.

The District contends that the functions referenced in the proposal are clearly within a teacher's job description and therefore submits that the proposal may not be mandatory.

The Commission agrees with the Association's contention that certain of the functions and responsibilities referenced in the disputed proposal are fairly within the scope of a teacher's responsibilities. To that extent, we find that the proposal is permissive in that an employer need not bargain over its authority or lack thereof to assign such duties and responsibilities to an employe. City of Wauwatosa, supra; Milwaukee Board of School Directors, 15917 (11/77). As we do not believe that the clause can reasonably be interpreted as infringing upon teachers' constitutional rights, we conclude that it is not a prohibited subject of bargaining.

(4) The disputed proposal is as follows:

> 6.a. It is recognized that an effective instructional program requires the participation of teachers in meetings and conferences outside the students day in school. The teachers regular day is deliberately kept to minimum in order to provide teachers - as professionals - with the greatest opportunity for freedom and flexibility. With this freedom and flexibility goes the responsibility of attending such meetings as conferences with parents and/or students, staffings on students, multi-disciplinary team meetings, team and unit meetings, committee meetings, and so forth.
>
> b. Therefore to insure that educational objectives of the District are met, teachers shall, unless excused by the person calling the meeting, attend the following meetings outside their regularly scheduled day:
>
> 1. Building staff meetings called by the principals, and subject area meetings called by the Directors of Instruction shall not exceed a total of thirty-eight (38) hours per school year nor fall on Saturday or after 5:30 p.m. weekdays.
>
> 2. Special meetings called by a department head, unit leader, team leader or area coordinator.

3. Unscheduled meetings called from time to time dealing with specific issues.

The Association contends that the proposal is a permissive subject of bargaining. It asserts that Section 6.a. is at best mere surplusage and thus cannot be deemed to primarily relate to wages, hours and conditions of employment. As to Section 6.b., the Association argues that the clause purports to limit the District's ability to require its employes to perform work necessary to the implementation of its educational program outside the regular workday and thus is permissive under the Commission's decision in Milwaukee Board of School Directors, 17504 (12/77). The Association also notes that Section 6.b. is permissive because it contains no limitation upon the length or timing of such meetings.

The District contends that the functions covered by this proposal are clearly within a teacher's job description and therefore submits that the proposal may well not be mandatory.

In Milwaukee Board of School Directors, 17504 (12/79), the Commission made the following comments as to a proposal which would preclude the assignment of work necessary to the implementation of educational programs outside the regular workday:

> We find this proposal, as written, to be a permissive subject of bargaining. We do so because the proposal here places an absolute ban on the Board's ability to require its employes to perform work necessary to the implementation of its educational program outside the regular workday.
>
> MTEA's reliance on our decision in the Wauwatosa case is misplaced. In that case we held that a proposal which limited the performance of routine work (non-emergency work other than fire fighting) to the first eight hours of a fire fighters's twenty-four hour shift was a mandatory subject of bargaining. We compared such a proposal to a proposal limiting the amount of time during a scheduled shift that active work can be required, i.e. before paid breaks and rest periods will take place. We acknowledged that such proposal, like a proposal to substantially increase wages, indisputably placed a burden on the employer's ability to provide public services and that such fact went to the merits rather than the bargainability of the proposal. However, we did not find that the proposal would effectively prevent the employer from providing public services.
>
> On the other hand, in that same case we found that two other proposals would have had such an effect and were, therefore, permissive subjects of bargaining. First of all, we found that a proposal which limited home inspections to the hours after 10:00 a.m. and before 4:00 p.m. and prohibited such inspection on Sundays and/or holidays directly affected the type and level of services to be provided the community. Similarly, a majority of the Commission found that a proposal which would have banned all routine (non-emergency or fire-fighting) work on holidays was a permissive subject of bargaining since it would have effectively prevented the employer from assigning any duties which are a necessary concomitant of its firefighting function on such days. 11/

11/ The dissenting Commissioner in that case focused on the view that this was a benefit in lieu of time off and indicated that he would have agreed with the majority if he believed that the proposal would have prevented the employer from accomplishing its basic fire-fighting mission.

> Here, contrary to the assertions of MTEA, the proposal would effectively prevent the employer from scheduling various functions important to its educational program outside the normal workday. The fact that the Board may have scheduled parent-teacher conferences during the day in the past, like the fact that the employer in the Wauwatosa case had previously scheduled home inspections during the hours proposed, does not alter the fact that this proposal would effectively preclude a policy choice to change that practice. Nor are we persuaded by MTEA's contentions that this proposal would not have the effect of preventing the scheduling of activities outside the regular school day. Its proposal, B/147, does not directly address the question of whether the employer may require the performance of extracurricular activities outside the regular workday. Furthermore, that proposal, as interpreted by MTEA, like MTEA's proposal, 1/54, dealing with assignments to "commencement" and "necessary supervision" would be contradicted by the working of the proposal here and could be withdrawn if this proposal were found to be a mandatory subject of bargaining. Finally, the existing contract language in Appendix K deals with only one circumstance where the Board might reasonably require the attendance of teachers to meet its obligations to the public and, like the two proposals discussed above, is not part of the disputed proposal so that it might be considered together with the disputed proposal.

We initially note that the unique positions of the parties taken as to this issue place the Commission in the posture of ruling on whether an employer proposal is permissive because it unduly restricts the employer's ability to insure that teachers will be available for certain educationally related duties. We conclude that 6(a) and 6(b)2 and 3 are permissive because the language therein primarily relates to educational policy decisions regarding the assignment of duties which are fairly within the scope of a teacher's responsibilities. Any interpretative role this language may have (see our discussion of Association proposal 1) is outweighed by these educational policy dimensions. Section 6(b)1 represents a limitation upon the scheduling and cumulative length of certain meetings which are fairly within the scope of a teacher's responsibilities. In Milwaukee Board of School Directors, 17504 (12/79) we found a proposal which prohibited the assignment of duties to teachers outside the regular workday to be permissive because an absolute prohibition would "effectively prevent" the District from scheduling functions important to its educational program. Here, the Association has not demonstrated through record evidence (and, indeed the District has not argued) that the consequences of the instant proposal's limitations on the instant District would unduly limit the District's ability to require its employes to perform work necessary to the implementation of its educational program outside the regular workday. Since the proposal has a direct relationship to employe hours, and since no impermissible impact on educational program has been demonstrated by the Association, we conclude that in the context of the instant record, Section 6(b)(1) of the instant proposal is a mandatory subject of bargaining.

(5) The disputed language is as follows:

> 9. A teacher shall receive a daily thirty (30) minute duty-free lunch period, except that the District may contract with a teacher for service during such lunch period at the rate of up to seventeen (17) cents per minute payable annually. In the event enough teachers do not contract to provide such lunchroom supervision and it is not feasible to utilize aides or to alter the school day, the building principal may assign teachers to such lunchroom duty.

The Association contends that this proposal is a prohibited subject of bargaining in that it forces teachers to give up their statutory right to a duty-free lunch period as provided by Sec. 118.235, Stats.

The District concedes that the proposal may be non-mandatory.

Sec. 118.235, Stats., provides for the following:

> Every school board shall grant daily a duty-free lunch period to each of its teachers, except that a school district may contract with any teacher employed by it for services during such period. Such period shall be not less than 30 minutes and shall be provided at or near the time of the regular school lunch period.

The proposal in question roughly parallels this statutory language except that it gives the District the option of involuntarily assigning teachers to lunchroom duty. Such an assignment would directly conflict with that teachers' statutory right to a duty-free lunch period and therefore we agree with the Association that the proposal is a prohibited subject of bargaining.

(6) The disputed proposal is as follows:

> 11. The principal working with the teaching staff will decide whether to conduct home visits and when to schedule them.

The Association contends initially that this provision is difficult to address insofar as it is not clear whether home visits are part of the teachers workday or whether they are after hours or extra-curricular duty assignments. Assuming arguendo that the visits are part of the teacher's regular workday, the Association argues that the proposal is permissive under Oak Creek-Franklin Jt. City School District No. 1, 11827-B (9/74), aff'd Dane County Circuit Court (11/75), and Milwaukee Board of School Directors, 20093-A (2/83), wherein the Commission stated that allocation of the teachers' workday was a permissive subject of bargaining. The Association also contends that under Milwaukee Board of School Directors, supra, the District has an absolute right to determine the level of services to be provided. The Association concludes by noting that the language is of no practical use to it.

The District concedes that the proposal may be non-mandatory.

The term "home visit" as utilized in the District's proposal refers to visits which may be made to the home of a student to assist the District in assessing that student's educational needs. As this proposal would involve bargaining unit members in the determination as to whether such a visit should be conducted and as this decision relates to the manner in which educational services are provided to students, we conclude that this clause is permissive.

ARTICLE XIX - FIVE YEAR CREDIT REQUIREMENT CYCLE

(7) The disputed language is as follows:

> 1. Each teacher shall be required to complete a five year credit requirement cycle by obtaining five semester hours of college credit each five years. This cycle begins on September 1st of the school year employment begins, including teachers who begin employment after September 1st. The credits must be obtained from a North Central accredited institution or from one accredited by an equivalent agency. (In meeting this requirement, a teacher may substitute eight credits earned toward Board of Education sponsored workshops and/or a combination of workshop and college credits.) Board of Education workshop credits cannot be used for placement on the salary schedule. Where a combination of credits is used, each Board of Education workshop credit, based on the presently established format, shall be equivalent to 2/3 of the acceptable college credit.
>
> 2. Failure to meet this requirement will result in a teacher's placement on the salary schedule one step below where he/she would otherwise be placed for each year he/she has been deficient in meeting the requirement. Thereafter, when the requirement is fulfilled, the

teacher will regain the step placement he/she would have been on had no deficiency occurred.

The Association contends that Article XIX, Section 1, can be viewed from two perspectives. It argues that the continuing education requirement can first be viewed as a choice by the District to require that teachers continue their education and to establish a minimum level of continued education which is acceptable. Such a requirement is related to the District's decision that employes should be prevented from becoming intellectually stale and should remain acquainted with modern teaching methods. From that perspective, the language requirement goes directly to the quality and level of educational services being provided by the District, subjects over which the District need not bargain. The Association therefore asserts that the language is permissive.

The Association also asserts that viewed from a second perspective, the language can be seen as governing the continuing educational requirements of bargaining unit members. The Association notes that pursuant to Sec. 115.28(7), Stats., the Superintendent of Public Instruction may establish rules as to standards for the attainment of a teaching license. Citing Wis. Adm. Code PI3.03(2)(b), the Association notes that the Superintendent has exercised this power and promulgated rules which determine that certain teachers who possess lifetime licenses need not meet any continuing education requirements while others holding renewable licenses are required to meet more stringent education requirements that those proposed by the District herein. By requiring that lifetime license holders continue to acquire education and by requiring that renewable license holders meet continuing education requirements which are less stringent than those established by the Superintendent, the Association argues that the District's proposal invades the jurisdiction of the Superintendent. The Association believes that the proposal is therefore contrary to law and should be found to be a prohibited subject of bargaining.

Turning to Article XIX, Section 2, the Association argues that if the Commission finds Article XIX, Section 1, permissive or prohibited, Section 2 then becomes surplusage. The Association further argues that by establishing a penalty for those who fail to meet the continuing education requirement, Section 2 invades an area already governed by the Department of Public Instruction rules which designate that the penalty for failing to meet such requirements is non-renewal. As the District has not been delegated any authority to impose additional sanctions, the Association argues that this language is also a prohibited subject of bargaining.

The District contends that it may be that qualifications it may require of teachers from time to time are non-mandatory subjects of bargaining. The District has no other argument to make as to the status of the proposal.

We do not see Article XIX, Section 1, as having any direct relationship to the continuing education requirements which may be imposed upon certain teachers by the Department of Public Instruction. While it may be that certain credits earned under this proposal would be applicable to meeting any Department of Public Instruction requirement, we view this proposal as an effort by the District to establish a monetary incentive for teachers to continue their education. Thus, the proposal clearly is not a prohibited subject of bargaining.

When determining the mandatory/permissive status of the proposal, we must view the disputed language as a whole. As noted above, the language creates an incentive for teachers to continue their education. Teachers who chose not to do so suffer loss of compensation. While we agree with the District and the Association that certain types of credit requirements may, under certain circumstances, be permissive subjects of bargaining, we conclude that in the context of this record this proposal is not such a permissive requirement. As it is optional for teachers to meet the credit standard specified in the proposal, we do not believe that the proposal rises to the level of an educational policy determination. Instead, the proposal simply establishes different compensation levels for employes with different educational attainments. In this regard, it is akin to the "educational lane" portion of the salary schedule commonly found in teacher collective bargaining agreements in Wisconsin. Given this relationship to compensation, we find the proposal to be a mandatory subject of bargaining.

ARTICLE XXI - MISCELLANEOUS

(8) The disputed proposal is as follows:

> 3. Within thirty (30) days after the beginning of the school year, the Association shall notify the Superintendent in writing of the teacher's holding the positions of building representative for the purpose of handling first level written grievances. Thereafter, the Association will inform the Superintendent in writing of any changes.

