STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE TEACHERS EDUCATION ASSOCIATION	Case CXXXIX No. 30548 DR(M)-264 Decision No. 20979

Appearances:

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Milwaukee Board of School Directors having, on October 21, 1982, filed a petition requesting the Wisconsin Employment Relations Commission to determine, by a declaratory ruling issued pursuant to Sec. 111.70(4)(b) of the Municipal Employment Relations Act (MERA), whether certain provisions, or portions thereof, proposed by the Milwaukee Teachers Education Association to be included in a new collective bargaining agreement covering wages, hours and conditions of employment of certain "teacher aide" personnel in the employ of said Board, and represented by said Association for the purposes of collective bargaining, relate to mandatory or permissive subjects of collective bargaining; and Counsel for said Board and said Association having filed pre-hearing briefs in the matter; and hearing in the matter having been conducted by the full Commission on November 29 and 30, 1982, at Madison, Wisconsin; and Counsel for the parties having filed post-hearing briefs by January 24, 1983; and the Commission, having reviewed the entire record, and the briefs of the parties, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

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

2. That Milwaukee Teachers Education Association, hereinafter referred to as the MTEA or the Union, is a labor organization, which represents municipal employes for the purposes of collective bargaining; and that MTEA maintains its principal offices at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

3. That at all times material herein MTEA has been, and presently is, the exclusive collective bargaining representative of employes of the Board who are included in an appropriate collective bargaining unit, hereinafter characterized as "aides".

4. That for the past number of years the Board and MTEA have been parties to successive collective bargaining agreements covering the wages, hours and conditions of employment of the "aides" in the employ of the Board; that the last of such agreements, by its terms, expired on December 31, 1982; that on August 16,

1982, the parties exchanged their initial proposals with respect to provisions desired to be included by them in their new collective bargaining agreement; that thereafter representatives of the parties met in negotiation on the new agreement, during which MTEA proposed to include in the new agreement various provisions which had been included in the 1980-1982 agreement; that during the course of said negotiations the representatives of the Board contended that a number of said provisions pertained to permissive, rather than to mandatory, subjects of collective bargaining; that the parties have been unable to reach an accord with respect to said proposals; and that in the latter regard the Board initiated the instant proceeding by filing a petition requesting that the Wisconsin Employment Relations Commission issue a declaratory ruling determining whether the following provisions, or portions thereof, proposed by the MTEA to be included in the new collective bargaining agreement covering "aides" relate to either permissive or mandatory subjects of collective bargaining:

PART I

. . .

(1) C. 2. All expenditures or compensation to be paid employes in accordance with this agreement must first meet the requirements and procedures required by law and the provisions of Chapter 119 of the Wisconsin Statutes.

. . .

(2) F. AMENDMENTS, RULES, POLICIES AND PROCEDURES

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

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

. . .

(4) 3. ADMINISTRATIVE PROCEDURES

c. If, during the term of the contract, any administrative procedure is changed by amendment or by a new procedure, on which the contract is silent, which has a major effect on wages, hours, and working conditions of members of the bargaining unit, no such procedure shall be effective until after negotiations with the MTEA. If, after a reasonable period of negotiations, no agreement has been reached, the MTEA may proceed to mediation prior to the implementation of such procedure. The MTEA may proceed to advisory fact finding if the matter is not resolved in mediation. In an amergency (sic)

situation which would interfere with the orderly operations of the schools, the Administration may temporarily implement emergency action prior to mediation.

. . .

PART II

. . .

(5) F. ASSOCIATION RIGHTS

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

. . .

PART III

(6) A. NEGOTIATIONS OF POSITION DESCRIPTIONS

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

. . .

(7) 3. It is recognized and agreed that school aides are employed to supplement and assist teachers in the performance of their professional duties. It is further recognized that an aide shall not be used to replace or supplant the teacher as the instructional leader.

. . .

PART IV

(8) A. WRITTEN EVALUATIONS

The name of the employer administrative evaluator shall be made known to the employe in writing within five (5) workdays of the commencement of the school year. MTEA bargaining unit employes shall not evaluate other bargaining unit employes.

School aides shall be provided with written evaluations on the aide evaluation form by the administrative evaluator. Upon receipt of an evaluation, the aide shall be provided with a copy of the eval-

uation report and be allowed forty-eight (48) hours to study the comments and respond to them in writing, if the aide so desires. Any written response by the aide shall be made a part of the original evaluation and shall remain in the aide's evaluation file in the central office. After the aide has examined the evaluation, the administrative evaluator shall discuss the evaluation with the aide. The aide shall sign the form to indicate that he or she reviewed the evaluation. Definition: Except for Part IV, Section A, 1, c and A, 2. b. the word, administrative evaluator shall include: principal, designated assistant principal, and AIA who is responsible for aide supervision and has a personal knowledge of the aide's performance.

