STATE OF WISCONSIN CIRCUIT COURT BRANCH VIII RACINE COUNTY

RACINE UNIFIED SCHOOL DISTRICT,

Petitioner,

-vs-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 84-CV-431

Case No. 84-CV-855

RACINE UNIFIED SCHOOL DISTRICT,

Petitioner,

-vs-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Decision No. 20653-C

D E C I S I O N

INTRODUCTION

A) As to 84-CV-431

On 13 March 1984 Petitioner filed for Judicial Review of a WERC decision under 227.15 et seq, Stats. The WERC decision was issued on 5 January 1984. Respondent WERC filed its Notice of Appearance and Statement of Position on 23 March 1984. An Answer was later filed on 13 June 1984. All parties to this dispute stipulated to consolidation of 84-CV-431 and 84-CV-855. An Order to this effect was signed by the Court on 16 July 1984. Briefs were submitted by Petitioner and Respondent. The last day for filing briefs was 11 October 1984.

B) As to 84-CV-855

On 29 May 1984 Petitioner filed for Judicial Review of a WERC decision under 227.15 et seq, Stats. The dispute related to the same general matter as in "A" above except that its focus (modified teacher workday) is a Supplemental Decision issued on 17 May 1984. Petitioner had sought rehearing of the 5 January 1984 WERC decision. That motion was denied by WERC on 15 February 1984. The case was consolidated with 84-CV-431. Briefs have been submitted on legal issues. The last day for submitting briefs was 11 October 1984.

FACTS

On 24 August 1982 the collective bargaining agreement between the Petitioner, as employer, and the Racine Education Association, as the teachers' collective bargaining representative, expired. Collective bargaining took place from 15 December 1981 to 24 August 1982.

On 29 August 1982, REA filed a petition for mediation-arbitration under 111.70(4)(cm)(6). Consistent with the statutory mandate, both REA and Petitioner met with representatives of Respondent. Ultimately, "final offers" were submitted. The statute allowed the final offers to "...include only mandatory subjects of bargaining."

Both Petitioner and REA felt that the final offer of the other included permissive subjects of bargaining. As a result, REA, on 11 April 1983, and Petitioner, on 18 April 1983, filed Petitions for Dectaratory Rulings. The object of the Petitions was to have Respondent

determine what was and what was not a mandatory subject of bargaining which properly could be in a valid final offer.

Respondent issued, on 10 May 1983, an Order consolidating both cases for hearing. The evidentiary hearing itself was held in Madison on 18 and 19 May 1983. Testimony was received from Mr. Del Fritchen on the 18th and from Mr. Dennis Wiser on the 19th. No other persons were called. Many exhibits were received as is reflected in the record of this case which was filed with this Court on 17 July 1984.

Both Petitioner and REA submitted lengthy memorandums in support of their positions to Respondent.

On 5 January 1984 Respondent issued its decision on matters raised by REA and Petitioner. That decision, in part, concluded that:

A. Petitioner is a municipal employer.

B. REA is a labor organization and the exclusive bargaining representative for teachers employed by Petitioner.

C. The collective bargaining agreement last in effect between Petitioner and REA expired on 24 August 1982.

The decision then goes on to state that many, many issues were unresolved between the parties. These included 10 proposals by Petitioner and 14 proposals by REA. Each of the proposals is then dealt with seriatim.

Respondent determined that 5 of the 10 proposals of Petitioner related to mandatory subjects of bargaining. 4 constituted permissive subjects of bargaining and 1 proposal conflicted with a statutory command.

In addition, Respondent determined that (in whole or in part) 9 of the 14 REA proposals concerned mandatory subjects of bargaining.

Conversely, 6 of the proposals, in whole or in part, concerned permissive subjects of bargaining. As to one REA proposal (#7), Respondent determined that there was an inadequate record to make any decision.

Respondent concluded by stating in its decision that Petitioner and REA had a duty to bargain, under 111.70 (1)(d), Stats. over those disputed proposals from both sides, which were determined to be manadatory subjects of bargaining under Wisconsin statutes.