The Association contends that this proposal purports to limit the options available to the Association when handling first level grievances. It asserts that the District is attempting to limit the right of the Union to use any reasonable system of representing employes at the first level. It argues that the proposal would require that building representatives hold office on a continuous basis or indeed that the building representative system be used at all. As the Association may well wish to handle grievances in a manner different than that specified in this proposal, the Association asserts that the proposal is permissive. In addition, the Association argues that the thirty day requirement for notification of building representatives serves to limit the internal process by which a representative may be designated. Asserting that the selection of Union representatives, their tenure, qualifications and jurisdiction are internal Union matters, and that the proposal bears no relationship to wages, hours and conditions of employment, the Association asserts that it should be found to be a permissive subject of bargaining. In support thereof it cites NLRB v. Wooster Division of Borg-Warner, Corp., 356 U.S. 342 (1957); NLRB v. Superior Fireproof Door and Sash Company, 289 F. 2d 713 (CA2, 1961).

The District contends that the proposal does not limit the Association's ability to appoint any agent it wants. The District asserts that the proposal merely requires that the Union tell it who the agents are. Since it has a duty to deal with those agents, the District argues that it is a mandatory subject of bargaining for the District to require that it be so notified. The District further denies that its proposal mandates that the agent remain constant during the term of the contract. It contends that the proposal only requires that the Association identify a new agent if a change is made.

We concur with the District's argument that this proposal only requires that the Association inform the District as to the identity of the Association representatives who will be handling grievances on behalf of the Association. Therefore, we reject the Association's contentions as to the manner in which the proposal interferes with its internal process and find the clause to be mandatory given its legitmate and mandatorily bargainable relationship to the parties' right to obtain the identity of those authorized representatives with whom they will meet for the purposes of resolving disputes.

(9) The disputed language is as follows:

> 5. Under no circumstances are individual pupils to be sent on errands outside the school or released from school to an unauthorized individual.

The Association contends that this proposal is permissive in that it primarily relates to the District's concern as to liability for student injuries occurring outside of school during the school day. The Association argues that it is also a policy statement as to the conditions under which students will be released from school during the day. The Association argues that the proposal has no relationship to wages, hours and conditions of employment and asserts that, in any event, teachers lack the statutory power to release a student from school during the school day without the permission of the District.

The District concedes that the proposal is non-mandatory.

We concur with the parties' assessment that the proposal in question represents a policy judgment as to the manner in which students are controlled during the school day and bears no significant relationship to wages, hours and conditions of employment. Thus it is found to be a permissive subject of bargaining.

(10) The disputed language is as follows:

> 7. A student treasury advisor shall work without additional compensation the time necessary at the close of the school session in order to properly close the account books.

The Association contends that the proposal is permissive as it involves utilization of the teacher workday and constitutes bargaining over duties which are fairly within the scope of a teachers responsibilities. Milwaukee Board of School Directors, 20093-A (2/83); Milwaukee Sewerage Commission, 17025 (5/79).

The District asserts that it does not need to bargain about the subject of the student treasury advisor's duties but wishes the Commission to confirm that it need not bargain over this proposal.

Contrary to the parties' contentions, the Commission views the disputed language as constituting a proposal as to the compensation which will be received by a teacher who performs the duty described therein. The sentence must be viewed as a whole, and while, if the last portion is read in isolation, it could be viewed as describing a job function, it is also clear from the totality of the language that the portion to which the Association objects merely defines the work which will be performed without compensation. Thus we find the clause to be mandatory.

The Association's Proposals:

(1) - (4) The disputed proposals are as follows:

VIII - STAFF UTILIZATION AND WORKING CONDITIONS

(1) 1.a. The parties recognize that the number of students assigned to a teacher is a matter of basic educational policy and that the District may assign any number of students it so desires to a teacher's class. The parties also recognize that the number of students assigned to a teacher directly affects the conditions of employment and workload of that teacher.

(2) b. Teachers in grades Pre-K-3 who are assigned thirty (30) or fewer students per school day, in academic subjects, shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Teachers in grades 4-5 assigned thirty-two (32) or fewer students per school day, in academic subjects, shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Teachers with the exception of department chairpersons in grades 6-12 assigned one hundred seventy-five (175) or fewer students per school day in academic subjects, or student supervision (e.g. study halls, laboratories, or other supervision) shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Teachers who are department chairpersons in grades 9-12 assigned one hundred and forty (140) or fewer students per school day in academic subjects of student supervision shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. However a department chairperson given an additional period of academic subjects or student supervision in lieu of his preparation period who has been compensated as provided elsewhere in this agreement for loss of preparation period shall be treated as a teacher in grades 7-12 for purposes of work overload compensation. Teachers in Pre-K-5 teaching split grades who are assigned eighteen (18) or fewer students per school day, in academic subjects, shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule.

c. In the event the District chooses to assign more students to a teacher per school day than the class size workloads set forth above, the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation each semester in accordance with the following rates:

1. Grades Pre-K-3: Additional compensation at the rate of two percent (2%) of the teacher's daily base salary for each student in excess of thirty (30) per school day.

2. Grades 4-5: Additional compensation at the rate of two percent (2%) of the teacher's daily base salary for each student in excess of thirty-two (32) per school day.

3. Grades 6-12: Additional compensation at the rate of two-fifths percent (0.40%) of the teacher's daily base salary for each student in excess of one hundred seventy-five (175) per school day.

4. Department Chairpersons Grades 7-12: Additional compensation at the rate of two-fifths of one percent (0.40%) of the teachers daily base salary for each student in excess of one hundred and forty (140) per school day.

5. Split-Grades Pre-K-6: Additional compensation at the rate of two percent (2%) of the teacher's daily base salary for each student in excess of eighteen (18) per school day.

d. For teachers with less than full-time contracts with the District, the class size workloads described above in paragraph b., and the additional compensation provided for in paragraph c., shall be prorated according to the precentage of a full-time contract held by such teachers.

(3) e. The provisions of subsections 8 (1)(b)(c) shall not apply to physical education, music and art, where instructional needs and/or legal requirements dictate a modification in the class size workloads referred to above.

(4) f. Teachers in arts, music and physical education who are assigned no more than the number of students per class period established as the maximum for such subject per class period under the policies of the District in effect on August 26, 1982, shall receive wage compensation in accordance with the provision of the Basic Salary Schedule.

g. In the event that the District chooses to assign more students to a teacher in art, music or physical education than the class size work load set forth above in VIII (f), the teacher so affected shall receive, as work overload compensation in addition to his/her scheduled salary, additional compensation each semester at the rate of two-fifths percent (0.40%) of the teacher's daily base salary for each student in excess of the class size overload.

h. Speech pathologists who are assigned no more than thirty (30) clients per school day on a per semester average shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule. Psychologists who are assigned no more than sixty-five (65) cleints per school day on a per semester average shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule.

i. In the event that the District chooses to assign more clients to a speech pathologist or a psychologist than the client load set forth above in VIII (h), the employee so affected shall receive, as client overload compensation in addition to his/her scheduled salary, additional compensation each semester at a rate of one percent (1%) of the employee's yearly base salary for each client in excess of said client load.

j. High School Counselors who are assigned responsibility for three hundred and twenty-five (325) or fewer students per school day average on a per semester basis shall receive wage compensation in accordance with the provision of the Basic Salary Schedule. Counselors and Junior High Student Counselors who are assigned responsibility for three hundred and fifty (350) or fewer students per school day average on a per semester basis shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule.

k. In the event the District chooses to assign more students to a counselor per school day than the responsibility work loads set forth above, the counselors so affected shall receive, in addition to their scheduled salaries, additional compensation each semester in accordance with the following rates:

1. High School Counselors: Additional compensation at the rate of one quarter of one percent (0.25%) of the counselor's yearly salary for each student in excess of three hundred and twenty-five (325) per school day, average on a per semester basis.

2. Counselors and Junior High Counselors: Additional compensation at the rate of one quarter of one percent (0.25%) of the employee's yearly base salary for each student in excess of three hundred and fifty (350) students per school day averaged on a per semester basis.

l. 1. For the purpose of determining the number of students or clients assigned to an employee "per school day" or "per school day average on semester basis", the first ten (10) school days of the semester and the number of students or clients assigned to an employee during that period of time, shall be excluded from the calculation.

2. For purposes of calculating the total number of students assigned per school day to teachers in grades 6-12, the total shall be the sum of the number of students assigned per period without regard to whether the same student(s) is (are) assigned to the teacher for more than one (1) period.

3. The total additional compensation earned by an employee pursuant to subsection 8 (1) shall be separately itemized and paid at the end of each semester.

4. The workload provisions of subsections VIII (1)(b) (f)(h)(j) shall be effective with the beginning of the first semester of the 1983-84 school year.

As to proposal (1), the District argues that these two sentences purport to preempt the legal determination which the Commission and the courts are supposed to make. It asserts that unions and employers cannot be made to bargain about, recognize or agree about what is or isn't a mandatory subject of bargaining. The

District contends that the second sentence of this proposal would require it to agree that the number of students assigned to a teacher "directly" affects the conditions of employment and the workload of that teacher. It notes that it has earlier argued that Beloit, supra, requires a union to prove that a proposal primarily relates to conditions of employment. The District asserts that the Association wants the District to agree to a proposition that the Association did not and cannot prove. The District argues that the proposal itself is a tacit admission by the Association that the number of students assigned to a teacher does not primarily, or "directly", affect the conditions of employment of a teacher.

The District further asserts that the two sentences are analogous to a request for a recognition clause where the proposed clause does not contain a statement to the effect that the clause has no meaning other than to identify the bargaining unit. It believes that even if the Commission were to decide that both sentences were true statements of law and fact, the sentences should be found non-mandatory, unless they were limited to a specific statement that the clause means nothing as a matter of contract, but is merely a way of identifying a legal conclusion reached by another entity.

As to proposals (2) and (4), the District contends that they establish various "normal" class sizes as well as varying and inconsistent penalties in the event the District does not implement the Association's views of normality. It argues that there is no evidence in the record showing any relationship between the specified penalties and the workload of any teacher. Indeed, the District believes there is no evidence of any affect on any workload of any teacher of any kind resulting from an increased class size. The District contends that the addition of students to a class impacts upon the allocation of existing work time but does not create more work. It asserts that a teacher is a professional and can be expected to have a concern about how well the educational process is proceeding, about how well he can prepare his lessons, and about how much of his time he must allocate to clerical duties. However, the District also believes that those matters are legitimate concerns to not only teachers but also to parents, electors and taxpapers. It alleges that class size concerns are not the exclusive province of teachers and do not affect their employment terms. Rather, the District argues that class size affects allocation of time and the level of delivery of services. The District believes that the testimony of the Association witness only confirms that class size is connected to educational policy and that payments for larger classes do not compensate for more work, but rather punish the District for failure to attain a teacher's view of the proper level of delivery of educational services.

The District notes the testimony of the Assistant Superintendent of Personnel Services to the effect that class size has a relationship to the level of teacher services but that it was as likely that a teacher with difficult students in a small group would be working as hard as a teacher with a larger number of average students.

As to the question of keeping records, correcting papers, etc., the District asserts that a teacher must devote whatever time is necessary to that particular assignment. However, the District believes that it does not follow that the teacher with more students is working harder than a teacher with fewer students. It believes that if a teacher has to grade more papers during the day or at night, the teacher cannot give as much personalized service to the individual student. Recognizing that that fact may be professionally distressing to the teacher, the District, and the electors, the District still believes that the primary effect, and on this record the only effect, of differing class sizes is differing allocation of a teacher's time.

Even if the record did contain evidence tending to show that the primary effect of a change in class size is to increase teacher workload, the District contends that the Association's proposal bears no direct, primary, or material relationship to the actual increase in workload. Citing what it believes to be numerous inconsistencies in the Association's compensatory proposals, the District argues that the proposals are not merely the sort which no rational interest arbitrator would grant, but are also non-mandatory because they have no connection to workload. It asserts that the proposals are nothing less than a penalty designed to control academic structure.

Turning to proposal (3), the District argues that the language is non-mandatory because it would allow a grievance arbitrator to determine when and whether instructional needs and/or legal requirements require a modification in class size. As an employer cannot be required to bargain about when instructional needs or legal requirements require modification in class size, the District argues that it cannot be required to be exposed to a decision by a grievance arbitrator as to whether instructional needs or legal requirements dictate a modification in class size. The District also contends that proposal (3) reveals that all of the Association's proposals for class size penalties are pretextual and are not primarily related to conditions of employment. It notes that instructional needs and legal requirements for physical education, music and art cannot be meaningfully distinguished from any other educational function which might be affected by these factors.

The District therefore asks the Commission to find proposals (1) thru (4) non-mandatory subjects of bargaining.

