STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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-C

Appearances:

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

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

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On January 5, 1984, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Declaratory Ruling in the above-entitled matter wherein the Commission determined whether certain proposals made by the Racine Education Association during collective bargaining with the Racine Unified School District were mandatory or permissive subjects of bargaining and wherein the Commission concluded that it lacked an adequate record to determine the bargainable status of a proposal made by the Association relating to the teacher workday. Following the issuance of said declaratory ruling, the parties resumed their efforts to reach voluntary agreement on a successor collective bargaining agreement. As a part of those efforts, the parties exchanged final offers pursuant to Sec. 111.70(4)(cm), Stats. The final offer then submitted by the Association contained a modified version of the teacher workday proposal as to which the Commission concluded it could not rule upon in the earlier declaratory ruling proceeding. On April 11, 1984, the District filed a supplemental petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the mandatory or permissive status of the Association's modified teacher workday proposal. The Association filed a response on April 25, 1984. The District and the Association agreed to waive hearing and further argument and to allow the Commission to proceed to decide the matter based upon the record and arguments in Racine Unified School District, 20653-A and 20652-A (1/84) and School District of Janesville, 21466 (3/84).

Based upon its consideration of the record and the parties' positions, the Commission makes and issues the following

SUPPLEMENTAL 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.

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 the District's duty to bargain over the following proposal contained in the Association's March, 1984 final offer submitted pursuant to Sec. 111.70(4)(cm), Stats.

> 3.b If teachers are given work assignments outside the following teacher workday, they shall be considered overtime assignments:
>
> 1. A continuous period of seven (7) hours and twenty-one (21) minutes at the High School level;
>
> 2. A continuous period of seven (7) hours and ten (10) minutes at the Junior High School level;
>
> 3. A continuous period of six (6) hours and fifty (50) minutes at the Elementary School level;
>
> 4. A continuous period of seven (7) hours and thirty (30) minutes with a thirty (30) minute duty-free lunch, or, in the alternative, a continuous period of eight (8) hours with a sixty (60) minute duty-free lunch, for all unassigned teachers.
>
> 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 each school year on the first day teachers are required to report to school.

5. That the Association proposal set forth in Finding of Fact 4 is primarily related to wages, hours and conditions of employment.

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

SUPPLEMENTAL CONCLUSION OF LAW

That the proposal set forth in Finding of Fact 4 is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

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

SUPPLEMENTAL DECLARATORY RULING 1/

That the District and the Association have the duty to bargain under Sec. 111.70(1)(d), Stats., over the proposal set forth in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner

Footnote One appears on Page Three

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

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

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

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

Before entering into a specific consideration of each proposal, it is useful to set forth the general legal framework within which the issues herein must be resolved. Section 111.70(1)(d), Stats., defines collective bargaining as ". . . the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, . . . the employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees . . ."

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily," "fundamentally," "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of the "establishment of educational policy" affecting the "wages, hours and conditions of employment." The Court found that bargaining is not required with regard to "educational policy and school management and operation" or the " 'management and direction' of the school system." 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 disputed proposal is as follows:

> 3.b If teachers are given work assignments outside the following teacher workday, they shall be considered overtime assignments:
>
> 1. A continuous period of seven (7) hours and twenty-one (21) minutes at the High School level;
>
> 2. A continuous period of seven (7) hours and ten (10) minutes at the Junior High School level;
>
> 3. A continuous period of six (6) hours and fifty (50) minutes at the Elementary School level;
>
> 4. A continuous period of seven (7) hours and thirty (30) minutes with a thirty (30) minute duty-free lunch, or, in the alternative, a continuous period of eight (8) hours with a sixty (60) minute duty-free lunch, for all unassigned teachers.
>
> 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 each school year on the first day teachers are required to report to school.