On 24 January 1984, Petitioner filed for Rehearing with respect to all 9 rulings by Respondent, which held that these (9) REA proposals related to mandatory subjects of bargaining. No other matters as ruled on by Respondent on 5 January 1984 were challenged except that Petitioner asked to be allowed to create an adequate record regarding REA proposal #7. This Motion for Rehearing was denied on 15 February 1984.

Following this ruling, the Petitioner and REA with the aid of Respondent proceeded to return to negotiations. This voluntary effort was not productive and, on 11 April 1984, Petitioner filed another Petition for Declaratory Ruling relating to the REA proposal regarding "modified teacher workday". This proposal was contained in the new REA final offer of 30 March 1984. On this date, Petitioner also filed its final offer. REA filed another Petition for Declaratory Ruling also on 10 April 1984. This REA motion was dismissed by Respondent through WERC Dec. No. 21689. Matters relating to that case will be resolved in a month or so by this Court in Case 84-CV-810.

In any event, Respondent did rule on Petitioner's request for Declaratory Relief in a decision dated 17 May 1984. Respondent found that the REA proposal (#7) concerning "modified teacher workday" was a mandatory subject of bargaining under 111.70(1)(d), Stats.

Petitioner asks this Court to review and reverse all findings made by Respondent regarding REA proposals which were held (in the 5 January 1984 or 17 May 1984 decisions) to be mandatory subjects of bargaining. Legal error is asserted with regard to those findings, conclusions, and orders.

The final factual backdrop to this dispute is that the parties haven't reached a voluntary agreement and are scheduled for a mediation-arbitration hearing on 12 November 1984. This hearing is under 11.70(4)(cm), Stats.

The dispute in this Court relates to whether or not certain specific proposals contained in the final offer of a party are (as Respondent has already determined) subjects of mandatory bargaining. The final form of the collective bargaining agreement, whether voluntarily arrived at or secured through the decision of a third party, is not here at issue. The Court is not addressing whether the porposals (or some variation) are good or bad ideas, but rather whether they represent subject areas that must be bargained over.

GENERAL LAW STATEMENT

The instant review is under the provisions of Chapter 227. Only final administrative decisions are reviewable. Pasch v. Wis. Dept. of Revenue, 58 Wis. 2d 346 (1973). In order to have standing, the decision

being reviewed must cause injury or loss to the Petitioners, and the interest asserted must be one protected by law. Wis. Environmental Decade v. P.S.C., 69 Wis. 2d 1 (1975).

The trial court's decision in a review proceeding is based (in most cases - see 227.19(1), Stats.) on the record established before the Commission. 227.18, Stats. The Court is to defer to the Commission's judgment (experience, technical competence, specialized knowledge, and discretionary authority) regarding interpretations of law if the agency has special expertise and knowledge, if a rational basis for the interpretation is stated, and if the interpretation does not conflict with the law. Bucyrus-Erie v. DILHR, 90 Wis. 2d 408 (1979). The credibility of witnesses and the weight of the evidence are for determination by the Commission and not the Court. Neff v. Industrial Commission, 24 Wis. 2d 207 (1964). If there is any credible evidence to support the decision of the Commission, it must be upheld even if the contrary to the great weight and clear preponderance of the evidence. E.F. Brewer Co. v. ILHR Dept., 82 Wis. 2d 634 (1978). The findings of fact made by the Commission are conclusive if supported by credible and substantial evidence. The term "substantial evidence" is such relevant evidence as a reasonable person, acting reasonably, might accept as adequate to support a conclusion. State ex rel Eckmann v. Dept. of Health and Social Services, 114 Wis. 2d 35 at 43 (Ct. App. 1983).

A good overall summary is found in Hamilton v. ILHR Dept., 94 Wis. 2d 611 (1980):

"The agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therfrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences."