1. PROBATIONARY EMPLOYES

   a. School aides shall attain permanent status as a school aide one school year (190) days after the date of employment unless they are notified by the Division of Personnel that the probationary period will be extended an additional ninety-five (95) days, in which case the Division of Personnel shall furnish the employe with written reasons for the extension.

   b. Every opportunity will be given to the employe to correct his/her misconduct or inefficiency prior to discharge. During the probationary period, a written evaluation shall be made of each aide by the administrative evaluator at the end of the sixth month of his/her employment. The administrative evaluator shall discuss each evaluation with the aide. The aide shall initial the card to indicate he/she has received the card. Evaluations may be made at any time. An aide may at any time examine his/her personnel file, except for preemployment references or recommendations for out-of-the-unit positions.

   c. When the administrative evaluator is recommending dismissal of a probationary aide, he/she shall notify the aide of his/her recommendation and reasons in writing with a copy to the MTEA. The notice shall contain a statement of the fact that the employe may be represented by the MTEA, legal counsel or any person of his/her choosing.

   d. Within five (5) working days, the administrative evaluator shall hold an in-building conference to discuss his/her reasons for recommending dismissal and the aide's response. If the aide chooses, he/she may be represented by the MTEA, legal counsel, or any person of his/her choosing. If the administrative evaluator maintains his/her recommendation as a result of this conference, the employe shall have the right to appeal the administrative evaluator's recommendation to the Assistant Superintendent of the Division of Personnel.

   e. Within five (5) working days of the hearing the aide and the MTEA shall be notified of the assistant superintendent's decision. The aide shall have the right to proceed through the grievance procedure, commencing at the third step and ending at the fourth step.

2. PERMANENT EMPLOYES.

   a. The evaluation of permanent aides by the administrative evaluator shall recognize the aide's strengths and weaknesses and indicate suggestions

for further improvement of work skills based on the evaluator's observations. The evaluation of permanent aides shall take place during the second semester of each year and shall be written on the aide evaluation form.

b. School aides who successfully complete their probationary period shall be considered permanent employes and shall be discharged only for good and just cause. Should the administrative evaluator consider discipline or discharge recommendations, he/she shall first call the aide into a conference, at which the aide may be represented by the MTEA or some other person, explaining the reasons why he/she is considering such a reocmmendation (sic) and the aide shall be given the opportunity to respond thereto. Thereafter, if the administrative evaluator reocmmends (sic) discipline or discharge, he/she shall set forth the same in writing specifically stating the reasons for such recommendation with a copy to the MTEA.

c. The aide or MTEA may, within ten (10) working days appeal the administrative evaluator's recommendation to the Assistant Superintendent of the Division of Personnel.

PART VI

(9) A. HEALTH INSURANCE

1. * * *

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

. . .

(10) C. DISCIPLINE

* * *

1. School aides shall report breaches of discipline within the classroom to the classroom teacher.

2. School aides not working under the direct supervision of the teacher shall be allowed to report breaches of discipline to the appropriate administrator on a form 72. The administrator shall determine the appropriate action based on the reported facts and shall consider the recommendation of the aide if any is presented and report the disposition of the matter to the aide either verbally or in writing on the form 72.

* * *

(11) 4. In schools where there is a danger to the aides or students, the Board shall provide appropriate additional personnel to help in the building control.

. . .

(12) K. EDUCATIONAL/PROMOTIONAL OPPORTUNITIES FOR SCHOOL AIDES

2. ORIENTATION OF NEW AIDES. Where new aides are employed, the administration shall provide a minimum of one day's orientation to employment including such items

as building rules, job expectations and assignments, school building layout, employe fringe benefit enrollment forms and educational opportunities within the system.

(13) 3. G. E. D. In addition to on-the-job training and in-service opportunities, the Board shall provide a program in which interested aides can earn their high school diploma (G. E. D.). Applicants for participation in the program shall be considered on the basis of seniority. These instructional opportunities shall be scheduled at a time and location which would facilitate maximum participation by aides, but shall be held after the school day. The initial program shall be established for approximately twenty-five (25) participants each semester. The MTEA and the Board shall actively encourage the participation of presently employed school aides in this program.

4. INSERVICE TRAINING OPPORTUNITIES. Prior to June 1 and November 1 of each year the MTEA may submit to the administration its recommendations for inservice offerings in the fall and the spring semester.