As indicated in the preface to this decision, both parties rely upon the record and arguments presented to the Commission in Racine Unified School District, 20653-A and 20652-A (1/84) and School District of Janesville, 21466 (3/84). In addition, the District has asserted that the last sentence of the Association's proposal herein appears to prohibit the District from changing the starting time of a teacher day during the school year and thus that the proposal would effectively prohibit the District from making changes in pupil starting times during the school year. To that extent, the District contends that the Association's proposal directly limits the timing of the school day, contrary to the Commission's rationale in Janesville, supra.

In Janesville, the Commission held as follows:

The disputed language is as follows:

> Section 2. Regular Teacher Workday.
>
> a. The regular teacher workday for employes covered by this Agreement shall be as follows:
>
> Elementary (grades pre-K-6): 8:15 a.m. to 3:00 p.m.
>
> Secondary (grades 7-12): 7:45 a.m. to 3:45 p.m.
>
> The regular teacher workday shall include a duty-free lunch period consisting of thirty (30) minutes.
>
> b. 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 rate of $10.00 per hour, with a one-hour minimum payment per assignment.
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> c. As used in this Article, a teacher's regular hour rate of pay shall be determined by dividing the teacher's yearly salary by the product of 190 (contract days per year) x 8 (hours per workday).

The District asserts that Section 2(a) of the Association's proposal seeks to establish the "regular" length and starting and ending times of the teacher work day. The District argues that such a proposal is in and of itself a limitation upon the District's ability to educate students which is separate and distinct from the economic consequences of requiring teachers to work hours outside of the specified work day. In this regard, the District argues that the contractual reference to "regular" must mean something. The District asserts that it may mean no work day assignment may exceed such hours on a regular basis, notwithstanding a compensation proviso. It may mean no such assignment may be less than the prescribed hours on a regular basis, or ever. It may mean, the District alleges, that a third party arbitrator will have to decide what it means. In any event, the District argues that the Association's proposal does not simply seek to establish a standard from which it can then bargain overtime impact.

The District contends that the primary effect of the Association's work day proposal is to limit the District's ability to make educational and management policy decisions. The proposal limits the number of hours (that) can be taught on a regular basis. In the District's opinion, bargaining about a regular teacher work day amounts to bargaining about the student's school day. The District argues that the proposal limits when the District can regularly provide the service that is its primary reason for existing. The District contends that the school day has historically been established by reference to a number of factors with first consideration being given to the students and their ages, instructional needs, and ability to absorb knowledge. Other relevant considerations include transportation concerns, including obligations imposed by state law pertaining to private as well as public school operations. The District argues that because

teachers deal directly with students, the Association's proposal could require adjustments in a broad range of District operational decisions, significantly relating to the formulation or management of public policy by the District. The District therefore contends that this portion of the Association's proposal is clearly permissive.

As to the Association's reliance on the Commission's decisions in City of Wauwatosa, 15917 (11/77), Madison Metropolitan School District, 16598 (10/78) and City of Brookfield, 17947 (7/80), the District notes that each of those cases recognize that the impact on working conditions had to be measured against the impact on "decision-making as to the delivery of services". Moreover, the District argues that while the Commission has held that the impact of the proposal on the governmental units budget "is not determinative", none of the cases contain a suggestion that such considerations are entirely irrelevant. The District also points out that with the exception of the Madison case, the decisions relied upon by the Association did not arise in the school context and asserts that the Madison case involved custodians, not teachers. Nothwithstanding (sic) the Association's argument that it makes no difference what kind of employe is involved, the District contends that there is indeed a difference where, as here, the students' day is meaningless except to the extent that it is consistent with the teachers' day. The District further argues that in City of Wauwatosa, supra, the Commission was quoting at length from Joint School District No. 8 v. WERB, 37 Wis. 2d 483, 491 (1967) as support for the proposition that the particular hours of the day during which employes are required to work would be a mandatory subject of bargaining. The District notes that the Joint School District case did not involve a proposal specifying particular hours of work and was decided at a time when there was no duty to bargain collectively. The District also points out that the Court in the Joint School District case was itself quoting a U.S. Supreme Court case involving Sherman Trust Act allegations. Thus, the District argues that neither the U.S. Supreme Court nor the Wisconsin Supreme Court was considering the educational or public policy implications of a teacher proposal to set a "regular work day". The District concludes by noting that there is no evidence as to how this proposal impacts on teacher's employment, except through the most mechanical readings of the phrase "wages, hours and conditions of employment". It alleges that there is no showing that advancing or postponing the starting time of the teacher day by five minutes affects a teacher's employment to a more significant degree than it affects the student's learning experiences. The District therefore requests the Commission find this portion of this proposal to be permissive.