In De Leeuw v. ILHR, 71 Wis. 2d 446 at 449 (1976), Chief Justice Wilkie stated:

"In reviewing such a question of law, this court does defer to a certain extent to the legal construction and application of a statute by the agency charged with enforcement of that statute.[2] We are further guided by the rule of review under which, as to questions of law, we will not reverse a determination made by the enforcing agency where such interpretation is one among several reasonable interpretations that can be made, equally consistent with the purpose of that statute.[3]"

The Court is to look to see if any rational basis exists for the interpretation or conclusion made. Blackhawk Teachers' Federation v. WERC, 109 Wis. 2d 415 at 421-423 (Ct. App. 1982):

"We will not reverse the agency's determination where its statutory interpretation is one of several reasonable interpretations that can be made equally consistent with the statutory purpose. De Leeuw v. DILHR, 71 Wis. 2d 446, 449, 238, N.W. 2d 706, 709 (1976). If the agency's interpretation has no rational basis, however, we do not defer to its conclusions of law."

. . .

"We conclude that the "any rational basis" standard should be applied. Eleven years have elapsed since the legislature adopted the current statutory procedure that allows the WERC to issue declaratory rulings relating to the scope of municipal collective bargaining. The WERC issued the ruling challenged in Beloit eight years ago, and it has since gained substantial experience in determining whether contractual provisions are mandatory or permissive subjects of bargaining.[3] The WERC no longer has a "poverty of administrative experience" in determining the scope of bargaining under sec. 111.70(1)(d)."

If a case presents a matter of first impression a different standard is applied. Berns v. WERC, 99 Wis. 2d 252 at 261 (1980).

"But where the questions involved is "very nearly (one of) first impression," we do not use the "great weight" standard but, instead, accord to the interpretation due weight in determining what the appropriate construction should be."

Ultimately the Court and the Commision are led to a determination of whether a matter is or isn't mandatorily bargainable. In Blackhawk supra at 424, Judge Cane noted:

"The Federation's challenge to the WERC's ruling involves a determination whether certain proposals are mandatorily bargainable under sec. 111.70(1) (d). Our Supreme Court has stated that the applicable test is whether a proposal is "primarily related to wages, hours and conditions of employment." Beloit, 73 Wis. 2d at 54, 242 N.W. 2d at 236. A proposal primarily related to wages, hours, and working conditions is a mandatory subject of bargaining on which there is a duty to bargain. A proposal that relates to educational policy and school management and operation is a permissive subject of bargaining, and it imposes no bargaining duty. See Unitifed School District No. 1 v. WERC, 81 Wis. 2d 89, 96.259 N.W. 2d 724, 728-29 (1977). The impact of an educational policy affecting wages, hours, and working conditions is, however, mandatorily bargainable. See Beloit, 73 Wis. 2d 54, 242 N.W. 2d at 236; see also sec. 111.70 (1)(d), Stats."

Under 111.70(1)(d), Stats. an obligation exists to bargain in good faith with respect to wages, hours and conditions of employment. Though the goal is to reach an agreement, neither side is required to agree to any proposal or make any concession. In Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 at 105 (1977) the Court stated:

"In addition, this court has repeatedly stated that the duty to bargain collectively does not require the school board to reach any agreement with the union. See: Beloit, supra, at 61; Joint School Dist. No. 8 v. Wis. E. R. Board, supra, at 494, 495. Indeed, sec. 111.70 (1)(d), Stats., contains an explicit provision to that effect."

Justice Hansen went further at page 96 in noting that bargaining is not required on matters which are related only to policy.

> "Bargaining is not required, however, with regard to educational policy and school management and operation" or the"'management and direction' of the school system." Beloit, supra, at 52, 67. This "primary relationship" test must be applied on a case by case basis, the court held."

In Beloit Education Association v. WERC, 73 Wis. 2d 43 at 52 and 53 (1976), the Court faced up to the problem of subject areas that lie both in the field of educational policy and wages, hours and conditions of employment.