The Association initially notes that all numbers used in its class size proposal reflect the District's current policies as set forth in the 1979-1982 labor agreement and/or the Kroft policies implemented by the School Board. The Association believes that its proposals set forth the economic impact which an increase in class size workloads above the existing status quo averages will have upon teachers. The Association asserts that its proposals expressly recognize the District's right to unilaterally set new limits at any time. The Association believes that its right to bargain over the economic impact of the District's class size decisions is established in Beloit, supra, wherein the Commission opined that "the larger the class, the greater the teacher's workload, e.g., more preparation, more papers to correct, more work projects to supervise, the probability of more disciplinary problems, etc." The Association believes that the Commission's finding in that regard is important in several respects. First, it believes that said finding is dispositive of the argument raised by the District to the effect that a small class may be more difficult than a large class. The Association contends that although this may in some cases be so, the probabilities favor more disruption as the class size increases. The Association contends that this probability directly and primarily relates to the working conditions of the teacher involved and does so on a daily or even hourly basis. It contends that this conclusion is of crucial importance when the Commission engages in the artifice of balancing the interference a particular union proposal causes an employer when making permissive educational policy decisions, against the impact or effect those decisions have on the wages, hours and working conditions of the employes. Although it asserts that which of these dual concerns may be deemed of greater weight by the Commission is anybody's guess in any situation, the Association contends that it would appear that the impact of the District's decisions on working conditions of employes as to class size would outweigh the practical restrictions that the proposals in dispute would have on the District's decision-making ability. The Association argues that not only are the subjects of prime importance to the employes, but also asserts that the proposals do not preclude the employer from making or changing its decisions as to class size. Rather, the Association asserts that the proposals merely compensate employes who are adversely affected by the new levels.

The Association alleges the District's contention that the proposals would penalize the District when making educational policy decisions is a subterfuge of semantics. Assuming arguendo that the proposal would penalize the District, the Association notes that the penalty is only assessed when the District knowingly violates the rules (as set forth in the existing labor agreement, policies or practice of the District). Indeed, the Association argues that the penalties are only invoked when the District acts to penalize the employes by increasing their workload. The Association also believes that the District's public interest arguments are a smoke screen. It asserts that such arguments ignore the direct employer-employe relationship of the parties and the avowed public interest purpose of MERA to provide a forum and process for the resolution of labor disputes. The Association contends that it is incumbent upon the Commission to provide a method of allowing public employes to engage in collective bargaining on subjects which directly and primarily relate to wages, hours and working conditions. It asserts that the District is not adversely affected by its proposals as it continues to have the right to make permissive management decisions and to budget accordingly. The Association contends the District's penalty argument also

assumes a cost increase when it acts to increase class size. The Association alleges that this assumption belies reality as the District may well realize a savings if it chooses to have one teacher instruct large numbers of students.

Given the similarity of its proposal to those before the Commission in the case of the Janesville School District, DR(M)-276, the Association directs the Commission's attention the briefs filed on behalf of the Janesville Education Association in that matter. The Association also believes that the brief of the Campbellsport Education Association filed in the case of School District of Campbellsport, 20936 (8/83) should be considered. In particular, however, the Association would agree that the main thrust of the arguments advanced by the District have been cogently summarized in the Janesville Education Association's brief in the following manner: "The scope of mandatory impact bargaining implicit in the District's legal position in this case is so narrow as to effectively eliminate the Association's right to negotiate concerning the impact on employe working conditions of District class size policies or practices. Any impact proposal is necessarily related to the permissive managerial or educational policy decision whose impact is dealt with in that proposal." The Association does not deny that its proposals as to class size are related to permissive educational policy decisions. The Association asserts, however, that the impact of those decisions on the working conditions of the employes is of far greater significance than the countervailing effect of the proposals on the District's policy-making rights. The Association therefore asserts that its proposals should be found to be mandatory subjects of bargaining.

In Beloit, supra, the Commission was confronted with the question of whether the following proposal was a mandatory subject of bargaining:

> Because the pupil-teacher ratio is an important aspect of an effective educational program, the Board agrees that class size should be lowered wherever possible to meet the optimum standards of one (1) to twenty-five (25). Exceptions may be allowed in traditional large group instruction or experimental classes where the Association has agreed in writing to exceed this standard.

When finding the proposal to be a permissive rather than a mandatory subject, the Commission held:

> The size of a class is a matter of basic educational policy because there is very strong evidence that the student-teacher ratio is a determinant of educational quality. Therefore, decisions on class size are permissive and not mandatory subjects of bargaining. On the other hand, the size of the class affects the conditions of employment of teachers. The larger the class, the greater the teacher's work load, e.g., more preparation, more papers to correct, more work projects to supervise, the probability of more disciplinary problems, etc. While the School Board has the right to unilaterally establish class size, it nevertheless has the duty to bargain the impact of the class size, as it affects hours, conditions of employment and salaries. 10/ (footnote omitted)

Upon appeal, Dane County Circuit Judge Currie affirmed the Commission's conclusion, reasoning as follows:

> WERC, by Finding of Fact No. 7, found that this proposal as to class size related to basic educational policy but that the implementation thereof also had an impact on wages, hours and working conditions. Its declaratory ruling was that class size is not a mandatory subject of collective bargaining, but a duty existed to bargain collectively with respect to the impact thereof on wages, hours and conditions of employment.
>
> While the evidence conflicts as to the extent to which class size effects the quality of education received by students, there is a respectable body of opinion that it is a determinant of such quality. See Exhibits 9 (especially pp. 1, 3), 10 (especially pp. 1-2), and 11 (especially p. 1). It

should be noted that Exhibit 11 is a pamphlet entitled "Class Size -- Does it Make a Difference?" published and distributed by the Division for Planning Services, Wisconsin Department of Public Instruction, and gives the results of the Olson and Vincent studies on the subject where data from many thousands of classrooms were studied.

WERC is not required to resolve conflicts among educators on educational policy. It could rationally conclude that a school board's prerogatives in making educational policy include the power to decide that class size does affect the quality of education and to set class sizes accordingly.

It is true that the larger the class size the more work is imposed upon the teacher. Therefore, WERC properly held that the impact of class size was a subject of mandatory collective bargaining.

Ultimately the Wisconsin Supreme Court affirmed Judge Currie on the class size issue while recognizing the difficulty of the issue:

THE PROBLEM. The difficulty encountered in interpreting and applying sec. 111.70(1)(d), Stats., is that many subject areas relate to "wages, hours and conditions of employment," but not only to such area of concern. Many such subjects also have a relatedness to matters of educational policy and school management and operation. What then is the result if a matter involving "wages, hours and conditions of employment" also relates to educational policy or school administration? An illustration is the matter of classroom size, subsequently discussed. The number of pupils in a classroom has an obvious relatedness to a "condition of employment" for the teacher in such classroom. But the question of optimum classroom size can also be a matter of educational policy.

. . .

(H) CLASSROOM SIZE. The teachers' association submitted to the commission as a subject matter requiring mandated bargaining a proposal concerning class size. 35/ The commission, on the evidence before it, concluded that the size of a class is not primarily a matter of "wages, hours and conditions of employment" but is primarily a matter of basic educational policy. 36/ Therefore, it concluded, "decisions on class size are permissive and not mandatory subjects of bargaining." The trial court affirmed this holding, stating that, on the basis of the evidence before it, the commission could conclude that a school board's prerogatives in making educational policy include the power to decide that class size does affect the quality of education and to set class size accordingly. The commission also held that the size of a

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35/ The proposal as to class size was as follows: "Because the pupil-teacher ratio is an important aspect of an effective educational program, the Board agrees that class size should be lowered wherever possible to meet the optimum standards of one (1) to twenty-five (25). Exceptions may be allowed in traditional large group instruction or experimental classes, where the Association has agreed in writing to exceed this standard."

36/ The WERC memorandum stated: "The size of a class is a matter of basic educational policy because there is very strong evidence that the student-teacher ratio is a determinant of educational quality. Therefore, decisions on class size are permissive and not mandatory subjects of bargaining.

class has an impact upon conditions of employment of teachers. 37/ So it concluded that: "While the School Board has the right to unilaterally establish class size, it nevertheless has the duty to bargain the impact of the class size, as it affects hours, conditions of employment and salaries." The reviewing court also affirmed this commission holding that, while class size was not bargainable, the impact of class size upon "wages, hours and conditions of employment" was mandatorily bargainable. We affirm the trial court holding, agreeing that the commission was warranted in reaching the conclusions it did.

37/ Id., continuing: "On the other hand, the size of the class affects the conditions of employment of teachers. The larger the class, the greater the teacher's work load, e.g., more preparation, more papers to correct, more work projects to supervise, the probability of more disciplinary problems, etc."

Beloit established that although class size does impact upon teachers' wages, hours and conditions of employment, a proposal which would directly interfere with a determination of appropriate class size is a permissive subject of bargaining because the relationship to educational policy choices predominates over the aforementioned impact upon bargainable matters.

In Campbellsport, supra, the Commission applied the foregoing holding from Beloit to the following proposal:

a. The parties recognize that the number of students assigned to a teacher is a matter of basic educational policy and that the District may assign any number of students it so desires to a teacher's classes. The parties also recognize that the number of students assigned to a teacher directly affects the conditions of employment and workload of that teacher.

b. Teachers in grades K-5 who are assigned twenty-seven (27) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with the provisions of the Salary Schedule. Split-grade teachers in grades K-6 who are assigned twenty-two (22) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with the provisions of the Salary Schedule. Teachers in grades 7-12 who are assigned one hundred sixty (160) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with the provisions of the Salary Schedule.

c. In the event the District chooses to assign more students to a teacher per school day than the class size workloads set forth above, the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation each semester in accordance with the following rates:

1. Grades K-6: Additional compensation at the rate of one percent (1%) of the teacher's yearly base salary for each student in excess of twenty-seven (27) per school day, averaged on a semester basis.

2. Split-Grades (K-6): Additional compensation at the rate of one percent (1%) of the teacher's yearly base salary for each student in excess of twenty-two (22) per school day, averaged on a semester basis.

3. Grades 7-12: Additional compensation at the rate of one-quarter percent (0.25%) of the teacher's

yearly base salary for each student in excess of one hundred sixty (160) per school day, averaged on a semester basis.

d. For teachers with less than full-time contracts with the District, the class size workloads described above in paragraph b., and the additional compensation provided for in paragraph c., shall be pro-rated according to the percentage of a full-time contract held by such teachers.

e. The provisions of subsection 6.5 shall not apply to physical education, music, art and special education teachers, where instructional needs and/or legal requirements dictate a modification in the class size workloads referred to above.

f.1. For the purpose of determining the number of students assigned to a teacher "per school day, averaged on a semester basis", the first ten (10) school days of the semester, and the number of students assigned to a teacher during that period of time, shall be excluded from the calculation.

2. Any additional compensation earned by a teacher pursuant to subsection B.5. shall be separately itemized and paid at the end of each semester.

3. The class size workload provisions of subsection B.5 shall be effective with the beginning of the second semester of the 1982-1983 school year.

Finding the proposal to be a mandatory subject of bargaining, the Commission concluded:

> . . . The proposal at issue here, however, specifically recognizes that class size is a basic educational policy and provides for the District to assign "any number of students it desires to a teacher's classes." It does not establish guidelines as to student-teacher ratios. Contrary to the District's contentions, we note that the Commission's discussion of Section 21.3 in Oak Creek 9/ suggests that a proposal as provided herein, which does not restrict the District's right to determine class size, but provides for a method to compensate a teacher based on class size, would be considered impact and therefore mandatory.
>
> The District also contends that to be a legitimate class size "impact" proposal the provision must be based on increases in actual class size practices in the District and not on numerical guidelines unrelated to existing class sizes. The District's argument, however, again ignores the impact of its existing class size practices and the concomitant right of the Association to bargain over that impact. Contrary to the District's claim, rather than being an attempt to bargain the Association's version of what it feels is appropriate class size policy, the Association's proposal only provides a means for determining when a teacher will be entitled to additional

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9/ In Oak Creek, supra, we stated the following regarding Section 21.3 which provided for compensation of $10.00 per week per pupil beyond certain class sizes:

> While the District has the right to unilaterally establish class size, it nevertheless has the duty to bargain the impact of the class size, as it affects hours, conditions of employment and salaries. Such a proposal regarding impact is reflected in Section 21.3 of the Association's proposals. (at page 15)

compensation and how much the teacher is to receive. Unlike the proposal in Oak Creek, the Association's proposal here does not limit in any way the District's authority to set whatever class size limits it feels are proper. The fact that under the Association's proposal the District would have to start paying teachers additional compensation at class size levels below what the District considers appropriate and that the proposal distinguishes between certain grade levels and type of classes goes to the merits of the proposal and not to its status as a mandatory or permissive subject of bargaining.

The District also errs in its argument that the Association's proposal is permissive since it requires the District to have a written class size policy, distinguishes or does not distinguish between certain grade levels and classes, requires additional pay for teachers with classes exceeding specified numbers and provides a means of calculating the number of students assigned to a teacher. The proposal does not require the District to have a written class size policy or even to have any established class size policy. As noted above, the proposal only provides a method for computing impact pay. The

District is free to do as it deems proper as far as setting class sizes. While it is true that under the proposal the District would incur additional expense by having to pay teachers extra if it set class sizes above certain levels, that is not a sufficient limitation on the District's ability to set class size policy to make the Association's proposal permissive. 10/

The cost of a proposal goes to its merits and the question of the proposal's merits is left to the bargaining process. 11/ The question of the proposal's mandatory permissive status in this instance is decided by whether the proposal is worded so as to prevent the District from unilaterally determining class sizes. It has already been concluded that the proposal does not preclude the District from setting class size policy.