Turning to Section 2 (b) the District contends that the Association has presented no evidence of impact on teachers as to work assignments which are outside of the times specified in Section 2 (a). It argues that if the elementary day began at 8:00 instead of 8:15 a.m. and ended at 2:45 p.m. instead of 3:00 p.m. the record shows no impact or effect on the teachers. Thus, the District contends that although the Association's proposal would purport to compensate for an impact, no impact is present. The District's (sic) alleges that although the Association apparently considers "impact" proposals to hinge upon the Association's ability to fashion a proposal for dollars to discourage things it doesn't like, more is required. It argues that evidence of "impact" is necessary to support a conclusion that the work load of a teacher is affected. Beloit, supra; Blackhawk Teachers Federation v. WERC, supra. The District argues that in the Memorandum Accompanying Order Regarding Motion For Reconsideration, 11831-D (1974) in Beloit, supra, the Commission made it clear that the "impact" in these matters cannot be presumed when it stated:

"in support of its argument that the Commission erred in determining that the class size proposal was not a mandatory subject of bargaining, the Association argues that the evidence supports a conclusion that class size affects the work load of teachers. The Commission does not quarrel with that argument. If workload of the teacher is increased by an increase in the class size, under our Declaratory Ruling the Association has the right to bargain on the impact of such a determination, for the reason that the increase in the class size does not affect the work load of the teacher."

District argues that unless an impact is shown, it is clear that the Association is attempting to do via the back door what it could not do via the front door--negotiate a regular teacher work day. In these circumstances, the District contends that the $10.00 per hour overtime rate is a penalty constituting the Association's attempt to tell the District that if it won't run the schools the way the Association wants them run, it will cost, and dearly. The District asserts that the employer's prerogative and obligation to make educational policy decisions does not survive in any meaningful way under such a proposal.

Even if the Association's impact assertions are given weight by the Commission, the District contends that such impact does outweigh the District's interests herein. The District contends that it submitted substantial evidence as to the detrimental impact the Association's proposals would have on the District's educational policy. It argues that the elimination of the flexibility necessary to respond to educational and statutory concerns when establishing a school day would have a harmful impact on the District's ability to honor student's educational needs.

The District further asserts that teachers are recognized as professionals and that regular starting and ending times are inconsistent with traditional expectations of a professional. The District asserts that professional employes do not expect to work an identical number of hours from day to day or week to week and thus are not generally compensated by the hour. Given this inability to measure professional employes (sic) output on an hourly basis, the District argues that the concept of overtime compensation where an annual salary is also established is foreign to a professional employe and that assertions of impact should be scrutinized against this tradition. The District also contends that assertions of impact should be viewed within the context of the reality that the performance of teaching duties has traditionally required that teachers work prior to or after the starting and ending times specified in the Association's proposal. The District notes that the overtime figures specified in the Association's proposal are not related to any specific work load increase and are not related to the individual's hourly compensation. As it asserts that the Association must demonstrate that an employer action impacts upon working conditions, Manitowoc County 18995 (1981) and establish a relationship between the affected working conditions and the proferred impact proposal, Milwaukee Board of School Directors, 20093-A (2/83), and as the Association has not demonstrated either of these necessary prerequisites, the District contends that the proposal primarily relates to the educational and management policies which the District has demonstrated are affected by the Association's proposal. The District views the instant proposal as a direct frontal assault on the District's right to establish educational policy under the guise of bargaining compensation. The District does not recognize the validity of the Association's view that any time a dollar value is attached to a proposal,

the requisite impact has been demonstrated. Therefore, the District requests that the Commission find the Association's proposal to be permissive.