> "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.?"

. . .

> "What is fundamentally or basically or essentially a matter involving "wages, hours and conditions of employment" is, under the statute, a matter that is required to be bargained. The commission construed the statute to require mandatory bargaining as to (1) matters which are primarily related to "wages, hours, and conditions of employment," and (2) the impact of the "establishment of educational policy" affecting the "wages, hours and conditions of employment." We agree with that construction."

If a subject area or its impact relates primarily to wages, hours or conditions of employment it is mandatorily bargainable. In reviewing the determination made by WERC the trial court is to determine if any rational basis exists for the conclusion reached regarding

primary relationship. Consistency with prior rulings is important unless the matter is of first impression. The Court is also to look to the reasons articulated for the decision made. McCleary v. State, 49 Wis. 2d 263 at 277 (1971).

> "In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. As we pointed out in State v. Hutnik (1968), 39 Wis. 2d 754, 764, 159, N.W. 2d 733, ". . . there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth."

DISCUSSION

This Court will utilize the proposal numbering system found in the WERC decision of 5 January 1984. Each disputed REA proposal will be stated and then commented upon.

A. Proposal Number 1

> "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."

This statement is under the general heading of "Staff Utilization and Working Conditions." The first sentence acknowledges that assigning a particular number of students to a teacher is inherently a part of educational policy. Unified School District No. 1 of Racine County, supra. The second sentence affirms the impact that the number of assigned students have on a teacher's conditions of employment workload.

The dispute here concerns a permissive bargaining matter [illegible] whose impact relates primarily to conditions of employment. [illegible] at 63 and 64 indicates clearly that, while class size is pri[illegible] matter of basic educational policy, impact matters must be co[illegible]

> "The commission also held that the size of a class has an im[illegible] upon conditions of employment of teachers. So it concluded [illegible] "While the School Board has the right to unilaterally establ[illegible] class size, it nevertheless has the duty to bargain the impa[illegible] of the class size, as it affects hours, conditions of employ[illegible] and salaries." The reviewing court also affirmed this commi[illegible] holding that, while class size was not bargainable, the imp[illegible] of class size upon "wages, hours and conditions of employmen[illegible] mandatorily bargainable. We affirm the trial court holding, agreeing that the commission was warranted in reaching the conclusions it did."

Some of Petitioner's comments in its brief regarding Respondent's this and other issues are almost visceral (P. 13 of brief-"half heart" "illogical") and polyglot. At other times its argument is reflective of "woe is me" attitude. (Petitioner's brief at p. 54 "The only thing any public employer gets out of a collective bargaining agreement is relief from the duty to bargain with the Union.") The proposal would not in any way, much less primarily, restrict the managerial or policy-making ability of Petitioner to determine class size. The 2 sentences of the proposal need to be read together to determine the meaning of the submission. This (both sentences) is not a recognition clause. Milwaukee Board of School Directors, Dec. No. 20399-A (9/19/83), p. 16. It is a disclaimer as Respondent argues. The second sentence acknowledges the right to bargain on the impact of class size. The proposal primarily relates, through impact, to mandatory subjects. WERC had a substantial and rational basis for the finding it made.

B. Proposals Number 2 thru 4

"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.

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

1. Grades Pre-K-3: Additional compensation at the 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.

For teachers with less than full-time contracts with the District, the class size workloads described above in paragraph c., shall be prorated according to the percentage of a full-time contract held by such teachers.

Proposal No. 3

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.

Proposal No. 4

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.

In the event that the District chooses to assign more students to a teacher in art, music or physical education than the class size workload 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.

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) clients per school day on a per semester average shall receive wage compensation in accordance with the provisions of the Basic Salary Schedule.

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.

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.

In the event the District chooses to assign more students to a counselor per school day than the responsibility workloads 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.

1.1. For the purpose of determining the number of students of 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 student 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."