10/ The Commission has consistently held that the fact that a proposal affects the municipal employer's budget is not determinative with respect to the question of whether a proposal is mandatorily bargainable. City of Brookfield (17947) 7/80; City of Wauwatosa (15917) 11/77.

11/ City of Wauwatosa, Supra.

We note that the first paragraph of the Campbellsport proposal found to be mandatory is precisely the same as the first paragraph of the proposal at issue herein. However, as the employer in Campbellsport did not specifically challenge that paragraph of the proposal, we deem it appropriate to examine the specific objection to that paragraph raised by the District herein. We view the first sentence of this paragraph as a disclaimer which seeks to ensure that the language it precedes cannot be reasonably interpreted as dictating any class size choice. While the District may well be correct that this sentence, when standing alone, does not establish any contractual right related to wages, hours and conditions of employment, we believe it is artificial to view this sentence in a vacuum. Language such as that in this sentence is often essential to the proponent's desire to clearly set forth its intent. If the subject of that intent is a mandatory subject of bargaining, we find the introductory preface to such a proposal is mandatory as well. We turn to that determination below. However, as the second sentence of the first paragraph is of no interpretative assistance, we find the District's objections thereto persuasive and find that sentence permissive.

The District herein has argued that the impact of class size upon wages, hours and conditions of employment cannot be presumed and must be established by the record. It argues that the Association has failed to establish such an impact and thus asserts that the proposal should be found to be a permissive

subject of bargaining. We do not agree. As we have previously indicated herein, the primary relationship of the proposal to wages is sufficient to render the proposal mandatory. However, we further conclude that the court's decision in Beloit also establishes the apparent relationship which the number of students has upon the amount of work which a teacher must of necessity perform. Indeed, the court itself noted "The number of pupils in a classroom has an obvious relatedness to a 'condition of employment' for the teacher in such classroom". The court further agreed that the "commission was warranted" when concluding "the larger the class, the greater the teacher's workload, e.g., more preparation, more papers to correct, more work projects to supervise, the probability of more disciplinary problems, etc." Absent evidence of a radical change in the manner in which classes are taught in the public schools in Wisconsin, we believe the issue of whether class size impacts upon teacher's wages, hours and conditions of employment to have been resolved in Beloit. 3/ We further note that we find no support in Beloit or elsewhere for the District's contention that it is appropriate to balance the degree of impact against educational policy overtones when determining mandatory/permissive issues.

If evidence of the impact were deemed necessary, we believe such evidence exists in this record. The District's Assistant Superintendent of Personnel Services testified:

(Tr. 81-86)

Q Mr. Fritchen, sir, it is your position that the number of students a teacher has in his class is unrelated to the amount of work that he will perform during that class?

A That's one variable.

Q It's related to it?

A It's one variable.

Q For instance, a teacher in testing his class has to check the tests and mark them, is that correct?

A Yes, sir.

Q And where workbooks are used the teachers are required to check the workbooks and mark them, is that correct?

A There are variables in that too. Sometimes workbooks are corrected in class by students.

Q Where they are corrected in class by students the teachers are required to review the corrections to see that they are correct?

A Normally, yes.

Q And still work sheets are to be -- are used in the elementary schools, isn't that right?

A Yes.

Q And then just assignments that we all used to get back in school, right? You get that assignment, and you turn it in, and the teacher reviews it and hands it a -- back marked with comments on it if possible, isn't that correct?

A Yes.

3/ The Association's proposal is also applicable to speech pathologists, psychologists, and counselors. For such individuals, who generally do not perform their duties in a conventional classroom setting, the Beloit formula of more students served means more work seems equally applicable.

Q The teacher is required to give each student individual guidance if possible when that student is having a problem, isn't that correct?

A Sometimes it varies in terms of the amount of time the person has available, but, yes.

Q All right. Students are to be disciplined -- the teacher has to maintain discipline in the class, is that correct?

A That's all part of the teaching activity.

Q Do you -- it would be easier to maintain discipline if you were a teacher in a class with thirty students than it would be with fifty students given the normal cross section?

A It is totally dependent on the makeup of the class.

Q A normal cross section of students, sir, is -- let's talk about average. I understand you could have a class of fifty with two hellions in it, and a class of thirty made up of all hellions, but in going through your school system I didn't notice either of the formers, but given a normal cross section you will concede it is easier to maintain discipline in a smaller class than a larger class?

A I think discipline is something that is established from teacher to teacher, and it certainly varies. Some teachers have no problem maintaining discipline, and I don't think class size though is one way, or the other, and some teachers do have problems.

Q You don't feel the likelihood of getting a hellion is increased if you get more students?

A It depends on your definition of a hellion. Are you referring to an exceptional education student who maybe has a history of disruptive behavior?

Q I'm thinking of Bruce Rosnoski?

A I don't know him.

Q Am I correct that the teachers are expected to engage in one on one involvement to some extent with their students to give them individual attention?

A That will vary depending on the level of the student being taught, and the specific curriculum that is being taught.

Q I'm sorry. Are you indicating in your answer that there are classroom situations where you are not expected to have one on one involvement with students?

A One one one is something that will vary depending on the class being taught, and the curriculum involved in that setting.

Q Sir, isn't --

A Let me qualify it. If you are speaking for a -- for example of a Chapter I Reading, Language Arts type of assignment, there would be quite a bit of one on one in that assignment.

Q Let's talk about the 6th Grade, or a normal 6th Grade class. Aren't you expected to have individual involvement with your students?

A I think certainly it would be. The expectation of that I suppose will vary partially on the number of students, and partially on the subject area being presented, and from time to time it would be nice to have one on one.

Q Are you familiar with the inventory for teacher improvement?

A Yes.

Q That's the basic District instrument which sets down the criteria for evaluating teacher performance in the District, isn't it?

A Yes.

Q All right. Isn't individual attention and involvement with the students a -- isn't that one of the criteria listed in the inventory?

A A sub point of one of the criteria, yes.

Q Am I correct that the criteria in the inventory are in no way tied to class size?

A That's probably true.

Q Okay. Now teachers are also expected to take attendance, is that correct?

A For the most part, yes.

Q All right. And to do grades and report cards?

A Yes.

Q To record those items?

A Yes.

Q To the extent you have more students, and let's say you have forty students as opposed to thirty, a teacher with forty students is going to have to do more work in the area of recording attendance, grades, and preparing report cards, and marking tests, and reading and marking workbooks, skilpack sheets, correcting self-corrected materials, and all of those areas that a teacher is going to be doing more work, is that not?

A They will use their time in a different manner. When you refer to using -- when you talk about more work, you could have a special education teacher working with disruptive students, and let's say their are eight students, and they are certainly doing the same kind of curriculum instruction, and they are working in an intense kind of setting.

Q You are saying they might be doing as much work as they -- a fellow who has thirty?

A I'm not sure who is doing the most work.

Q Let me ask you about a teacher who is working with eight -- was the hypothetical eight students?

A Eight disruptive students. I'm talking about the emotionally disturbed students in a special education class.

Q Would you concede to me, sir, that a teacher who has sixteen students is probably doing more work than one who has eight?

A I would again say it probably goes to that teacher allocation or utilization of the time within the classroom setting. It has some impact on one on one, or individualizing with students.

Q Would you concede to me his task is more difficult?

MR. WALKER: I object to the question. It was just asked and answered.

MR. NIELSEN: I'm trying to form the question in such a way in which I can get a response.

MR. WALKER: That's the basis of my comments. You are dissatisfied with the answer, and you're asking the question again.

MR. NIELSEN: Let me ask you this. What takes longer to do, eight report cards, or thirty report cards?

A Time wise I assume 30.

Q Would you assume it takes longer to grade thirty papers than eight papers?

A That's a logical assumption; yes.

We do not dispute the District's contention that a teacher with a small class may, in some circumstances, work harder than a teacher with a large class or that a teacher with five classes of twenty students may work harder that a teacher with five classes of twenty-five students. However, the question of how hard an individual teacher works is not the determinative issue here. As we noted earlier, such arguments go to the merits of whether a proposal should become part of a contract. Instead, the court and the Commission have focused on the question of whether each student taught by a teacher represents a distinct portion of a teacher's workload. As each child yields more forms to fill out, more papers to correct, etc., it has been concluded that class size does indeed impact upon a teachers hours and conditions of employment. 4/

The District has also urged that the proposals are permissive because it believes the monetary consequences contained therein are inconsistent and bear no rational relationship to any actual impact. As noted earlier and as discussed specifically in relation to class size impact proposals in the previously quoted portion of Campbellsport, supra, and the cases cited therein, such arguments go to the merits of the proposal not to the mandatory or permissive status. We therefore reject the District's argument.

Lastly, the District has asserted that proposal (3) (Article VIII(1)e) is permissive because it would allow a grievance arbitrator to determine when and whether instructional needs and/or legal requirements necessitate a modification of class size, a subject over which an employer need not bargain. We do not accept the District's interpretation of this language. This clause, as the District subsequently concedes in footnote 2 of its brief, only indicates that where an increase in class size is dictated by the listed factors, additional compensation is not applicable. While a grievance arbitrator may have to resolve disputes over what triggered the increase, neither the clause nor an arbitrator interpreting same, represent any limitation upon the District's right to set class sizes at whatever level it deems appropriate. The Association's decision to create an exception to its additional compensation proposal for some teachers under some circumstances is not indicative of lack of impact, as the District argues, but rather represents a proposed choice as to how certain teachers will be compensated. The clash between the District's contention that a set salary is

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4/ We note that for teachers in grades 6-12, the Association's proposal uses the total number of students assigned per school day rather than a strict class size approach. We believe that this distinction has no effect on the applicability of the more students equals more work reality noted in Beloit.

satisfactory compensation for all work assigned to a professional and the Association's proposal that the set salary covers a specified amount of work beyond which additional compensation is paid represents a dispute for the bargaining table. The choice of one method of compensation over another does not present a mandatory/permissive dichotomy.

In summary, we have concluded that proposal (1), (sentence one), and proposals (2-4) primarily relate to wages, and also to the impact upon hours and conditions of employment of District class size policy choices. We do not find that specific evidence must be provided to establish these apparent relationships. We, therefore, find the proposals to be mandatory subjects of bargaining.

(5) The disputed proposal is as follows:

> m. Every reasonable effort shall be made so that the number of students per class shall not exceed the number of pupil stations available in specialized areas, i.e., science laboratory, industrial arts, art and home economics.

The District contends that this proposal is non-mandatory because it regulates facilities for students and does not primarily have an effect on a teacher's terms of employment.

The Association makes no specific arguments with respect to this proposal but asserts that it is mandatory.

We conclude that the disputed proposal is permissive because it primarily relates to the educational policy choice as to the amount of equipment which should be ulitized when educating students in the areas specified in the proposal. Any impact upon employes wages, hours and conditions of employment would be far less direct than the above-noted impact upon educational policy choices.

(6) The disputed language is as follows:

> 3.a. No teacher may be assigned to a subject area or grade level which is outside the teacher's area of certification and/or license.

The District argues that this proposal is non-mandatory because it purports to stop the District from assigning work to a teacher even though such work is within the normal scope of employment of teachers. The District contends that there is no showing that being assigned temporarily, in an emergency, or even permanently to an area outside one's area of licensing has any effect on terms of employment. The District asserts that such an assignment may be unlawful but contends that the purpose of any such legal prohibition is to protect the student. The District believes that there is no evidence or even an assertion that such an assignment primarily has an effect on the teacher. The District believes that such assignments affect educational policy. The District asserts that the statute prohibiting such assignments may be amended, repealed, or riddled with exceptions for emergency assignments. It contends that if there were a contract containing a flat prohibition such as that in the instant proposal, the contract would be the only thing controlling this educational policy decision.

The Association makes no specific arguments in support of its proposal other than those placed before the Commission as to District proposal (2).

As we concluded in our discussion of District proposal (2), under current Wisconsin law it is permissible for teachers to be granted "special licenses" which permit temporary employment for those individuals who do not meet the legal requirements for their teaching assignment. As we noted in our prior discussion, there is an employe interest against receiving assignments for which one is not trained inasmuch as job security concerns are implicated. These same interests are protected by this proposal. However, this proposal would prevent the District from seeking the "special licenses" noted above and could thereby potentially preclude the District from acquiring an employe to teach a certain subject or program and require that the program be dropped. We conclude that this potential interference with the District's educational program predominates over the job security concerns noted above. Therefore, we conclude that this proposal is a permissive subject of bargaining.

(7) The disputed proposal is as follows:

> b. The teacher day at the High School level shall not exceed a continuous period of seven (7) hours and twenty-one (21) minutes. The teacher day at the Junior High Level shall not exceed a continuous period of seven (7) hours and ten (10) minutes. The teacher day at the Elementary School level shall not exceed a continuous period of six (6) hours and fifty (50) minutes. The teacher day for teachers who are unassigned shall not exceed a continuous period of seven (7) hours and thirty (30) minutes with a thirty (30) minute duty-free lunch or, in the alternative, not to exceed a continuous period of eight (8) hours with a sixty (60) minute duty-free lunch. The Board shall advise the REA in writing and by posting in the individual schools, the starting time of the teacher work day at each school. Said notification and posting shall be completed by the first returning teachers day of each school year.