In its supplemental brief, the District asserts that the record herein should properly include a copy of a periodic newsletter distributed by the Racine Education Association to members of the bargaining unit it represents describing certain of the practical implications of the WERC decision in Racine Unified School District, 20652-A, 20653-A (1/84) that a regular work day and overtime proposal of REA's was a mandatory subject of bargaining. The District asserts that the document is relevant as there are striking similarities between the proposal of the Racine Education Association and the proposal at issue herein. The District further argues that the materiality of the document is established by the fact that the document itself confirms what the District has argued all along: that such proposals are merely back door attempts to bargain over matters of educational policy. The District therefore requests that the Commission overturn the ruling of Examiner Davis and receive the document into this record.

The District next argues that the Commission wrongly decided in Racine, supra, that an overtime provision which compensates teachers for assigned work performed outside the school day is a mandatory subject of bargaining so long as the proposal does not prohibit the making of such assignments. The District asserts that the thrust of the Commission's decision in Racine is that any proposal which carries a dollar value and which does not contain an express requirement setting or preventing the District from setting a particular educational policy is per se a mandatory subject of bargaining. The District contends that if the reservation of the right to establish educational policy which is expressly stated in Sec. 111.70(1)(d), Stats. is to maintain any vitality, the Commission must reverse its conclusion and stop putting form over substance.

As to proposal 8, the District contends that it does not have a "regular teacher work day" although it does have an availability requirement that teachers be present in the building fifteen minutes before and after the commencement and conclusion of the student class. The District asserts that this requirement only establishes the minimum access requirement of teachers to the students they teach and that state law vests in the District the exclusive authority under Sec. 120.12 (15), Stats. to establish the normal school day. The District alleges that there are many professional teacher duty assignments which are either (sic) can not be performed or which are ill-suited to performance during the normal school day. It also contends that the starting and ending times for the school day are matters of educational policy which change according to the District's needs. Under the Association's proposal, the District argues that it would not be able to change the regular teacher work day and thus necessarily could not change the normal student day. Although it is aware that the Association contends that the District retains the unrestricted right to schedule the hours of students and teachers, the District reasserts its position that the term "regular" seems to raise a question as to the reasonableness of such an interpretation of the Association's proposal. The District further argues that there is no evidence in the record of this case that changing the starting and ending times but retaining a constant length of the regular work day has an impact on teachers. It asserts that it should not be required to bargain over such a proposal simply because it involves the concept of "hours".

The District contends that the Association's proposal, while styled as an overtime proposal, ultimately takes certain

assignments or duties which are directly related to the educational mission and which traditionally have been considered to fall fairly within the scope of a teacher's duties and require that teachers receive additional compensation for the performance of same. Viewed in that manner, the District contends that the proposal compels it to bargain over the composition of the duties it will assign to teachers and that such a proposal is of course permissive. Citing Sewerage Commission of the City of Milwaukee, 17025 (5/79). The District also renews its argument that the overtime proposal is incompatible with the concept of professionalism. The District argues that teachers are professionals both statutorily and practically. It notes that Sec. 111.70(1) (1)1. c., Stats., defines a professional employe in part as one engaged in work ". . . of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time." The District asserts that the Association's proposal herein is at odds with the above quoted definition.

The District argues that municipal labor relations in Wisconsin cannot operate in a vacuum. It asserts that it is not enough to suggest that the mediator-arbitratror can sort through over-reaching proposals where, as here, the proposal has a direct impact on how educational policy will be implemented. It asserts that its objections to the Association's proposal are, in part, philosophical and, in part, practical. Its philosophical objections are rooted in the statutory definition of a professional employe and in the District's views as to how teachers should be compensated. The practical objections of the District are that, notwithstanding the Association's contention that most of the duties are and will continue to be performed on a voluntary basis without additional compensation, is reasonable to infer that if a teacher can garner more pay by withdrawing voluntary consent to perform such duties, said consent will be withdrawn. Thus the District contends that the primary impact of the proposal is on the District's ability to meet its educational mission. The District argues that the Association's proposal does not simply represent a different method of compensation but also represents a radical change in education. If teachers are professionals, the District asserts that their conditions of employment should reflect that fact and that if teachers are not professionals, certain statutory provisions will have to be rewritten. Therefore the District requests that the Commission find proposal 8 to be a permissive subject of bargaining.