These matters are also under the REA final offer heading of "Staff Utilization and Working Conditions." Having already accepted the correctness of WERC's use of Beloit, supra to provide an impact basis for consideration of class size, these 3 proposals are viewed as compensation initiatives. Educational policy, though impacted, is not thwarted by any of these proposals. The Wisconsin Supreme Court in Beloit at Page 53 recognized the direct relationship between class size and the factor of "condition of employment":

> "The number of pupils in a classroom has an obvious relatedness to a "condition of employment" for the teacher in such classroom."

WERC has also accepted the obviousness of the relationship. Oak Creek-Franklin Joint City School District, No. 1, Dec. No. 11827-D(1974).

Beyond Court and WERC recognition however, the record in the instant case contains credible evidence regarding a direct relationship between class size and conditions of employment. See 18 May 1983 testimony of Mr. Del Fritchen, Petitioner's Assistant Superindendent of Personnel Services.

Petitioner makes the point that these 3 proposals may be confusing inefficient and perhaps costly. However, proposal 3 provides on exception for physical education, music and art. In each case the policy and managerial decisions remain with Petitioner. The credible (believable) evidence and reasonable inferences do not support Petitioner's contention that changes in class size affect work allocation by the teacher and the quality of education received by the students but not the amount of teacher work involved. Petitioner's arguments go to the merits of these proposals and not to the underlying criteria for mandatory bargaining of subjects due to primary impact.

As to proposals 2, 3 and 4 the Court concludes that the impact of class size (increased compensation if Petitioner decides to assign more than a set number of students to a teacher) is primarily related to wages hours and conditions of employment. WERC had a substantial and rational basis for its conclusion. These proposals are mandatory bargaining subjects.

C. Proposal Number 7

> "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 exceen a continuous period of seven (7) hours and ten (10) minutes. The teacher day at the Elementary School level shall not exceed a continous period of six (6) hours and fifty (50) minutes. The teacher day for teachers who are unassigned shall not exceed a continous 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 continuous period of eigh (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 positng shall be completed by the firt returning teachers day of each school year. "

This REA proposal relates to hours of employment. As a general matter this topic is a mandatory bargaining issue under 111.70(1)(d), Stats.

> "Collective bargaining" means 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."

Both the United States Supreme Court and the Wisconsin Supreme Court have repeatedly recognized hours of employment as a mandatory bargaining issue. An exemplar would be Joint School District No. 8, City of Madison v. WERB, 37 Wis. 2d 483 at 490 and 491 (1967).

> "We think the language of sec. 111.70 (2) is sufficiently broad to cover the items constituting the school calendar. The days on which teachers must teach or be in service have a significant relationship to the "hours and conditions," if not the salary of teachers, and render the school calendar negotiable."

> "In addressing itself to the problem of whether a collective-bargaining agreement violated the Sherman Trust Act, the supreme court said in Meat Cutters v. Jewel Tea (1965), 381 U.S. 676, 691, 85 Sup. Ct. 1596, 14 L. Ed. 23 640:

> "Contrary to the Court of Appeals, we think that the particular hours of the day and the particular days of the week during which employees 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."

WERC has also constantly taken this position. See City of Wauwatosa, Dec. No. 15917 (11/77).

It is Petitoner's view that educational policy implications outweigh any impact on hours or wages. Also Petitioner asserts that the record is silent with respect to the conclusion of impact. The Court notes that this proposal does not limit management's ability to determine when the work day begins or ends. Further management unilaterally is able to set the total number of hours worked by a teacher.

The primary impact of this proposal, as a direct product of logic, is to relate to hours of work and wages to be paid for hours worked beyond those noted in item 7. The testimony of teacher Dennis Wiser is also credible evidence on the point. Minimal impact exists on managerial prerogatives (notice and posting requirements). The cost associated with Petitioners exercise of free choice is a matter related to the merits of the proposal and not its underlying nature as a subject of bargaining. This proposal primarily concerns a mandatory subject of bargaining. WERC has articulated a substantial and rational basis for its conclusions based on record evidence.