The District contends that the Association's argument to the effect that bargaining over the teacher day does not limit the length of the student day is a pretext. Pretending that the disputed language is an impact proposal because the District could hire a second staff of teachers if it wanted the school day to be five minutes longer than the teacher day proposed by the Association is, the District argues, no more related to the impact of hours of work than a proposal which would have the inevitable effect of forcing the school to build new school buildings to accommodate Association class size proposals. The District believes that proposing a flat limit on the length of the school day while pretending it does not dictate the length of the student day is the sort of reductio ad absurdum which the Wisconsin Supreme Court warned against in the initial pages of its Beloit decision.

The District argues that the Association did not make any effort to establish that a flat limit on the length of the teacher workday has an effect on the teacher. While the Association might argue that it is seeking to protect against an absurdly long workday, the District believes that such a workday, if established, might give rise to a plausible argument for an increase in annual salary. However, the District argues that longer workdays would not change the teacher's job from a professional job to an hourly job. The District asserts that there is no evidence of any threat of an absurd workday. It contends that limitations on the length of the school day are imposed by many groups including the Association. It believes, however, that the length of the day is not the sort of decision which should be the exclusive province of the Association. The District believes that too many other groups have a legitimate interest in such a decision. The District therefore asserts that the Association's proposal is non-mandatory.

The Association makes no specific arguments in support of its proposal.

The Commission lacks an adequate record to determine the status of this proposal.

(8) The disputed proposal is as follows:

> c. 1. Teachers shall be compensated in accordance with the provisions of the Basic Salary Schedule for duties within the normal scope of teacher's employment.
>
> 2. Elementary teachers Pre-K-5 to whom the District does not provide two and one-third (2 1/3) hours of preparation time per week shall receive compensation, in addition to their scheduled salaries, as provided in Article VIII(3)(c)(5).
>
> 3. Teachers in grades 6-12 to whom the District does not provide five and one-half (5 1/2) hours of preparation time per week, shall receive compensation in addition to their scheduled salaries as provided in Article VIII(3)(c)(5).

4. Departmental Chairpersons to whom the District does not provide nine and one-half (9 1/2) hours of preparation time per week shall receive compensation, in addition to their scheduled salaries, as provided in Article VIII(3)(c)(5).

5. Teachers to whom the district does not provide the hours of preparation time specified in VIII (3)(c)(2)(3) or (4) shall receive compensation in addition to their scheduled salaries, in the amount of one-fourth (1/4) of the teacher's regular hourly pay for each such quarter hour (or any portion thereof) less than the preparation time specified.

d. As used herein, preparation time provided by the District shall not include any unassigned time after the regular teacher workday begins but before the student school day begins, or after the student school days ends but before the regular teacher workday ends.

The District contends that the preparation time proposals are in essence penalty clauses just like the Association has proposed as to class size. The District argues that the proposal regulates the allocation of the teacher's time and does not compensate for more work. The District asserts that there is no judicial or Commission dicta that the loss of preparation time "obviously" causes more work for teachers. The District believes that if you don't have preparation time, you will not be as well prepared and believes that although that may affect the quality of instruction a student receives, it will not affect how hard you work. The District argues that there is no evidence of any effect on workload and notes that there is nothing to support the compensation levels specified in the proposal. The District cites testimony that if a teacher does not get a certain amount of preparation time, the teacher would not be working more hours and there would be no way to measure whether or not the teacher is working harder. It contends that there is not contradictory evidence in this record. Therefore, the District believes that the Association's proposal is non-mandatory.

The Association reiterates the arguments it made with respect to class size and urges the Commission to find its proposal to be a mandatory subject of bargaining.

The District herein seeks a finding that the proposal is permissive because (1) the Association failed to demonstrate the requisite impact upon teacher hours and working conditions; (2) the Association is seeking to control educational policy through indirect cost implications; and (3) the Association's definition of preparation time reveals its intent is simply to allocate the teacher day.

As we have previously indicated in our analysis of the Association's class size proposals, we do not share the District's view of the analysis which is appropriate for determining whether the instant proposal is a mandatory subject of bargaining. The disputed language establishes compensation levels for weeks when the District chooses not to provide teachers with the specified amounts of preparation time. It is therefore a compensation proposal which is primarily related to the additional wages a teacher will receive when his or her day is allocated in a certain manner. The Association bears no burden to demonstrate that a wage proposal which would apply to teachers who do not receive a specified level of preparation time is mandatory just as it bears no burden to establish the mandatory nature of the compensation which it proposes should be paid to teachers who receive at or above the levels of preparation time specified in the proposal. Both proposals establish the compensation which the Association proposes is appropriate for different kinds of work weeks. Thus, we reject the District's first contention as to why the proposal is permissive because we believe the analysis suggested therein is inapplicable. However, we also are persuaded that the impact which preparation time or the lack thereof has upon hours and conditions of employment is also apparent.

In Oak Creek, supra, the Commission was confronted with the question of whether the following proposal was a mandatory subject of bargaining:

This 25 contact hours may be averaged out over the entire school year. In the 1972-73 school year, no teacher in the Senior High School shall be obligated to teach more than five classes each semester. No 7-12 school teacher shall be required to teach more than three different preparations or ability levels. If a teacher agrees to more than three different preparations, said teacher shall be freed from all other supervisory duties such as study hall, lunchrooms, etc. They shall be guaranteed 2 preparation periods per day. If the teacher wishes, he or she may agree to take other supervisory duties as study hall." (emphasis added)

When finding the proposal to be a permissive rather than a mandatory subject, the Commission commented:

> We conclude that the Association's proposal with regard to teacher-pupil contact hours, and the number of preparations that may be required of a teacher concern matters of educational policy, and therefore are permissive and not mandatory subjects of bargaining. Such decisions directly articulate the District's determination of how quality education may be attained and whether to pursue same. However, the impact thereof, also as in the "class size" issue, have direct affects on a teacher's working conditions, and therefore, the impact thereof is subject to mandatory bargaining.

Upon appeal, Dane County Circuit Judge Sachtjen upheld the Commission's determination as follows:

> The third proposal submitted by the Association would reduce the number of "contact hours" (ie., hours of contact with students) required of each teacher. The proposal would also establish the number of daily "preparation periods" allowed a teacher and the number of different "ability levels" which a teacher could be called on to teach without being freed from certain supervisory tasks.
>
> The Association points out that the number of hours a teacher spends in contact with students, in "preparation periods," and in work on different "ability levels" directly affects the number of hours which a teacher must work each day. Thus, the Association characterizes the subject of this proposal as one of "work-load."
>
> We recognize that the subjects of the proposal here may have a significant effect on a teacher's total workload. But one could also look at the proposals from another perspective: The Association's proposals relate to the allocation of a teacher's work day. The allocation of the time and energies of its teachers is a consequence of basic educational policy decisions on the part of the District. It is not without reason to conclude that those decisions significantly affect the quality of education offered in the District.

Contrary to the District's assertions herein, in Oak Creek, supra, both the Commission and the court recognized that preparation time does have an impact upon working conditions and hours. However, where a proposal specifies the amount of preparation time to which a teacher is entitled, Oak Creek holds that the educational policy implications outweigh the impact upon teacher's working conditions and hours and, on balance, render the clause permissive.

Unlike the proposal found permissive in Oak Creek, supra, the language at issue herein does not require that the District allocate the teacher day in any specific manner. The language does not mandate that any amount of preparation time be provided. Thus, it cannot persuasively be said that the holding in Oak Creek, supra, renders this proposal a permissive subject of bargaining.

We find the impact of preparation time upon hours is clear. A teacher cannot teach, even poorly, without some knowledge of the subject to be taught. Knowledge of the subject to be taught requires preparation. Preparation requires the expenditure of time by the teacher. Time is either available as a part of the teacher's regular work day or outside the work day. If sufficient time is not available as a part of the work day, time must be spent outside the work day. While specific proof is not needed to establish the foregoing, we do note that supportive evidence is present in this record. The District's Assistant Superintendent of Personnel Services testified as follows:

(Tr. 89)

Q Have you, yourself, been a teacher in your career, sir?

A Yes, I have.

Q What did you teach?

A I taught English and Social Studies.

Q What level?

A Junior high school.

Q Was that in our District?

A Yes.

Q Mr. Fritchen, did you prepare for your lessons?

A Yes.

Q Would it have been possible to teach your lessons without preparation?

A It would have been possible to teach without preparation?

Q Yes.

A It would be very difficult.

Q Well, in fact, isn't preparation implicit in teaching a subject? Isn't it implicit in teaching a subject that you are prepared to do so?

A I think so, yes.

. . .

(Tr. 117)

Q Getting away from theoreticals, in your experience with the District as a teacher and administrator if a teacher isn't getting prep time during the day, isn't he doing it at home at night?

A That's part of the teaching job. I think that teachers utilize their prep times during the day, and they use outside time.

Q If he is not getting prep time during the day, he is going to do it at home, isn't he?

A That was just answered as a whole. Sure. It has to be done.

MR. NIELSEN: Thank you.

A It's part of the profession.

Earlier testimony was not quite as definitive but still represents a grudging recognition that time not made available during the teacher day may mean additional hours worked outside the day.

(Tr. 56)

A The contract does call for a provision of preparation time for elementary teachers, and I would imagine that if the teacher did not receive that amount of time that would mean perhaps that the teacher would not have that amount of time ready to plan and prepare for the classroom instruction.

Q What affect if any would that have on the classroom instruction?

A It may mean the teacher is -- well, I guess the impact would be not maybe delivering the service on what is anticipated to be delivered meaning that the teacher may not be as well planned and prepared if they don't have the preparation time.

Q Would the teacher who doesn't have preparation time be working any more hours than the teacher who does?

A In the sense of the school day, no.

Q What about outside the school day, would she be as a condition of her employment working more hours?

A Not necessarily.

The Assistant Superintendent also echoed the Commission's conclusion in Oak Creek, supra, that decisions as to the amount of preparation time available during the regular teacher work day ". . . articulate the District's determination of how quality education may be attained and whether to pursue same" when he testified:

(Tr. 57)

Q If a teacher has say five secondary classes assigned, and suddenly is assigned a sixth class, what if anything is the affect on the educational program at least as conducted by that teacher?

A Well, the teacher would be in that example ultimately losing a preparation period. Instead of having the time to prepare, he would be utilizing it in terms of a classroom teaching assignment, and ultimately it could mean less preparation time, less organization, and maybe a reduction perhaps in the services provided.

Q What about if a teacher who had five class periods suddenly had only three? What if anything would be the affect on the educational program delivered by that teacher?

A More time to plan, and organize, and more time to be prepared.

Q Would that have an affect on the program as delivered by that teacher?

A It is a different utilization of time. It could have an affect. I'm not certain. It is a different utilization of that teacher's time.

However, this theoretical reality of making an educational policy choice to provide lesser quality clashes with the reality of the Assistant Superintendent's subsequent testimony as to the commendable District expectation that all teachers provide quality instruction and the fact that a teacher's preparation or lack thereof for class is a criterion used when evaluating job performance.

(Tr. 111-112)

Q Let me phrase it a little differently. Let's suppose there are two high schools with the same general mix, and there are two teachers that teach English, and one teacher teaches five sections, and one teacher teaches six sections, and one has less preparation time during the school day as a result of that assignment.

A Okay.

Q Does the District have the expectation that the person with the six classes will do as good a job teaching that group of children, or students as the person with five?

A I think hopefully the answer is yes, but the District does recognize that the teacher teaching the six classes in this case has an assigned period, and that would take away perhaps from some of the preparation time that the teacher having five would do, and it is a little bit of a different utilization of that teacher's day, but the expectation would presumably be the same.

Q But that would be taken into consideration if in fact one performed more poorly than the other, or would it be said you had more kids, and that just means you should have done your preparation at night because under the old contract we're paying you more on top of it?

A I'm not sure exactly how to answer that question. I think there was testimony offered earlier that probably all staff does a certain amount of planning and preparation outside of the normal school day, and to the extent one does an hour to an hour and a half or two hours I don't know.

Q Well, in being prepared isn't that one of the criteria for inventoring teacher improvement which is used to evaluate teachers, isn't that correct?

A Yes.

Q And in fact being chronically unprepared would be one of the criteria -- would be one of the criteria used to non-renew teachers?

A Yes.

Q Last year didn't you have an occasion to, you being the District, terminate a teacher, and one of the major complaints against him was that he was chronically unprepared?

A Yes.

. . .

This testimony demonstrates the apparent impact which preparation time or the lack thereof has upon teacher hours and indeed job security.

Turning to the District's contention regarding the impact of the Association's proposals upon educational policy, it is clear that an educational policy choice to provide less preparation time than specified in the proposal will create cost implications. However, as we noted in our class size analysis we do not believe that these implications warrant a finding that the clause is permissive. As we concluded in Wauwatosa, supra,

> . . . It could not reasonably be contended that an employer is excused from bargaining about wages because the budget impact thereof prevents it from providing the services it feels the community needs.