The Association begins by noting that the definition of collective bargaining in Sec. 111.70(1)(d) Stats. includes the duty to bargain over employe "hours" and that the Commission has concluded that "in general, the hours of work of bargaining unit employes is a mandatory subject of bargaining." Sewerage Commission of the City of Milwaukee, 17025 (5/79). The Association further notes that in Joint School District, No. 8, supra, the Wisconsin Supreme Court quoted with approval the U.S. Supreme Court in Meat Cutters v. Jewel Tea 381 U.S. 676, (1965), as follows: ". . . The particular hours of the day and the particular days of the week during which employes shall be required to work are subjects well within the realm of 'wages, hours and other terms and conditions of employment' about which Employers and Unions must bargain." In City of Wauwatosa, supra, the Association points out that the Commission interpreted the Court's reference to Jewel Tea to mean that the particular hours of the day during which employes are required to work is a mandatory subject of bargaining. The Association also quotes the Commission's decision in Madison Metropolitan School District, supra, to the effect: ". . . the proposed work schedule directly relates to the hours of work of the employes in the instant classifications. Therefore, we find that the proposed starting and ending times, the lunch period for the

four classifications primarily relates to the wages, hours and conditions of employment of the employes in those classifications, and therefore, the times proposed are a mandatory subject of bargaining." The Association also directs the Commission's attention to City of Brookfield, supra, wherein the Commission held that "since the hours in which employes are regularly expected to work primarily relate to hours and working conditions, a proposal relating to regularly scheduled hours of work constitutes a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act."

The Association contends that the issues involved in its proposal are identical in all important respects to the scope of bargaining disputes resolved by the Commission in the City of Wauwatosa, Madison Metropolitan School District, and City of Brookfield decisions. It alleges that its teacher work day proposal establishes "the hours in which employes are regularly expected to work". It argues that its proposal also provides that teachers who are assigned by the District to perform work outside the regular teacher work day shall receive overtime pay for the additional assignment. The Association asserts that the above-cited cases establish that this aspect of the proposal is also a mandatory subject of bargaining. The Association argues that the District here makes the same tired claims of the significant restrictions on its educational policy making role as the Commission has previously rejected in the cases cited above. Given the weight of the Commission authority interpreting the Sec. 111.70(1)(d) reference to employe "hours" as including "the hours in which employes are regularly scheduled to work" and the employer's "liability for overtime or premium pay", the Association asserts that it is difficult to characterize the District's challenge to Section 2 as anything other than frivoulous (sic).

As to the District's allegation that the proposal "limits the number of hours students can be taught on a regular basis", the Association cites the Commission's rejection of comparable employer contentions in the cases cited above. Contrary to the District's assertion's (sic), the Association asserts that its teacher work day proposal does not limit the District's right to establish the hours of the school day. Under the express terms of its proposal, the Association asserts that the District is not prevented from requiring teachers to work beyond the hours of the "regular teacher work day" subject to compliance with the provisions (sic) overtime compensation requirements. The Association contends that its proposal merely establishes the teacher's "regularly scheduled working hours." The Association argues that while its proposal has, at best, an indirect impact on the District's managerial prerogatives, it has, as the Commission recognized in its City of Brookfield decision, "a very direct impact on the hours in which the employes are regularly scheduled to work." Accordingly, the Association asserts that its proposal is a mandatory subject of bargaining. The Association rejects the District's contention that the above cited Commission's decisions can be distinguished from the present case because the employes involved herein are professional employes. It argues that the distinction between professional and non-professional employes was not crucial to the Commission's decisions. The Association therefore reiterates its contention that prior Commission decisions establish that it is mandatory for the Association to bargain about (1) the number of hours in the teacher work day, (2) the times when the teacher work day normally begins and ends, and (3) the District's obligation to pay overtime compensation to the teachers for work assigned for performance outside the regular teacher work day.