D. Proposal Number 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 (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."

This proposal relates to the establishment of teacher preparation time and the compensation to be paid when certain preparation time is not provided to a teacher on-the-job during the course of a work week. No managerial discretion is taken from Petitioner. It alone will decide when and how much preparation time will be provided to a teacher. It will continue to be able to act to initiate termination proceedings in those circumstances where teachers are not prepared properly to teach.

Credible evidence was received regarding the primary impact of this proposal on wages, hours and conditions of employment.

1. In the past teachers have been terminated when not adequately prepared.
2. Mr. Del Fritchen testified that preparation is implicit in teaching a subject. Further he stated preparation time is utilized on-the-job.

Fact finder adherence to Wisconsin Jury Instructions Civil — 110, 215, and 220 is manifest. Teachers are affected by preparation. This proposal acknowledges the primary impact of preparation in the specific work environment. It seeks to establish a minimum preparation period and requires additional pay if the employer doesn't provide that time. The merits of the proposal are not before the Court, but the nature of the proposal is. Respondent in its 5 January 1984 memorandum which articulated its reasoning said that the "impact of preparation time upon hours is clear." The idea is that if preparation time must be spent to adequately teach, then that time must come either from the work day or the employee's time outside of the work day. This makes sense. Respondent need not disregard its cognitive faculties.

In setting forth a compensation schedule, this proposal does not control education policy. Decisions regarding policy and management as to preparation time remain with Petitioner. Only when that policy in action affects minimally necessary preparation time would additional

compensation have to be paid. The merit of the proposal or the REA definition of the limits of preparation time in the school day are proper subjects for discussion between the parties. However, the proposal itself is related primarily to mandatory bargaining subjects because of impact. WERC, through reasoning and credible evidence, has stated a rational and substantial basis for its conclusion.

E. Proposal Number 9

> "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 work day shall be considered overtime assignments. Unless compensation for such overtime assignments is provided for elsewhere in the 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."

This proposal concerns after school events. Under this proposal, Petitioner still retains all (the W's) managerial discretion regarding work assignments scheduled outside the work day. The proposal does call for compensation to be paid for this work and as such, it is directly related to wages. The compensation initiative calls for $10.20 being paid "for each hour or any fractional portion thereof". Later, this same

proposal states that the pay shall be "at the hourly rate as established in Professional Compensation Section 1.d."

Petitioner argues that the inconsistency augurs for a conclusion that the proposal is an effort "to eliminate those parts of the curriculum." Respondent notes that the inconsistencies "should be resolved through bargaining." The Court agrees with Respondent. The fact of an inconsistency (a question of merit) in a proposal does not, of itself, render the proposal a nullity or a nonmandatory issue. The thrust of the underlying notion, if it can be perceived, is to be dealt with. Here the central idea is discernible. The proposal seeks compensation for after school work. That such compensation hasn't been paid in the past is a nonfact regarding the mandatory/permissive issue.

This proposal has no impact on educational policy or management prerogatives. Its primary impact is on wages and hours (mandatory bargaining matters). WERC has stated a rational and substantial basis for its conclusion on this point.

F. Proposal No. 11

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

Petitioner correctly notes that it has the ability to manage and allocate school building space. As such the proposal, according to Petitioner, does not concern conditions of employment. The dispute focuses on the problem that results from Petitioner's establishment of duties for teachers regarding:

A. Keeping instructional materials (staples, etc.) secure.
B. Keeping tests and grades secure.

Petitioner argues that any loss to it of locked storage space would affect facilities available and curriculum.

In Blackhawk Vocational, Technical and Adult Education District, Dec. No. 16640-A (Sept. 1980) the Commission held that providing teachers lounges and toilets were mandatory bargaining subjects. Petitioner acknowledges that toilets and lounges can have an effect on working conditions--but not so as to locked storage space for work-related and required materials The Court does not agree. The reasoning of Blackhawk is persuasive.