The administration shall provide inservice opportunities for school aides in order to develop their work skills and shall schedule sessions at times and locations which might facilitate maximum aide participation.

Every reasonable effort shall be made to expand these educational opportunities. The MTEA and the Board shall actively encourage the participation of school aides in available courses.

. . .

(14) Q. SNOW EMERGENCY

. . .

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

. . .

PART VII

(15) A. PURPOSE

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

B. DEFINITIONS

1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith, provided, however, that it shall not be deemed to apply to any order, action, or directive of the Superintendent or of anyone acting on his/her behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes which have not been set forth in this contract.

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

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

C. RESOLUTION OF GRIEVANCE OR COMPLAINT

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

D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

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

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

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

(16) APPENDIX A

LEAD AIDE DEFINITION

Where five (5) full-time equivalent aides or multiples of five (5) full-time equivalent aides are employed and their major duties involve hall duty, lunchroom duty, or playground duty, a sixth aide may be appointed lead aide with functional supervisory duties, if the principal requests.

5. That during hearing the parties resolved their dispute as to the status of provision 9 relating to insurance coverage.

6. That disputed provisions 1, 14, and 16 as set forth in Finding of Fact 4 are primarily related to wages, hours and conditions of employment.

7. That disputed provisions 2-8, 10-13, and 15 as set forth in Finding of Fact 4 are primarily related to the formulation or management of public policy.

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

CONCLUSIONS OF LAW

1. That disputed provisions 1, 14, and 16 as set forth in Finding of Fact 4 are mandatory subjects of bargaining within the meaning of Sec. 111.70(3)(a)4 of MERA.

2. That disputed provisions 2-8, 10-13, and 15 as set forth in Finding of Fact 4 are permissive subjects of bargaining within the meaning of Sec. 111.70 (3)(a)4 of MERA.

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

DECLARATORY RULING 1/

1. That the Board has a duty to bargain collectively about disputed provisions 1, 14, and 16 as set forth in Finding of Fact 4.

2. That the Board has no duty to bargain collectively about disputed provisions 2-8, 10-13, and 15 as set forth in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of September, 1983

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Herman Torosian, Chairman

I dissent as to proposal 2 and fully concur as to the remaining proposals.

Gary L. Covelli, Commissioner

I separately concur as to proposal 13 and fully concur as to the remaining proposals.

Marshall L. Gratz, Commissioner

I have participated only as to proposals 1-2, 7, 10-14, and 16 and fully concur as to said proposals.

(See Footnote 1 on Page 9)

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

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

For the sake of expeditious issuance of this decision, Commissioner Gratz has not participated herein with respect to proposals 3-6, 8 and 15. Commissioners Covelli and Torosian had previously joined in the Commission's dispositions of the status of parallel teacher unit proposals in Milwaukee Board of School Directors, (20093) 2/83, herein Milwaukee Board II, and neither of them has altered his views with respect to the language at issue herein. Accordingly, the discussion of those issues herein parallels that set forth in the previous decision.

THE DISPUTED PROVISIONS

(1) Part I - Section C. 2. - Conditions and Duration of Contract

The disputed contractual provision contains the following language:

> All expenditures or compensation to be paid employes in accordance with this agreement must first meet the requirements and procedures required by law and the provisions of Chapter 119 of the Wisconsin Statutes.

The District asserts that this language relates exclusively to the manner in which it handles its funds and thus that the provision has no relationship to the wages, hours and conditions of employment of school aides. The District contends that the MTEA's citation of Blackhawk Teacher's Federation v. WERC, 109 Wis. 2d 415 (Ct. App. 1982) is unpersuasive and requests that the proposal be found to be permissive.

The MTEA argues that this section does not restrict management in its budgetary determinations nor does it relate exclusively to the manner in which the Board handles its funds. It contends that the section was written into the contract in order to insure that the MTEA would not ignore the sections of the law that applied to the Board's compliance with contractual provisions relating to payment of wages. MTEA believes that this contractual provision provides employes with a grievance mechanism under the contract if the Board does not comply with legal requirements such as minimum wage and that such a mechanism is a mandatory subject of bargaining. It argues that the Commission has previously found that a proposal which sought to incorporate certain pre-existing legal requirements into a contract was mandatory, citing Blackhawk, supra.

In Blackhawk, supra, the Court concluded that the bargaining table is a proper forum for employes to seek protection from discipline when exercising constitutional rights. The Court thus found a proposal which sought to establish such protection to be a mandatory subject of bargaining because of its substantial impact upon employe conditions of employment (i.e. discipline). Here the MTEA seeks to ensure District compliance with pertinent statutory provisions relating to wages and other monetary compensation. We believe the Court's holding in Blackhawk, supra, renders this proposal mandatory given the impact upon employe wages and the legitimacy of an effort to establish a contractual forum for redress of any District non-compliance. We would also note that we see no public policy choices which are implicated by this proposal and that the relationship to wages therefore clearly predominates.