We have reaffirmed the continuing validity of this conclusion in City of Brookfield, 17947 (7/80) and Campbellsport, supra.

The District's third contention focuses upon its belief that the definition of preparation time contained in the Association's proposal is capricious because it assumes preparation time available prior to or after the student day does not reduce workload. It argues that the only rational purpose for such a definition is control of the allocation of the teacher work day, a permissive subject of bargaining. We find the District's arguments potentially relevant to the merits of the Association's proposal but not as to its mandatory or permissive status. The time frame used to define preparation time, like the level at which compensation is required and the rate of compensation, are necessary components to a preparation time impact proposal. The wisdom of and justification for specific components is left to the bargaining table.

Given the foregoing, we find that the instant proposal is a mandatory subject of bargaining because it primarily relates to wages as well as to the impact upon hours and conditions of employment of District preparation time policy choices.

(9) The disputed language is as follows:

> 5.a. Except as provided elsewhere in this agreement, attendance at after school day events will not be required without additional compensation. Teachers required to attend after school day events shall be compensated at the rate of $10.20 per hour for each hour or any fractional portion thereof. All work assignments scheduled for performance outside the regular teacher workday shall be considered overtime assignments. Unless compensation for such overtime assignments is provided for elsewhere in this Agreement, teachers assigned such overtime assignments shall be compensated, in addition to their scheduled salaries, at the hourly rate as established in Professional Compensation Section 1.d, with a one (1) hour minimum payment per assignment.
>
> . . .
>
> Teachers may be required to attend one meeting per week on a regularly scheduled work day without additional compensation provided that proper written notice is prominently posted or individually transmitted, and the starting time for said meeting is directly contiguous to the teacher's normal work day. If the weekly meeting described herein exceeds one (1) hour in length, teachers shall be compensated at the hourly rate as established in Professional Compensation, Section 1.d., with a one (1) hour minimum payment.

The District initially notes that the proposal contains two different rates of compensation for what is apparently the same function. It believes that the implication of this unexplained double rate is that the purpose of the proposal is not to obtain any "fair" compensation for extra work but rather to eliminate those parts of the curriculum. The District asserts that currently the number of meetings and their timing vary and that attendance at said meetings is part of a teacher's professional job. It contends that such meetings have never been a subject for separate compensation. As teaching is a profession, the District asserts that the number of hours that any two different professionals spend cannot be meaningfully compared. It argues that there is no straight line connection, or any other connection, between variances in one sort of activity - after school meetings - and how hard the teacher is working to obtain his/her salary. The District alleges that the Association's proposal would not take any step in the direction of equalizing workloads because the question of how hard a teacher works does not correlate to the number of team meetings, student conferences, or any other after school event which may be called by her peers or administrators. The District believes that the proposal would, by economic penalty, limit those aspects of the curriculum without having any material effect on how hard a teacher works. Thus, the District contends that the proposal is non-mandatory.

The Association makes no specific arguments in support of the mandatory status of its proposal.

The Association's proposal does not preclude the District from conducting any after school meetings or events. Rather, it seeks to compensate teachers who are required to attend such meetings or events outside of the school day. Clearly, such meetings or events have a direct impact upon the hours which a teacher works. The District's arguments to the effect that it has never had to compensate teachers for such additional hours in the past is irrelevant to the issue of whether the proposal is mandatory. This proposal simply reflects a different means of compensating teachers for their work. The fact that the parties' agreement has in the past had teachers who work varying numbers of hours compensated similarly does not preclude the Association from proposing a different compensation formula. Given the direct impact upon teacher hours and the lack of any prohibition against the District requiring teachers to attend the meetings covered by this proposal, we find this proposal to be a mandatory subject of bargaining. The District's contention as to the possibly inconsistent level of compensation established in this proposal is a matter for discussion at the bargaining table. We note, however, that if this proposal were to appear in a final offer, it would be subject to the requirement that all portions of said offer must be sufficiently consistent and definite so as to allow both the opposing party and ultimately the mediator-arbitrator to respond thereto. 5/

(10) The disputed language is as follows:

> Teachers shall be provided with the supplies necessary to meet daily instructional needs.

The District contends that this proposal primarily relates to instructional needs, not to teacher employment.

The Association contends that this proposal is substantially similar to one which has been made by the District. Thus, it argues that it would appear that the District concedes the necessity of providing such supplies to teachers so as to enable them to accomplish the educational goals established by the District. The Association contends that the District's view of this proposal is premised upon an unreasonable construction of the language.

The record does not disclose the scope of the "supplies" referred to in the proposal. It is clear to us, however, that the proposal, at least in part, is intended to require the District to provide certain supplies for use by students. In that respect the proposal is primarily related to educational policy. Therefore, even if the proposal is also intended to require the District to provide teachers with certain supplies primarily related to wages, hours and conditions of employment, the proposal as a whole is rendered a permissive subject of bargaining by the permissive element noted above.

(11) The disputed language is as follows:

> SECURE STORAGE SPACE
>
> Each teacher shall be provided with a lockable storage space at his/her home building.

The District contends that this clause is a permissive subject of bargaining in that the use to be made of any part of a school facility is not bargainable. The District contends that the Association's attempts to paint this proposal as having impact on wages, hours and conditions of employment has failed. It believes that the potential loss of District equipment which might be caused by the lack of such space does not impact upon the teachers' conditions of employment, but rather upon the District's facilities and curriculum. The District contends that it cannot be required to bargain over the allocation of its facilities so as to protect employe belongings which employes choose to bring to

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5/ See, Ithaca School District, 17461-B (12/79); Milwaukee Area Vocational, Technical and Adult Education District, 19216 (12/81).

work. It argues that while it may be convenient for teachers to have such space available to them, said convenience does not rise to the level of a term or condition of employment.

The Association asserts that the dispositive question as to the mandatory nature of its proposal is whether the duties of the teachers involved are such that storage space primarily relates to working conditions or to the management of the District's facilities. Blackhawk, supra. The Association asserts that teachers are required to use and keep grade books on a day-to-day basis over the course of the school year. It argues that the content of grade books should be kept confidential and that the teachers are charged with the safekeeping of instructional equipment. By making teachers responsible to keep and secure grade books, the Association believes that the District has a concomitant duty to provide a place or at least to bargain over providing a place to make the safe-keeping of the grade books possible. The Association therefore contends that the proposal is primarily related to the working conditions of teachers and should be found to be a mandatory subject of bargaining.

The record demonstrates that employes are held responsible for the availability of certain equipment and are expected to maintain the security of grade books. Given these requirements and expectations, we believe that it is a mandatory subject of bargaining for the Association to attempt to provide the employes with means by which they may meet those requirements and expectations. In addition, as there is no substantial basis for concluding that this proposal would interfere in any significant way with the District's ability to manage existing facilities, we believe that a proposal which would provide some lockable storage space as a matter of personal security and convenience for employes also primarily relates to conditions of employment. Support for this conclusion is found in Blackhawk, supra, wherein the provision of lounges and restroom facilities was found to be mandatory due to a primary relationship to working conditions. Thus, the proposal is a mandatory subject of bargaining.

The disputed language is as follows:

DRUG AND ALCOHOL ABUSE

(12) 1. Teachers on Unified School District premises are prohibited during the hours of work from the use or possession of alcohol and/or other controlled substances not prescribed by a physician.

The District asserts that this clause is a non-mandatory subject of bargaining because it implies that teachers can work while using alcohol or controlled substances if they are prescribed by a physician. It contends that this choice primarily relates to educational policy and not to working conditions. The District further asserts that the proposal implies that teachers may use drugs or alcohol on District premises at times other than work hours. The District would again contend that this choice primarily relates to public policy and that the right to use drugs or alcohol on District premises when an employe is not working has nothing to do with conditions of employment.

The Association counters by arguing that its proposal is a response to an alcohol and drug policy promulgated by the School Board. The Association contends that its proposal must reasonably be interpreted as a restriction upon employe behavior and not as a license, as argued by the District. It asserts that if the District's arguments were carried to their logical conclusion, a proposal stating that teachers are prohibited from the use of corporal punishment during the course of their duties or during the school year would, according to the District, give teachers the right to assault students during the summer. The Association contends that the District's argument that the proposal permits doctors to make educational policy by determining when a teacher can be under the influence of a controlled substance is equally specious.

The Association asserts that it has demanded bargaining because the District's policy refers only to employes and it therefore believes that said policy is subject to bargaining under the rationale enunciated in Middleton Joint School District No. 3, 14680-A (6/76). The Association asserts that its proposal primarly relates to conditions of employment in that it prescribes conduct that must be maintained during hours of employment. The Association argues that its

proposal is analogous to other provisions prescribing or proscribing conduct or personal appearance during working hours. City of Wisconsin Rapids, 13814-A (3/76).

We do not share the District's view that the proposal implies that employes are free to engage in certain conduct on District premises outside the hours of work. In our view, the proposal is most reasonably interpreted as specifying circumstances under which employe use or possession of alcohol or other controlled substances will be permitted on District premises during the work day.

As the District contends, the proposal seeks to protect the right of employes to possess and use on District premises during the work day controlled substances, including alcohol that has been prescribed for the employe by a physician. Both employes and the District have significant legitimate interests at stake regarding that subject. The District legitimately needs to be assured that employes are not working under the influence of drugs that present an intolerably high risk that the employe will be rendered incapable of safe and appropriate job performance. The District also legitimately needs to be assured that its professional teaching personnel will not give the appearance to students or others that they are abusing controlled substances and will not permit students or others in the school to obtain access to such substances. The Association and employes have a legitimate interest in seeking an assurance that employes will not be prohibited from working just because they need to use a prescribed medicine during working hours where that use does not present an intolerably high risk of rendering the employe incapable of safe and appropriate job performance.

In our view, because the instant proposal requires that the substance be prescribed by a physician as a precondition to its use or possession, it would be a mandatory subject but for the fact that it leaves the District without means of preventing use of prescribed controlled substances on District premises during work hours in circumstances that would involve an intolerably high risk of rendering the employe's job performance unsafe or inappropriate. However, as written, the instant proposal is a permissive subject of bargaining.

The disputed language is as follows:

ENTIRE AGREEMENT

(13)

3. Board decisions, rules or policies which affect the wages, hours or conditions of employment shall be transmitted to the REA in writing and the impact thereof shall be subject to negotiations between the parties at reasonable times during the term of this agreement. When said negotiations are required, this agreement shall be amended or modified to incorporate the agreement(s) reached in said negotiations.

4. If said negotiations result in an impasse, the impasse shall be resolved pursuant to provisions of section 111.70(4)(cm), Wis. Stats.

The District contends that Section 3 of the proposal is permissive because it would obligate the District to bargain over any change during the term of the contract even if the Association had already waived its right to bargain about that subject. The District distinguishes its waiver clause from that herein asserting that its proposal provides the District with a contractual basis from which to argue that a waiver in fact occurred. The District contends that under the Association's waiver language, the Association would be able to bargain even over subjects as to which the parties had already reached an agreement and had placed same in their contract. The District asserts that such bargaining would amount to a refusal to reduce a previous agreement to writing. As to Section 4, the District contends that a proposal specifying the availability of interest arbitration is a non-mandatory subject of bargaining. In this regard, it asserts that interest arbitration is either available or not available, depending on the law and that its availability should not be subject to the results of collective bargaining.

The Association contends that Section 3 of its proposal has, in concept, already been found by the Commission to be mandatory in Milwaukee Board of School Directors, 20093-A (2/83). As to Section 4, the Association admits that the

proposal would require mid-term interest arbitration in some circumstances, but notes that the need for such arbitration would be contingent upon the District's decision to unilaterally promulgate new rules or policies that primarily related to, or directly impacted on, wages, hours and conditions of employment. The Association also notes that the parties have already agreed to mid-term interest arbitration for the purposes of salary.

In Milwaukee Board of School Directors, 20093-A (2/83) at page 38, we held the following:

> 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 rights 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.

This holding applied to a proposal which specified "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 conditions of employment 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." As the above-quoted rationale indicates, our comment as to the modification of a proposal which would render it mandatory was directed at a change which would allow bargaining over policy changes which were, in themselves, mandatory subjects of bargaining. However, we see no distinction between the ability to bargain mid-term over changes in policy which are mandatory subjects of bargaining and the ability to bargain mid-term over the impact on wages, hours and conditions of employment which a permissive policy change may have. As we noted in that same decision at pages 39-40, ". . . a proposal by the MTEA which would seek to require that the Board provide it with notice of program decisions which will impact on wages, hours, and conditions of employment and which would require the Board to meet at reasonable times to bargain impact would be found to be a mandatory subject of bargaining."