The testimony of teacher Dennis Wiser is also credible and conclusive on this issue. If equipment is stolen (a stapler) then the teacher goes without. This absence of needed tools and artifacts substantially and primarily would affect conditions of employment. Grade books are required by Petitioner to be confidential and yet no means is provided to allow compliance with the directive.

Under this proposal Petitioner would continue to allocate its facilities. The primary impact of the proposal would be on conditions of employment--a mandatory subject of bargaining. This is not an effort to take over Petitioner's buildings. A logical nixus exists between the proposal and the duties imposed by Petitioner in the workplace. WERC has articulated a rational and substantial basis for its determination.

G. Proposal Number 13

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

Stats."

WERC determined that this was a specific reopener clause regarding Board decisions, rules or policies impacting on mandatory bargaining areas during the life of the agreement. Impasse will be resolved under 111.70(4), Stats. In Dane County, Dec. Nos. 17400-A (1979) and 17411 it was determined that interest arbitration was not available (absent a reopener clause) to resolve disputes during the term of a collective bargaining agreement. Two years later in City of Milwaukee, Dec. No. 19091 (1981), the parties agreed on a specific reopener and WERC recognized that.

The language of Proposal 13 clearly indicates that it relates to Board decisions, rules or policies which come about (are created) during the term of the agreement. Prior matters remain resolved and not subject to reopening.

This reopener clause relates primarily to wages, hours and conditions of employment. It is limited to bargaining the impact of changes only during the life of the agreement. WERC stated a rational and substantial basis for its determination.

H. Proposal Number 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 voluntary 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."

This proposal establishes a process to be followed when extra-curricular work tasks are assigned. Selection concepts of preference and seniority are explicit. Petitioner retains the ability to decide extra-curricular assignments, to decide work qualifications, to decide time and place, to subcontract if necessary and to otherwise control these work tasks through policy and managerial discretion. Petitioner,however,would be required to maintain a priority roster and employees can challenge placement, nonplacement and/or priority position.

Proposal 14 concerns the method of assigning extra-curricular work. This particular proposal is a mandatory subject of bargaining which primarily impacts on wages, hours and conditions of employment. The issue is covered well in Milwaukee Board of School Directors, Dec. No. 20093-B (Aug., 1983). A real need exists for Petitioner to insure that qualified persons be available to direct activities which are related to the educational mission. Any proposal which would interfer with or prevent Petitioner from providing qualified direction of educationally related

extra-curricular activities is permissive. The language of the instant proposal does not interfer with managerial prerogatives.

Petitioner's brief at page 55 classifies the involuntary assignment aspect of this proposal to be "cumbersome, uncertain and unpleasant". This concerns the merits of the idea and not its basic thrust. The problems discussed, including the potential for grievance arbitration, are not of such magnitude as to substantially or primarily interfer with the employer's ability to manage toward the fulfilling of its educational mission.

This proposal relates primarily to the impact of extra-curricular work assignments on wages, hours and conditions of employment. The relationship is manifest through an articulation of a selection procedure. WERC did note a substantial and rational basis for its determination on this matter.

C O N C L U S I O N

The overwhelming thrust of Petitioner's objections to the ten (10) proposals determined by Respondent to be subjects for mandatory bargaining go to matters of merit or basic dissatisfaction with the interest arbitration law.

The operative standard to be applied by the trial court calls for an analysis of each initiative in terms of determining whether a substantial and rational basis existed for the WERC decision that the proposal, through impact, relates primarily to wages, hours and conditions of employment.

In this case each of the ten disputed "final offer" proposals relates primarily to wages, hours and conditions of employment. WERC did state

a substantial and rational basis for its decision on each disputed proposal.

The Court next comments obiter dicta. Dispute resolution under 111.70 (4)(cm) takes a very long time. Why?

Dated this 15 day of OCTOBER, 1984.

BY ORDER OF THE COURT

Dennis J. Flynn

Dennis J. Flynn