(2) Part I - Section F. 1.

The disputed contractual provision contains the following language:

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

The District asserts that its rules contain matters which are primarily related to educational and public policy. As such matters are permissive subjects of bargaining, the District contends that a proposal which requires that such permissive rules be deemed incorporated in the collective bargaining agreement is not a mandatory subject of bargaining. The District maintains that under the rationale in the Commission's City of Wauwatosa (15917) 11/77, such a proposal must be limited to the inclusion of Board rules which primarily relate to wages, hours and conditions of employment. The District further argues that the MTEA's claim that the word "applicable" refers to the parties' contract is not persuasive under a reasonable reading of the phrase. Given this ambiguity, the District asserts that the Commission should reject the MTEA's interpretation of the disputed language.

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

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

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

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

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

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

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

> See Southern Transport, Inc., 145 NLRB No. 69, 55 LRRM 1023 (1963), enforced 343 F.2d 558, 58 LRRM 2822 (8th Cir. 1965); See Murphy Diesel Co. v. NLRB, 454 F.2d 303, 78 LRRM 2992 (7th Cir. 1971); NFL Players Assoc. v. NLRB, 503 F.2d 12, 87 LRRM 2118 (8th Cir. 1974).

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

We would emphasize that it is the mandatory/permissive nature of the proposal (here Board rules) sought to be included in the agreement that is the focus of our majority holding, not the fact that the item sought to be included could or would relate to a portion of the agreement that upon independent review would be held to constitute a permissive subject of bargaining. Once a provision is included in the agreement (and in a pre-agreement final offer not objected to), it is treated as a mandatory subject of bargaining for the purposes of that bargain (and hence for the term of the agreement). Sec. 111.70(4)(cm)6.a., Stats. ("...final offers may include only mandatory subjects of bargaining. Permissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject.") Hence, there is no viable mandatory/permissive distinction applicable to the provisions of an existing agreement during its term or to the provisions of a pre-agreement final offer not objected to in a timely fashion.

Commissioner Torosian - Dissent

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

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

(3) Part I - Section F. 2.

The disputed contractual language states:

> Where there is any new new rule or Board policy or amendment to any rule or Board policy which will have a major effect on wages, hours, and working conditions of the members of the

---

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

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

bargaining unit and the contract is silent, no such rule or Board policy shall be effective until after negotiations with the MTEA.

This provision provides, that, with respect to a rule or Board policy which has a "major effect" on wages, hours, or conditions of employment, the MTEA may, after a reasonable period of negotiations, proceed to mediation and ultimately to advisory fact finding if no agreement (on the effect) is reached. The provision also provides that in emergency situations the administration may temporarily implement a rule or policy prior to mediation. The Board argues that as the disputed contractual language is not limited to those Board rules or policies which primarily relate to wages, hours and conditions of employment, the language requires bargaining prior to implementation of rules or policies which are permissive subjects of bargaining. The Board asserts that in both Sewerage Commission of the City of Milwaukee, (17302) 9/79, herein Sewerage II, and City of Appleton, (17034) 5/80, the Commission concluded that a municipal employer can implement a permissive rule or policy without first bargaining either over the rule or policy itself or the impact of that rule or policy upon wages, hours and conditions of employment. Citing these decisions, the Board argues that it cannot be required to bargain prior to implementation as required by the proposal in question. It further argues that it need not establish that an emergency exists before it can implement a decision regarding a permissive subject of bargaining. The Board argues that the distinction drawn by MTEA between the right to establish a rule or policy and the right to implement a rule or policy is not a meaningful one because it effectively precludes the Board from taking actions which primarily relate to public or educational policy.

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

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

protect the union from unknowingly waiving its right to bargain over the impact, while at the same time leaving the employer free to implement the decision policy or rule. We would also note that if a union is informed of a permissive decision prior to its implementation, the union's statutory right to bargain over impact "at reasonable times" under Sec. 111.70(1)(d) Stats. may require that bargaining over impact commence prior to implementation.

(4) Part I - Section F. 3.c.

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

(5) Part II - Section F. 2.