While the Association has clearly professed its intent to have this proposal mirror that which the Commission's rationale in Milwaukee Board of School Directors, supra, would find to be mandatory, that effort has not been entirely successful. Thus, we note that the initial phrase of Section 3 refers on its face to existing Board decisions, rules or policies the impact of which could be subject to collective bargaining during the parties' current negotiations for a successor agreement. However, both parties herein presume that the intent of this language is that it refers only to changes in Board decisions, rules or policies which occur during the term of the contract. Given this shared presumption of intent, we do not find the absence of such a specification in the proposal itself to be fatal. More troublesome is the District's assertion that this clause would mandate bargaining over changes as to which the parties had previously reached agreement. Thus, for example, if the contract were to contain a provision which specified additional compensation for teachers when class sizes increased, and if the District subsequently altered its class size policy decision, the parties would already have reached an agreement on that subject and further bargaining would both be unnecessary and inappropriate. This concept was recognized by the proposal in Milwaukee Board of School Directors, supra, given its reference to "and the contract is silent". However, we note that Section 3 herein contains a limitation upon the duty to negotiate with its phrase "when said negotiations are required". We interpret Section 3 as only obligating the parties to engage in impact bargaining when the impact in question has not previously been bargained by the parties. Thus, we reject that District's assertion that the clause is permissive due to the lack of such a qualification and find it mandatory.

Turning to the status of Section 4, the Commission concludes that the proposal for the use of mediation-arbitration to resolve impasses which might arise during mid-term impact bargaining is a mandatory subject of bargaining. In City of Milwaukee, 19091 (10/81), the Commission was confronted with the following proposal:

> If the City rents, leases, or purchases side loader trucks for sanitation pickup, it will meet with the Union for the purpose of negotiating the impact of the new type vehicle on the bargaining unit members. If the parties are unable to reach agreement, the matter shall be submitted to final and binding arbitration.

The Commission concluded that such a proposal was a "specific reopener provision" which falls within the statutory applicability of the mediation-arbitration procedure set forth in Sec. 111.70(4)(cm), Stats., and not a voluntary impasse resolution procedure within the meaning of Sec. 111.70(4)(cm)5, Stats. As a specific reopener, the proposal was found to be a mandatory subject of bargaining. That conclusion is consistent with our statement in Sewerage Commission of the City of Milwaukee, 17025 (5/79), wherein the Commission stated that a union may propose as a mandatory subject of bargaining final and binding third party resolution mechanisms of disputes arising during the term of the contract as to the impact of management action. As we interpret the Association's proposal here to be a "specific reopener provision", we find Section 4 of the proposal to be a mandatory subject of bargaining.

EXTRA-CURRICULAR WORK ASSIGNMENTS

(14) 1.a. All extra-curricular work assignment shall be assigned on a voluntary basis, unless the District can demonstrate that there are no reasonable alternatives available in the bargaining unit, in order to provide the extra-curricular activity, other than the involuntary assignment of the activity to an employee in the bargaining unit. The District shall make every reasonable effort to obtain qualified bargaining unit volunteers for all extra-curricular work assignment. This section shall not be interpreted to limit the District's ability to subcontract such assignments to non-bargaining unit personnel when necessary for purposes of furthering the educational policy of the District.

"Extra-curricular work assignment" as used in this Article means those responsibilities which are set forth in Article XII(6) and (11) of the parties 1979-1982 contract, the Schedule of Compensable Extra Duty Assignments agreed to by the parties on 3/2/83, and Junior High School Intramural Supervisors, the Timer and the I.B. Coordinator.

b. In the event that two or more qualified teachers apply for the same position, the assignment shall be by seniority.

c. In the event that the District, after reasonable effort, is unable to secure a qualified bargaining unit volunteer for an extra-curricular work assignment the District then may make an involuntary assignment of the extra-curricular work to a qualified bargaining unit member. All such involuntary assignments shall be to the least senior, qualified employee on the roster of employees for the extra-curricular work assignment involved; provided, that employees once assigned to an involuntary duty shall not be assigned a second time until all qualified employees have been assigned.

d. No employee shall be involuntarily assigned more than one (1) extra-curricular work assignment per year unless the District can demonstrate that there are no reasonable

alternatives in the bargaining unit available in order to provide the extra-curricular activity.

e. No employee shall be assigned more than two (2) years total of involuntary extra-curricular work activity unless the District can demonstrate that there are no reasonable alternatives available in the bargaining unit in order to provide the extra-curricular activity.

2. ROSTER -- For each extra-curricular work assignment, the District shall prepare and maintain a roster of all bargaining unit employees who the District has determined are qualified to perform the work assignment. The qualification standards shall be reasonable and uniformly applied. The roster shall be updated annually. The District shall furnish a copy of the current roster to the Association and shall post the roster in a conspicuous place in each school building. Disputes over the placement of employees on the roster shall be subject to the Grievance Procedure commencing at Level III and shall be filed no later than twenty (20) days after the posting of the roster.

3.a. Within a reasonable time after the District becomes aware that a vacancy in an extra-curricular work assignment will occur, notices of vacancies will be posted on the official bulletin board in each school and sent to the Association.

b. Notices shall contain such information necessary for timely and proper application.

c. Teachers who desire a change in extra-curricular assignment may file a written statement of such desire with the Superintendent or his/her designee not later than April 1. Such statement shall include the extra-curricular assignment to which the teacher desires to be assigned.

d. On or before the last day of each school term the Executive Director of the Association shall be notified in writing of the names of all teachers who have been reassigned or transferred to new or different positions.

4. No extra-curricular work assignment may be voluntarily or involuntarily assigned by the District nor subcontracted unless the notice announcing the vacancy in that assignment has been posted for at least fifteen (15) work days. This requirement shall not be interpreted to prevent the District from immediately filling a vacant extra-curricular work assignment on a temporary emergency basis.

The parties were unable to agree as to whether they had reached an agreement on an extra-curricular clause during post-hearing bargaining. However, both parties agreed to brief the mandatory/permissive aspects of the Association's proposal and neither party contends that a decision on the status of the proposal is inappropriate despite their disagreement over the question of whether a dispute in fact remains. Under these circumstances we believe that labor peace is best served by issuance of a ruling on the proposal so as to remove any issue as to the proposal's mandatory or permissive status should the parties subsequently ascertain they they have not reached agreement on the subject covered by this proposal.

The District contends that the Association's extra-curricular proposal is a non-mandatory subject of bargaining. It initially notes that extra duty assignments covered by this proposal are an integral and important part of the District's educational program. Thus, the District argues that decisions relating to the manner in which such activities are assigned constitute significant educational policy choices. The District contends that the significant role of

extra-curricular activities in the overall educational program is further evidenced by the fact that personnel needs for extra-curricular positions may be taken into account when teachers are initially hired.

The District alleges that Section 1 of the proposal would impose a substantial and potentially crippling limitation upon the right and ability to assign employes to extra-curricular positions based upon needs of the students and the desire to put quality of the educational program above all other considerations. While noting that the proposal ostensibly stops short of absolutely precluding involuntary assignment to employes deemed by the District most suitable to fill its educational goals, the District contends that the effect of the proposal would be to make involuntary assignment so cumbersome, uncertain and unpleasant as to result in interference on a grand scale with the District's program and goals. The District contends that under this proposal a teacher whose initial hiring was influenced by his/her suitability for an extra-curricular assignment could disavow that assignment. The District also notes that an involuntary assignment which sought to place the best employe in the position could be challenged on so many grounds that the uncertainty and expense of contesting such challenges would encourage the "safe" route under the contract. The District asserts that a review of the "standards" in the proposal, which would be subject to arbitral review, demonstrates the extent of the intrusion on management and educational policy which this proposal represents.

> 1. All such assignments must be on a "voluntary basis" unless the District is willing to attempt to demonstrate "no reasonable alternative" to an involuntary assignment.
>
> 2. A volunteer has to be accepted unless the District is willing to attempt to demonstrate the volunteer is "not qualified".
>
> 3. Involuntary assignments may only be made to "qualified" unit members.
>
> 4. The qualification standards must be reasonable and uniformly applied.
>
> 5. The District must make every reasonable effort to obtain a volunteer from the unit before subcontracting or making an involuntary assignment.
>
> 6. Involuntary assignments must go to the least senior employe who is "qualified".
>
> 7. Unless the District is willing to attempt to demonstrate "no reasonable alternatives" no employe can have more than one extra-duty assignment per year.

The District contends that it has no duty to bargain over a proposal which would remove from the Board of Education decisions as to whether a teacher is qualified or as to the qualifications necessary to perform an extra-curricular assignment. The District cites in this regard the court's statement in Blackhawk Teachers Federation v. WERC, 109 Wis. 2d 415 (Ct. App. 1982) at page 434, to the effect that ". . . the language of this provision would allow submission to the grievance-arbitration procedures of issues concerning educational policy and school management not primarily related to wages, hours and working conditions . . . Similarly, because the grievance-arbitration procedure is not analogous to an ordinary political process (cite omitted), it is an inappropriate forum to discuss matters primarily unrelated to wages, hours and employment conditions." Thus, the District contends that the Association proposal, which would subject District prerogatives to arbitral review must be found to be permissive as determinations as to what qualifications teachers should have to fulfill extra-curricular responsibilities primarily relate to the formulation or management of educational or public policy. Similarly, the District asserts that a requirement that qualifications standards be "uniformly applied" intrudes into the educational policy deliberations of the District. Arbitral review of District determinations as to qualifications effectively removes the decision-making power from the District. Citing the above-quoted language from Blackhawk VTAE, supra, the District asserts that it need not bargain over such a proposal.

The District alleges that placement of the Association's proposal in a contract would yield involuntary assignments based solely on seniority without regard to any other consideration of educational policy or public interest. It contends that that is potentially so destructive of the educational program and process of the District that it illustrates that the proposal primarily relates to educational policy and the quality of the educational experience. The District further contends that placement of the proposal in a contract would likely result in massive turnover of personnel in extra-curricular positions, inasmuch as the involuntary status of an assignment rewards the teacher with (1) a right to get out after a year and (2) protection against more than one assignment. Given the likely result of a decline in the number of volunteers for such positions, the quality of the extra-curricular program would suffer as the least senior employes receive more and more of the involuntary assignments. The District contends that the proposal demeans the students and the programs by demanding that lengthy service be rewarded by a decreased role in these positions. The District contends that it does not want students to view these assignments as inconsequential. It argues that the whole proposal speaks a negative message to the students and community and that its impact on the programs could be devastating.

The District notes that the roster portion of this proposal could well subject it to innumerable grievances by employes who did not believe their placement on said roster was appropriate. It contends that the District could not function effectively during the time period which such challenges might take to be resolved. The District also contends that the fifteen working day limitation upon filling extra-curricular vacancies also should be found to be a permissive aspect of the proposal. It contends that under this proposal if a vacancy occurred on the last day of school, the position would have to sit vacant for the entire summer, absent an emergency, thus denying the District the opportunity to fill the vacancy in time for the employe to adequately prepare during the summer for the commencement of the duties' responsibilities. It contends that this loss of opportunity is without any benefit to the employe or employes in general. Given the absence of any relationship of this requirement to wages, hours and conditions of employment and given its interference with the District's educational mission, the District contends that this requirement is permissive.

The Association asserts that to determine whether its proposal constitutes a mandatory subject of bargaining, it is necessary to understand the proposals relationship to managerial decision-making and what the proposal would, and would not, require of the District. The Association contends that its proposal is almost entirely procedural in nature. It argues that its proposal is in essence a process for allocating involuntary and undesirable work assignments among the District's teaching staff, which will not and cannot prevent the District from securing qualified personnel (whether teachers or non-employes) for its extra-curricular program. The Association asserts that the proposal recognizes the District's managerial right to secure the availability of a qualified teacher for each extra-duty activity and its right to reasonably decide what qualifications the persons directing its extra-curricular activities should possess to fulfill such assignments. However, since the District can involuntarily assign extra-duty work to bargaining unit employes, it necessarily follows that such work assignments are "fairly within the scope of responsibilities applicable to the kind of work performed by" such employes and is thus bargaining unit work which the Association is entitled to protect through collective bargaining. In this context, the Association's proposal permits the District to subcontract extra-duty assignments, and thus decide to use non-teachers in its extra-curricular program, but protects the teachers' bargaining unit work by requiring the District to use qualified bargaining unit volunteers before subcontracting extra-duty work assignments except when necessary for the purposes of furthering the educational policy of the District.

The Association contends that its proposal is mandatory under the rationale expressed by the Commission in <u>School District of Rhinelander,</u> 19761 (7/82). It asserts that under the <u>Rhinelander</u> decision, the District can require that teachers, as opposed to non-teachers or non-unit volunteers, direct all educationally related extra-curricular activities offered to students by the District. Thus the Association asserts that a contract proposal which would require the District to subcontract extra-curricular assignments for which there are no unit volunteers is probably a permissive subject of bargaining. Thus, the Association's proposal permits the subcontracting of extra-curricular duties to non-unit volunteers, as an option available to the District to be utilized or not utilized

at its discretion. However, as the duties in question are "fairly within the scope of a teachers job" which can be involuntarily assigned to teachers by the District, the Association maintains that it must be able to bargain contractual protections for that unit work, such as the qualified right of qualified bargaining unit volunteers to receive such assignments before the District can subcontract same.

The Association also believes that its proposal does not run afoul of the Commission's statement in Rhinelander, supra, to the effect that the "qualifications" which teachers assigned to extra-curricular activities are to possess are permissive subjects of bargaining. It argues that the District's assertions to the contrary are the result of an overly broad interpretation of the Commission's decision. In that regard the Association notes that the Commission's discussion in Rhinelander, supra, as to the authority to establish qualifications was derived from prior decisions holding that the employer need not bargain over the minimum qualifications for a job but must bargain over the selection criteria to be applied to qualified applicants for a job vacancy. Thus, the Association alleges that its proposal allows the District to makes its determination as to the appropriate qualifications for a position but does require that those qualification standards be reasonable and uniformly applied. While admitting that this aspect of its proposal is not wholly unrelated to managerial decision-making, the Association argues that its implicit prohibition against arbitrary, inconsistent and non-job-related qualification criteria is not primarily related to the formulation of educational policy or the management of the school district. The Association asserts that the District can claim no legitimate managerial or educational policy interest in establishing extra-duty assignment qualifications which are unreasonable, arbitrary, individualistic, or inconsistently applied. The Association notes with approval the Commission's analogy in Rhinelander, supra, to the Supreme Court's analysis of the teacher layoff proposal in Beloit, supra.

The Association contends that its proposal does not affect the District's decision as to which extra-curricular activities its students will have available to them nor does it prevent the District from staffing all of the extra-curricular programs which it chooses to offer to students with qualified teachers. It notes that the District's obligation to give preference to qualified bargaining unit volunteers is limited to the utilization of "reasonable efforts" and notes that the restriction of one involuntary extra-duty work assignment per year is specifically conditioned on the existence of available reasonable alternatives.

The Association notes that the Commission in Rhinelander, supra, reaffirmed the right to bargain over the impact which extra-curricular assignments have upon hours of work. The Association contends that at its most elemental level, such mandatory impact bargaining must include the right to propose a procedure for allocating the "involuntary overtime" inherent in such extra-duty assignments among the District's teaching staff. It argues that the proposal's seniority-based allocation system and its carefully qualified limitation on more than one involuntary assignment per year are insufficiently restrictive to make the proposal a permissive subject of bargaining. The Association further argues that the proposal's posting requirement and its seniority-based procedure for involuntary assignments are conceptually and legally indistinguishable from intra-unit transfer provisions and seniority-based layoff procedures which the Commission has ruled to be mandatory subjects of bargaining. The Association reiterates that its proposal constitutes a procedure for allocating involuntarily assigned unit work among qualified employes with the District retaining the right to establish reasonable qualifications for the assignment to and the performance of such work.

The Association argues that the District's contentions that the proposal is cumbersome, uncertain and unpleasant and subject to employe grievances are irrelevant to a determination as to its mandatory or permissive status. The Association notes that its proposal expressly requires only "reasonable" decisions and actions on the part of the District and asserts that such actions would likely be interpreted by an arbitrator and applied in a context of a reasonableness standard even without that specification in its proposal.

In conclusion, the Association contends that its proposal primarily relates to the procedure for selecting employes for bargaining unit work assignments, where the selection pool consists of qualified unit teachers who represent essentially identical employes for the purposes of the District's educational mission. While the proposal has, at best, an indirect impact on the District's managerial

prerogatives, the Association argues that its proposal has, as the Commission recognized in its decision in City of Brookfield, supra, a very direct impact on the hours which the District's employes are required to work. A reasonable balancing of the impact of the proposal on the District's legitimate interests and managerial functions, and on the employe's hours and conditions of employment, requires the conclusion that the proposal is primarily related to employe hours and conditions of employment and is, accordingly, a mandatory subject of bargaining.

In Rhinelander, supra, the Commission set forth the following analytical framework for considering extra-curricular proposals:

> . . . there can be no doubt that the essence of educational policy is the school district's decision as to which academic classes and extra-curricular activities its students should have available to them. 7/ After making this decision, the question then becomes what type of person will direct those activities and what qualifications should such persons be required to possess. We believe that such decisions are so intimately related to the school district's judgment as to how its extra-curricular program can best serve the students' education needs that they, like the choice of which activities to provide, are primarily related to basic educational policy rather than to wages, hours and conditions of employment. We therefore conclude that a district's decisions regarding what type of persons (teachers or non-teachers) will direct extra-curricular activities and what qualifications they should possess are not mandatory subjects of bargaining.

The Association's proposal would give a teacher the right to refuse the extra-curricular assignment which that teacher held during the preceding school year. This proposal does not infringe upon the District's right to determine what activities will be available. Nor does it impinge upon the District's decision as to whether teachers should direct the activity because the District presumably could assign a different teacher to the activity in question. However, as earlier discussed, the question of what qualifications are necessary to direct the activity remains a matter of public or educational policy 8/ which need not be bargained. Having determined what qualifications are appropriate, the District, as indicated by the Court in Beloit in its discussion of a layoff proposal, retains the right to insist that qualified individuals be available to direct an activity. Here if the incumbent teacher were the only qualified individual available for the assignment, the proposal in question would interfere with the District's right to have qualified employes inasmuch as the District, under the Association's proposal, could not insist that the qualified incumbent take the assignment. Given this potential infringement due to the lack of an assurance that a qualified teacher would be available, the proposal in question is found to be permissive. 9/

7/ Beloit, supra.

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

9/ As the parties chose not to litigate the issue of whether certain extra-curricular assignments may be so far removed from an educational policy determination that a staffing decision would constitute a mandatory subject of bargaining, it is inappropriate and the record does not (continued)

In reaching this conclusion the Commission has considered the Association's arguments regarding the undeniable effect which the performance of extra-curricular duties has upon an employe's hours. However the Commission must conclude that where, as here, a proposal may prevent the District from providing students with qualified direction of extra-curricular activities, the educational policy dimensions of such a proposal predominate over the effect upon hours. It is also clear that the Association has the right to bargain over the impact which extra-curricular assignments have upon hours of work.

9/ (continued)

allow any comment as to whether any such assignments are found in Appendix C. Suffice it to say that as the proposal in question applied to all such assignments and as the substantial majority of the listed activities unquestionably relate to educational policy determinations, such an activity by activity analysis is also unnecessary.

In Milwaukee Board of School Directors, 20093-B (8/83), the Commission refined the Rhinelander decision in the following manner:

> As footnote 8 in the Rhinelander decision indicates, the Commission has consistently held that an employer need not bargain over the minimum qualifications for a job but must bargain over the selection criteria to be applied when choosing among qualified applicants. The right to establish such qualifications, as recognized by the Court in Beloit, flows from the need to insure that qualified individuals be available to direct any activity which is sufficiently related to the educational mission. We find that the District retains the right to set unilaterally certain minimum qualifications vis-a-vis the coaching positions in question, notwithstanding the existence of the WIAA. We note that the WIAA is a voluntary organization to which the District need not belong and that the WIAA does not purport to and does not in fact make educational policy judgments that foreclose the District from pursuing further educational objectives where extra-curricular athletics programmings is concerned.
>
> We find the proposal as written to be permissive because, as in Rhinelander, it may prevent the District from providing qualified direction of an extra-curricular activity (athletics) which activity bears a significant and sufficient relationship to fulfillment of the District's educational mission. (See our note 9 in Rhinelander, above). We so conclude because the language at issue here may require the District to hire a bargaining unit member who has no familiarity with the sport in question and who thus could lack minimum qualifications to perform the assignment.
>
> It is our view however, that the District's right to set minimum qualifications is not without its limits. The educational policy dimensions predominate as regards such job performance related minimum qualifications as the professional certification, educational attainment, experience with and knowledge of a sport, knowledge of safety practices regarding the sport, knowledge of first aid and/or sports injury training practices that will be required of applicants for each of its coaching work opportunities. However, minimum qualifications that do not primarily relate to educational policy or management of the district could not be imposed without fulfillment of the statutory bargaining requirements; examples might include a requirement that the applicants must be District residents, unmarried, etc.

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

We also think it appropriate to clarify the application of the Rhinelander holding to the instant dispute. Where, as here, the District has historically utilized unit teachers to fill the vast majority of coaching positions, the positions become unit work which the MTEA can seek to protect from assignments thereof to non-unit personnel. As the Supreme Court indicated in Racine, absent evidence that the decision represents a choice among alternative social or political goals or values, the decision to substitute non-unit for unit personnel is a mandatory subject of bargaining. While, as stated in Rhinelander, it is theoretically possible that a district could show that use of non-unit personnel represented a choice among goals or values, such a showing remains a burden which must be met by the record before the Commission. Here, the District has not shown that any value choice is at stake, other than its expressed desire to have the "best qualified" person in the job. Especially in view of the court's holdings in Beloit and Glendale, 4/ we do not believe that the foregoing District desire is sufficient to overcome the MTEA's legitimate interest in protecting what has historically been essentially unit work if qualified unit employes are interested in filling the position. If no qualified unit applicant timely applies for a given assignment, as the parties have interpreted the language, the District would be free to use non-unit personnel.

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

Our review of the Association's proposal satisfies us that it honors the management prerogatives and rights to bargain which are set forth above. Section 1(c.) ensures the District that unit personnel it finds qualified will be available for assignments while the Association's right to bargain over the criteria to be used when filling an assignment from qualified unit personnel is reflected through the proposal's specification that qualified volunteers be used first (the most senior getting preference) and that involuntary assignments, due to an absence of volunteers, will be made to the least senior qualified individual. The proposal leaves the District free to establish qualifications for assignments but reflects the Association's right to bargain over non-job performance related qualifications by the requirement that the qualification be "reasonable". The proposal leaves the District free to establish the extra-curricular activities which will be available to students while reflecting the Association's right to bargain over the impact of extra-curricular assignments upon hours with the

qualified limitations upon the duration, type, and number of involuntary assignments. The proposal allows subcontracting necessary to further educational policy while at the same time providing unit work protections.

The proposal also contains various requirements and procedures which are designed to insure that the rights and concepts contained therein are protected. Thus, for instance, the District is required to make "every reasonable effort" to obtain volunteers before making an involuntary assignment. The District is also required to avoid more than one involuntary assignment per employe per year or more than two years of involuntary assignment per employe unless "there are no reasonable alternatives available in bargaining unit in order to provide extra-curricular activity." Furthermore, District qualifications must be "uniformly applied." A roster must be established. Vacancies must be posted for a set period before being filled.

The District argues that these requirements and procedures are burdensome and difficult to administer. We believe that, in general, such arguments go to the alleged reasonableness, or lack thereof, of said proposal rather than to the mandatory/permissive determination. Assuming arguendo the validity of these arguments, these factors are not relevant to our determination so long as a proposal's procedures and requirements are not so restrictive that they effectively render the employer incapable of managing the operation and fulfilling the educational mission and thus predominate over their relatedness to wages, hours and conditions of employment. Aside from the 15 working day posting period, we do not believe the requirements and procedures contained in this proposal reach that level of interference with management prerogatives. This portion of the provision is found permissive because, as the District points out, the combination of the working day specification and summer vacation raises a realistic potential for positions going unfilled at the start of the school year or immediately prior thereto. The allowance in the proposal for filling positions on a temporary emergency basis cannot reasonably be viewed as providing adequate protection against this problem. If the proposal were modified to specify a 15 calendar posting period, it would be mandatory.

With regard to the District's contention that this proposal interferes with initial hiring decisions, we disagree. We find that the question of whether an applicant will accept an extra-curricular assignment if hired involves the initial hiring decision, which is a non-mandatory subject of bargaining. 6/ Furthermore, acceptance of such an assignment by a newly hired teacher would be viewed as a voluntary acceptance of said assignment.

The District has also raised the specter of arbitral review of its actions under this proposal as a basis for the proposal being found to be permissive. In general we note that such an argument, if adopted, would render all contract provisions permissive as arbitral review is always theoretically available as to any employer action under a contract. Would a "just cause" provision as to discipline become permissive merely because of the potential for arbitral review of employe discipline? We think not and thus reject the broad brush scope of this argument. To the extent that the District focuses upon arbitral review of the "reasonableness" of the qualifications it establishes or the "uniformity" of their application, we recognize the potential for an arbitrator determining that a qualification is unreasonable or was not uniformly applied to all unit personnel. We would first note that we have given considerable direction in the previously quoted portions of Milwaukee Board of School Directors, 20093-B (8/83), regarding the job performance related minimum qualifications which a school district may unilaterally establish. In addition, balanced against this limitation upon management action is the Association's interest in ensuring that the District does not render assignment procedures a sham by developing qualifications which are tailored to only one individual or by treating equally qualified individuals differently. The relationship of these limitations on employer action to wages, hours and conditions of employment in our judgement predominates.

6/ Madison Metropolitan School District, 16598 (1/79); Sewerage Commission of the City of Milwaukee, 17025 (5/79); City of Madison, 16590 (10/78).

Lastly, we think it is important to comment upon the District's argument that the proposal will require that someone other than the "best qualified" individual receive the assignment and thus permissively interferes with educational policy. As we noted in Milwaukee Board of School Directors, 20093-B (8/83), the court's holdings in Beloit, supra, and Glendale, supra, have rejected that argument and reflect the reality that unions would no longer have a right to bargain layoff, recall, promotion, transfer and assignment procedures if an absolute right to the best qualified employe was guaranteed by law. We note the District is free to propose language which would give it that right.

Dated at Madison, Wisconsin this 5th day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

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