During the February 24, 1984 supplemental hearing, the Association asserted that under proposal 8, the District is free to require that any and all teachers work hours outside those specified in the proposal on a daily basis subject only to the requirement of the overtime provisions contained therein. The Association notes that the record reflects that the times specified in the proposal are consistent with the existing hours which, by District policy, teachers are required to be available to students before, during, and after the current school day. The Association reiterates its position that by defining the scope of the regular teacher work day, it is in essence defining the amount of work which a teacher will perform for his or her basic salary. The Association therefore renews its request that the Commission find this proposal to be mandatory.

Discussion of Proposal 8

We initially conclude that the Racine Education Association's memorandum was properly excluded from the record by the Examiner. The proposals before us here will be examined based upon the word choice and arguments of the Janesville Education Association and not the post decision propaganda distributed by a labor organization in a different case.

As the Association has indicated, the Commission has previously found language which specified both the timing and length of the work day to be mandatory. Indeed, bargaining over "hours" is a basic employe interest because the amount of time which an employe must work has an obvious and direct relationship upon the time which that employe has available for non-work related activities upon which the employe may well place far greater value in his or her life. In addition, there is the intimate relationship between the number of hours an employe works and the amount of compensation which the employe and the bargaining representative will seek as compensation. However, a close examination of those decisions reveals that in each instance the Commission was satisfied, when balancing the relationship of the proposal to hours and conditions of employment and to public policy concerns, that the proposal in question did not prevent the employer from providing the basic service for which it utilized the employes. Here we are confronted with District assertions that the proposal will prevent the District from providing basic service by (1) restricting the hours when any bargaining unit employes can be required to work; and (2) structuring compensation in a way which will break down existing professionalism. We will address these concerns separately.

We commence our consideration of proposal 8 by concluding that the proposal can reasonably be interpreted as allowing the District the discretion to assign teachers duties outside the hours specified therein. Indeed, the Association asserts and we concur with a conclusion that the District retains the discretion to require any or all teachers to perform work assignments on a daily basis outside the hours specified in the proposal. Thus, while the specified times currently parallel the existing student school day and the record further reflects that the District has no current plans to alter that day, the District could, without violating this proposal, establish a school day outside the parameters of the hours set forth in the proposal subject only to the payment of the overtime rate contained therein. Thus, we reject the District's contention that this proposal could prevent the District from requiring that teachers be present during a school day the times of which were different than those specified in the proposal. Therefore, contrary to the District's claim, we find that this proposal has no effect in the District's prerogative to schedule school at times and for lengths of time which it deems educationally appropriate and

does not prevent the District from providing the basic service for which it utilizes the teachers.

Remaining are the District's concerns that the overtime dimensions of the proposal are philosophically wholly in conflict with the appropriate manner for compensating professionals. It asserts that if professionals are to be compensated on a piece-meal basis depending upon the duties performed and the times at which they are performed, the concept of teachers as professionals will crumble and the duties which teachers now perform voluntarily to provide a high quality of education will become matters of contention between the District and the Association. We agree with the District's contention that this proposal represents a departure from the conventional modes of compensating public school teachers. However, this different approach to compensation is only that and does not, in our view, implicate any substantial educational policy concerns. By contrast, overtime or premium pay proposals directly relate to wages. Thus, on balance, we conclude that the employe's interests in bargaining over the amount of work time for which the employe's basic salary will provide compensation and the premium pay applicable to additional hours of work are mandatory subjects of bargaining given their primary relationship to employe wages, hours and conditions of employment.