The objectionable contractual language is as follows:

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

The Board contends that language in issue designates specific administrators to assume certain responsibilities regarding the standards for posting MTEA communications on bulletin boards. The Board contends that in Beloit, supra, the Commission held that naming which management official would evaluate an employe's job performance was a matter of management technique which need not be bargained. Similarly, the Board argues here that naming the precise individuals who will review bulletin boards relates to management's internal procedure, and should also be found to be permissive. The Board contends that this clause differs from that previously found to be permissive by the Commission in Milwaukee Board of School Directors, 5/ (17504) 12/79, herein Milwaukee Board I; in two important respects. First, in the earlier decision the Commission determined that a due process procedure dealing with charges of misconduct was involved. The Board contends that the instant procedure does not involve such a due process procedure. The Board also contends that unlike the earlier disputed provision, the clause here

---

5/ That clause provided the following:

> "Part IV, Section I, (1) (a)
>
> The principal or supervisor shall promptly notify the accountant on a form that an accusation has been made against the accountant which if true, could result in procedings (sic) under Part IV, Section G of the contract. The memo will also indicate that it would be necessary to confer on the matter and that such a conference, the accountant will be allowed to be represented by the MTEA, legal counsel, or any other person of his/her choice. This notice shall be followed by a scheduled, personnel conference during which the accountant will be informed of the nature of the charges of the alleged misconduct in an effort to resolve the matter. Resolutions of day-to-day problems which do not have a reasonable expectation of becoming serious, will not necessitate a written memo. (Emphasis added)
>
> . . .

(See Footnote 5 continued on Page 15)

(Footnote 5 Continued)

"Part IV, Section I, (1) (b) (c)

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

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

does not provide the Board with any discretion in determining which management person will have the responsibilities in question. Thus, the Board argues that this language does not reflect an attempt by MTEA to assure that matters are handled at a supervisory level and reviewed at a higher level, but rather dictates specific tasks to be assumed by specific administrators. The Board thus contends that the language relates primarily to management's internal procedure and the job responsibilities of particular administrators.

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

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

(6) Part III - Section A. 1.

The objectionable contractual language is as follows:

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

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

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

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

(7) Part III - Section A. 3.

The disputed contractual language is as follows:

> It is recognized and agreed that school aides are employed to supplement and assist teachers in the performance of their professional duties. It is further recognized that an aide shall not be used to replace or supplant the teacher as the instructional leader.

The District contends that the underlined portion of the contractual language at issue limits the manner in which school aides may be used as well as the functions they will perform. The District contends that it has a management right to assign aides to perform other duties which are fairly within the scope of their responsibilities. Sewerage I, supra. The District asserts that the language from Oak Creek-Franklin Joint City School District No. 1, (11827-D) 9/74 (Aff'd Dane Co. Cir. Ct. 11/75) quoted by the MTEA for the proposition that the language is mandatory is unrelated to the instant case. 6/ It believes that the instant language has nothing to do with other employes replacing aides in the performance of the aides' bargaining unit duties. The District therefore argues that the underlined language is permissive.

The MTEA counters by arguing that the language is mandatory because it relates to the performance of bargaining unit duties in relationship to employes in other bargaining units. The MTEA cites the Commission's decision in Oak Creek, supra, as support for its argument. The MTEA alleges that the language herein does not limit or describe in any detail the job responsibilities of school aides. It believes the language is intended only to indicate that aides are not hired to supplant teachers but may be used to supplement or assist them. It believes that aides as well as teachers should be informed of the limitations of their relationship. The MTEA therefore requests that the language be found to be mandatory.

We concur with the District's view that the disputed sentence does, in a general sense, seek to describe the job to be performed by unit employes. To the extent that the sentence limits the ability of the District to assign duties to aides which are fairly within the scope of their function but which are not within the ambit of supplementing and assisting teachers in the performance of their professional duties, the sentence interferes with the District's management prerogative to assign such work. This interference will render the language permissive under our rationale in Sewerage I, supra unless the MTEA can demonstrate that the relationship of the sentence to wages, hours and conditions of employment predominates. During the hearing the MTEA argued that the disputed sentence clarified the meaning of the mandatory sentence which it precedes. While

---

6/ In Oak Creek, supra, the Commission was confronted with the following language:

> Practice teachers, intern teachers, and paraprofessionals shall not be used to replace or substitute for absent teachers to increase the teacher-pupil ratio, or to increase teacher class loads."

The Commission ruled:

> The proposal of the Association with regard to practice and intern teachers, as well as to paraprofessionals primarily concerns itself with a basic educational policy decision concerning the affect upon the quality of the education provided by the use of such personnel, except the last paragraph of said proposal. Such paragraph relates to bargaining unit duties, and therefore should such personnel be employed by the District, the Association has the right to bargain with respect to the utilization or non-utilization of such personnel in duties normally performed by teachers. Therefore, with the exception of the last paragraph, this proposal is a matter of permissive, but not mandatory bargaining.

there is some truth to that position, we believe that sentence (which precludes use of aides to "replace or supplant" teachers) stands meaningfully on its own two feet and thus that the nexus which the MTEA seeks to establish is insufficient to overcome the interference with the managerial function noted above. Thus, the sentence is found to be permissive.

(8) Part IV - Section A.

The Board objects to these contractual provisions to the extent that they limit the District to the selection of one primary evaluator. The Board asserts that the number of evaluators and the extent to which a specific evaluator will be involved in an evaluation, are primarily related to managerial policy decisions as to the most meaningful way to acquire an evaluation of employes. The MTEA asserts that none of the Board's objections are well-founded. Citing Beloit, supra, MTEA claims that it has the right to bargain over the procedures followed in an evaluation. It contends that the number of evaluators utilized is part of the evaluation procedure, and thus that the contractual language is not permissive. It argues that the Board is attempting to obtain from the Commission what it could not obtain at the bargaining table, and that the Board is of course free to propose that it have the right to utilize one or more evaluators.

In Beloit, supra, the Commission concluded, and the courts ultimately affirmed, that the employer's decision as to the selection of evaluators is an inherently managerial prerogative over which the union has no right to bargain. We believe that the issue of how many evaluators will be utilized by the Board is encompassed in its permissive right to make a selection as to the evaluators. Thus, just as MTEA cannot dictate to the Board who will be utilized to evaluate teachers, MTEA has no enforceable right to bargain as to the number of evaluators the Board will utilize for that purpose.

(9) Part VI - Section A. 1.a.

RESOLVED

(10-11)
Part VI - Section C. 1. 2. and 4.

The District contends that Part VI - Sec. C. 1. and 2., relate to the procedure to be followed in handling student discipline and is not limited to situations involving threats to employe's physical safety. Citing Beloit the MTEA contends that this lack of a limitation renders the language a permissive subject of bargaining. The District notes that the Commission reaffirmed the need for this limitation in Blackhawk, supra.

As to Sec. C. 4., the District argues that the language requires that it hire "appropriate additional personnel" to help in building control where there is a danger to the aides or the students. The District believes that in Milwaukee Board I, supra, the Commission ruled that similar language restricts the Board when making determinations as to who in its organizational structure would provide such assistance or whether the Board should utilize employes when supplying such assistance. The Board therefore asserts that this language should also be found to be permissive.

The MTEA took no specific position with respect to this language.

We concur with the District's assertion that Part VI, Sec. C. 1. and 2. is permissive language to the extent that it sets forth a disciplinary procedure applicable to students which is not limited to situations involving threats to the employe's physical safety. Beloit; supra; Blackhawk; supra.

As to Sec. C. 4., we find it permissive under the following analysis in Milwaukee Board I, supra, p. 16-17.

> . . . we are troubled by the reference to the use of appropriate "central office support personnel". While we understand that this aspect of the proposal reflects current practice, the inclusion of that portion of the proposal in the agreement would restrict the Board in making determinations as to who in its organizational structure would provide such assistance or whether it should utilize employes in supplying such assistance. Such matters relate primarily to the Board's management functions as noted in our Oak Creek-Franklin deci-

sion as well as the Milwaukee Sewerage Commission case relied upon by the Board. It also interferes with the Board's choice as to assignment of particular personnel. 7/ Therefore, we conclude that this proposal, as worded, is a permissive subject of bargaining. If it were modified to exclude the words "appropriate" and the words "central office support personnel" so as to require the District to provide help when bargaining unit personnel are in jeopardy we would find it to be a mandatory subject as written. Worded in this manner, the Board would not be restricted to utilizing any particular personnel or employes of the District nor would it necessarily be required to hire additional personnel as argued in its brief.

7/ cf. Madison Metropolitan School District (16598) 10/78 at p.6.

(12) Part VI - Section K. 2.

The disputed contractual language provides the following:

2. ORIENTATION OF NEW AIDES. Where new aides are employed, the administration shall provide a minimum of one day's orientation to employment including such items as building rules, job expectations and assignments, school building layout, employe fringe benefit enrollment forms and educational opportunities within the system.

The District argues that this provision requires that it provide a minimum of one day's orientation to school aides regarding certain subjects. The District argues that the decision as to how much time should be devoted to orientation, and whether an orientation will be the method by which the Board will share information with the aides, are both primarily related to management functions. Furthermore, the Board argues that the provisions require it to provide orientation regarding educational opportunities within the District. It argues that the decision as to whether to provide such educational programs is a permissive subject of bargaining. Inasmuch as it believes it need not bargain over whether in-service programs are provided, citing Milwaukee Board I, supra, or whether it need provide orientation on educational opportunities, citing Beloit, supra, the District believes that this language is permissive.

The MTEA does not believe that the holdings in Beloit, supra, or Milwaukee Board I, supra, are relevant to the resolution of the status of the language at hand. It argues that as the language in question relates to educational opportunities which are relevant to a bargaining unit member's ability to maintain and advance in their employment, the language is a mandatory subject of bargaining.

The Board's objection to the language does not dispute the MTEA's right to insist that employes be informed regarding job expectations and requirements or existing educational opportunities. Rather, it contests the MTEA's right to bargain over how the information will be communicated. We find this objection to be well taken. Just as the MTEA can bargain over acquiring protection for employes in situations threatening physical safety but cannot insist on bargaining over how that protection will be provided (see Issue 10), the MTEA can bargain over acquiring job related information but cannot insist on bargaining over how that information will be communicated. Thus the requirement of a one day orientation is permissive. We would also note that an apt analogy between in-service and orientation could well be drawn and that an attempt to mandate orientation days would appear to be permissive just as an attempt to mandate the existence of in-serivce days was found permissive in Milwaukee Board I, supra.

(13) Part VI - Section K. 3. and 4.

The District contends that Section K.3 requires it to provide an instructional program for aides so that the aide can acquire a high school diploma. The District notes that a high school diploma is not required for an aide to continue his or her employment and while a high school diploma may be required for a paraprofessional position, the District should not be required to assume an active role in training an individual to meet the necessary qualifications by providing a special program for this. The District argues that if a school board is not required to provide an assistance program to employes who are in danger of actually losing their job, citing Beloit, supra, and if a school board is not required to provide a program to assist employes in the performance of the skills necessary for their existing job, citing Milwaukee Board 1, supra, then certainly the District should not be required to provide a special program to train employes for duties in a new position. With respect to Section K.4, the District argues that since this proposal requires the District to provide in-service training and the Commission has already held in Milwaukee Board 1, supra, that the decision to provide in-service is permissive, this proposal is obviously permissive.

The MTEA contends that Section K.3, which requires instructional programs for aides, relates to promotional opportunities and therefore to wages and working conditions. Oak Creek, supra. It further asserts that the provision in essence stands as a benefit of employment that should be negotiated as a mandatory subject of bargaining. MTEA took no position with respect to Section K.4.

The K.4. ("Inservice Training Opportunities") concerns a decision as to whether and how to provide job-related work skill development programs to the employes. Such decisions have been held by the Commission in prior decisions 7/ to primarily relate to educational policy rather than to employe wages, hours and conditions of employment.

The K.3. (G.E.D.) proposal as written is permissive in our opinion for these reasons.

First, the opening clause implies that in service training opportunities elsewhere provided are mandatory whereas we have elsewhere held herein that such a demand is a permissive subject of bargaining.

Second, the provision seems to require the District to use its own facilities and its own personnel to provide the educational opportunities called for in the provision--as opposed to arranging for the provision of the classes at some non-District facility under the auspices of some non-District institution, but at District expense. Such a facilities requirement would potentially interfere with the District's right to control its property and to determine the uses to be made thereof after school hours. That is a matter primarily related to management of the District's affairs. Such a personnel requirement would relate more significantly to the District's policy management interests than to the aides' interests in obtaining an educational opportunity beneift. Those are both, then, permissive subject areas in the instant context.

But for those two problems, we would hold that the language of K.3. is properly viewed as no more than a proposal for an in-kind benefit of a general educational opportunity to be provided at District expense; and that, as such, it would be a fringe benefit primarily related to wages and a mandatory subject of bargaining. We conclude that such a general in-kind educational benefit proposal would be materially distinguishable from the decisions as to whether, how and by whom bargaining unit personnel will be given job orientation and job-related in service training that have been held permissive in prior Commission cases.

COMMISSIONER COVELLI - CONCURRENCE

I agree with my colleagues that both K.3 and K.4., as written, are permissive subjects of bargaining, but I find that K.3. is permissive for reasons in addition to the two cited in the foregoing discussion, and so I do not join them in the analysis set forth in the last preceding paragraph of discussion, above.

7/ Oak Creek, supra; Milwaukee Board I and II, supra.

In addition to the above-stated reasons by my colleagues, I would also find the proposal to be permissive because I view the proposal as requiring job related training rather than a "general educational opportunity", as characterized by my colleagues, and therefore strictly a fringe benefit. My view of this proposal is based on the parties' characterization of the proposal--the MTEA describes the proposal as relating to promotional opportunities as an aide since a high school diploma is a requirement for promotion to paraprofessional status in the unit and the District doesn't dispute this characterization. Further, assuming that the proposal called for a program to provide for a general educational opportunity, I would still disagree with my colleagues, since under their rationale the District would have to find an outside organization to provide any general educational opportunities program that the MTEA proposes. I would agree with my colleagues, if the proposal was in the nature of a tuition reimbursement or payment for costs associated with an employe getting training with another institution.

(14) Part VI - Section Q. 8.

The disputed contractual language is as follows:

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

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

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

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

(15) Part VII

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

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

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

(16) Appendix A - Lead Aide Definition

The disputed language is as follows:

> Where five (5) full-time equivalent aides or multiples of five (5) full-time equivalent aides are employed and their major duties involve hall duty, lunchroom duty, or playground duty, a sixth aide may be appointed lead aide with functional supervisory duties, if the principal requests.

The District contends that this language requires the establishment and maintenance of an organizational structure which includes a lead aide as a supervisor. The District believes that it need not bargain over its organizational structure and therefore that the language is permissive. The District argues that the clause bears no relationship to the language regarding department chairman held by the Commission in Milwaukee Board I, supra 8/ to be mandatory. Thus the language is akin to that found to be permissive in Oak Creek, supra, where the Commission determined that the various designated responsibilities of department heads were permissive subjects of bargaining.

8/ That proposal was as follows:

> "7. DEPARTMENT CHAIRPERSON. When a department has fifty (50) selections of classes or a major portion thereof, the chairperson of that department will be given a released period. If a department does not qualify, it will be combined with one or more others to qualify for released time, every efforts will be made to provide released time during the semester for these chairpersons. A release period for small departments may be shared on a proportional basis. If it is not possible to release a chairperson in the manner prescribed, a chairperson not so released be paid in the following manner.
>
> Proportion of released period for this department x
> Number of days in semester x
> Part-time certificated rate.
>
> If the chairperson prefers, he/she may, in lieu of payment, request release in succeeding semesters, if it is possible to program in this manner." (Emphasis Added)

The MTEA counters by arguing that the contract does not require that the District appoint or hire a lead aide nor does it in any way affect who will be selected by the District to be the lead aide. It asserts that under the contract language these decisions are left solely to management. The MTEA contends that if, however, an aide in the bargaining unit is appointed to perform some supervisory duties, then this clause provides that aide with protection of the the aide's status as a bargaining unit member. The MTEA further asserts that to the extent that such an appointment is a promotion, the clause is a mandatory subject of bargaining. The MTEA believes that this language is akin to that involving department chairpersons discussed by the Commission in Milwaukee Board I, supra. The MTEA therefore believes that the language is mandatory.

Initially we note that this language does not obligate the District to have a lead aide under any circumstances. Indeed, even if a principal, a non-unit employe, requests that a lead aide be appointed, the District is not required to provide same. Thus we reject the District's contention that the proposal impermissibly interferes with the organizational structure. The proposal also does not prevent the District from deciding to have supervision of its own choosing when any number of aides are present. What the proposal does do is define the circumstances in which a unit employe can be temporarily made a functional supervisor. The parties' agreement elsewhere provides a cents-per-hour differential for "Lead Aide". In our view, the "Lead Aide Definition" herein at issue is the standard by which the MTEA proposes to determine when an aide in the bargaining unit is entitled to that lead aide differential, though that end is achieved somewhat circuitously.

As the definition of the circumstances in which an employe becomes entitled to a wage differential, we find the provision to be a mandatory subject of bargaining, as written.

In so concluding, we note that this language does not obligate the District to assign functional supervisory responsibilities to aides or, therefore, to create situations in which employes are entitled to the lead aide differential. The provision merely establishes the pay entitlement when and if the District sees fit to assign the functional supervisory responsibilities defined in the language to bargaining unit personnel. Thus, contrary to the District's contention, we do not find that the proposal would impermissibly interefere with the District's policy determinations as to its organizational structure or as to the allocation of duties fairly within the scope of bargaining unit employes' jobs.

Dated at Madison, Wisconsin this 13th day of September, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Herman Torosian, Chairman

I dissent as to proposal 2 and fully concur as to the remaining proposals.

Gary L. Covelli, Commissioner

I separately concur as to proposal 13 and fully concur as to the remaining proposals.

Marshall L. Gratz, Commissioner

I have participated only as to proposals 1-2, 7, 10-14, and 16 and fully concur as to said proposals.