The Association's proposal also establishes the starting and ending times of the work day for which an employe will receive his or her basic salary. The District has argued that there is no impact upon employe wages, hours and conditions of employment involved in this portion of the proposal. We disagree. Although we have earlier concluded that this proposal does not prevent the District from requiring employes (even on a daily basis) to perform duties outside of the hours specified in the proposal, we have also noted that under the terms of the proposal, such would be compensable by overtime pay in addition to the teacher's salary schedule compensation. Employe interests in being compensated if the starting and ending time of his or her work day fall outside those preferred by the employe relate to employe preferences as to the scheduling of their own non-work activities with family members or friends. The Association's proposal presumably reflects an employe interest in not working--except at overtime rates--at times such as evening or night which might conflict with the non-work time of family or friends or early morning which might conflict with daily family preparations or other preferred personal or transportation routines. Since we have earlier concluded that this proposal does not prevent the District from requiring employes to perform duties (even on a daily basis) outside of the hour's specified in the proposal, we find tht (sic) this proposal does not interfere with management prerogatives or educational policy choices. Thus, we find the proposal to be a mandatory subject of bargaining.

We conclude that the Association's proposal can most reasonably be interpreted as setting forth the length of time which teachers can be assigned to work in return for their basic salary. The proposal does not prevent the District from requiring employes, even on a daily basis, to perform duties outside the length of the workday specified in the proposal, subject only to the District's obligation as to overtime pay applicable to such assignments. The last sentence of the proposal can plausibly be interpreted in either of two manners. First, the proposal can be viewed as a notification and posting procedure which presumes that the District will not have to modify the starting time of the teacher day during the course of the school year. Such an interpretation would not preclude the District from altering the starting time of the teacher workday at each school, contrary to the concerns of the District expressed herein. Second, the proposal could be viewed as giving the District the discretion to initially establish the starting time of the teacher workday at each school which will then be utilized for the remainder of the school year for the purposes of determining whether work assignments are compensable pursuant to the basic salary schedule or are, in the alternative, overtime assignments. Thus, for instance, if the District chose to

establish an 8:00 a.m. starting time, all assignments prior to 8:00 a.m. would be deemed overtime assignments during the remainder of the school year even if the District were subsequently to determine that the teachers should report at 7:45 a.m. at a later point in the school year. The District would be free to require that teachers appear for work at 7:45 a.m. each day but would be obligated to pay 15 minutes of overtime pay for the period between 7:45 and 8:00 a.m. Under such an interpretation, the District would be free to alter the starting time of the teacher workday if it chose to do so, contrary to the District's assertions herein. As our subsequent analysis will indicate, we need not determine which of these plausible interpretations is most reasonable because under either interpretation the proposal remains a mandatory subject of bargaining.

As we noted in the quoted portions of our decision in Janesville, proposals establishing the length of the workday have a direct and substantial relationship to both "wages" and "hours." The length of the workday impacts upon a basic employe interest because the amount of time which an employe must work has an obvious and direct relationship upon the time which that employe has available for non-work related activities upon which the employe may well place far greater value in his/her life. There is also an intimate relationship between the number of hours an employe works and the amount of compensation which the employe and the bargaining representative will seek as compensation therefor. However, when analyzing workday proposals, the Commission must also ascertain whether the contractual provision would prevent the employer from providing the basic service for which it utilizes the employes. As we indicated earlier herein, we do not interpret this proposal as restricting the hours when any bargaining unit employes can be required to work by the District to provide basic educational services. Even if the last sentence of the proposal were to be interpreted as something more than a pro forma requirement that teachers be notified as to when they are expected to appear for work (the second of the two above-noted plausible interpretations) the proposal remains, in essence, an overtime proposal under which the District retains the ability to provide the educational services that it desires subject to the payment of the overtime premium should the District subsequently modify the starting time of the workday or make work assignments to teachers outside the workday which is established and maintained at the school(s) involved throughout the school year. Employe interests in being compensated if the starting time of his/her workday is altered after being initially established at the commencement of the school year relate to employe preferences as to the scheduling of their own non-work activities with family members or friends.

As we have concluded that this proposal does not prevent the District from requiring employes to perform duties, even on a daily basis, outside the length of the workday specified herein or outside the starting and ending times of the teacher workday which the District will unilaterally establish, and as we have concluded that the proposal bears a substantial and direct relationship to employe concerns as to "wages" and "hours," we find the proposal to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 17th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner