STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of<br><br>SCHOOL DISTRICT OF JANESVILLE<br><br>Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and<br><br>JANESVILLE EDUCATION ASSOCIATION | Case XXV<br>No. 30763 DR(M)-276<br>Decision No. 21466 |

Appearances:

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Assocaition.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701, by Mr. Joseph A. Melli, Mr. James K. Ruhly, and Mr. Thomas R. Crone, appearing on behalf of the District.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The School District of Janesville having on December 2, 1982 filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the District's duty to bargain with the Janesville Education Association over certain matters; and hearing on said petition having been held in Madison, Wisconsin on March 15, 1983, before Examiner Peter G. Davis, a member of the Commission's staff; and the parties having submitted written post-hearing arguments, last of which was received on October 10, 1983; and a supplemental hearing having been held on February 24, 1984, before Examiner Davis; and the parties having filed supplemental briefs, the last of which was received on March 2, 1984; and the Commission, having considered the record and the positions of the parties, makes and issues the following

## FINDINGS OF FACT

1. That the School District of Janesville, herein the District, is a municipal employer having its offices at 527 South Franklin Street, Janesville, Wisconsin 53545.

2. That the Janesville Education Association, herein the Association, is a labor organization.

3. That at all times material herein, the Association has been the exclusive collective bargaining representative of certain individuals employed by the District as teachers and related professionals; and that the District and the Association have been parties to a series of collective bargaining agreements covering the wages, hours and conditions of employment of said employes, the last of which had a term of July 1, 1981 through June 30, 1983.

4. That during collective bargaining between the parties over the terms of the agreement which would succeed their 1981-1983 contract, a dispute arose as to the District's duty to bargain with the Association over certain matters; that the parties were unable to resolve said dispute voluntarily; and that the District subsequently filed the instant petition for declaratory ruling.

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

## Teacher/Association Rights

(1) Section 1. The Association and its representatives shall have the right to use school buildings for organizational meetings and activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative, at reasonable hours and locations, provided that such use does not interfere with school functions or activities or previously scheduled community activities. The Association shall make prior arrangements for the use of school buildings with the Administration. Such use of school buildings on regular school days, during the hours that a custodial staff employe is on regular duty, shall be without cost to the Association. When the Association uses school buildings at other times, the Association shall reimburse the District for its custodial costs incurred as a result of such use.

Section 2. The Association and its representatives shall not be denied access to school property for the purpose of engaging in organizational activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative, provided that such access and activities do not interfere with school functions or activities or previously scheduled community activities. Association representatives who are not employes of the District shall notify the Administration of their presence and purpose in any school building.

Section 3. The Association shall have the right to post notices of activities and matters of Association concern on teacher bulletin boards. Subject to all applicable rules and regulations of the U.S. Postal Service, the Association shall have the right to communicate with bargaining unit members regarding matters related to the Association's responsibilities and functions as the exclusive collective bargaining representative, through use of the District mail service and teacher mail boxes.

Section 4. Each school year, the Association shall be provided with ten (10) days of paid released time to be used by employes of the District who are officers or representatives of the Association for the transaction of Association activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative. The use of such paid released time shall be at the discretion of the Association, provided that the Association gives the Administration at least twenty-four (24) hours advance notice of the intended use of such paid released time and that the use of such paid released time by Association representatives or officers does not unreasonably interfere with normal school functions. The Association shall assume the cost of substitute teachers, employed by the District to replace employes utilizing the paid released time authorized herein.

(2) Section 5. Right to Association Representation.

a. All employes shall be entitled to Association representation, upon request, at any meeting, interview or conference with the District or its agent(s) which is reasonably likely to result in disciplinary action against the employe or to adversely affect or jeopardize the employe's wages, hours or conditions of employment, or which has as its purpose the gathering of information intended to or reasonably likely to have such results.

b. The District shall advise the employe of his/her right to Association representation, and the purpose(s) of the meeting, at the time that the employe is directed to meet with the District or its agent(s).

c. In the event that an Association representative is unavailable to meet with the employe and the District's agent(s) at the scheduled time and place, the District shall make a reasonable effort to reschedule the meeting in order to accomodate the employe's right to have Association representation.

d. An employe shall have the right to consult privately with his/her Association representative prior to any meeting, interviews or conference which falls within the criteria described above in subsection a.

e. No employe may be disciplined for refusing to participate, without an Association representative, in any meeting, interview or conference which falls within the criteria described above in subsection a.

Section 6. No employe may be disciplined or discriminated against in regard to terms or conditions of employment by the District on the basis of the employe's exercise of any of the rights or provisions of this Agreement.

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(3) Transfers and Vacancies

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Section 2. Teacher-Initiated (Voluntary) Transfers.

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c. Vacant teaching positions and reassignment positions shall be filled by qualified bargaining unit applicants, unless good reason(s) exists to select a non-unit applicant over a bargaining unit applicant. Where two (2) or more qualified bargaining unit employes have applied for a vacant teaching position or reassignment position, the vacancy shall be filled by the qualified bargaining unit applicant with the greatest seniority (as determined pursuant to the provisions of Article VIII, Section 4).

Section 3. Administration-Initiated (Involuntary) Transfers.

a. No teacher will be involuntarily transferred by the administration without a conference followed by a written notice from the District Administrator which will include the reasons for the transfer.

b. No teacher may be involuntarily transferred without good reason(s). Where the District determines for good reason(s) to fill a vacant teaching assignment by involuntary transfer, and two (2) or more bargining unit emploeys are qualified to fill that teaching assignment, the District shall select that employe with the least seniority (as determined pursuant to the provisions of Article VIII, Section 4) for the involuntary transfer.

c. In the event that a teacher does not receive notification from the District of his/her involuntary transfer until after June 1, that teacher shall receive additional compensation in the amount of $500.00, payable by the District within thirty (30) calendar days following notification of the transfer.

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## Teacher Evaluation

(4) Section 1. Elementary and secondary teachers shall be evaluated pursuant to uniform evaluation criteria and written evaluation instruments, developed for their respective instructional levels, to insure that teacher performance is measured consistently by all persons charged with the responsibility for the evaluation of classroom teachers. No bargaining unit employee may be assigned to evaluate the performance of any other bargaining unit employee, for purposes of promotion, demotion, discipline and/or continued employment.

Section 3. Classroom Visitation.

a. Classroom visitation shall be one phase of the evaluation process and shall be done on a planned, systematic basis.

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c. The District shall conduct at least two (2) classroom visitations each school year, as part of the evaluation process for first and second year teachers. Teachers with three (3) years or more experience shall have at least one (1) classroom visitation each school year. All classroom visitations shall be for a minimum of thirty (30) minutes. Evaluator(s) shall be physically present during the classroom visitation.

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## Article VIII. Staff Reduction

(5) Section 1.

In the event the Board determines to reduce the number of employe positions (full layoff) or the number of hours in any position (partial layoff) for the forthcoming school year, the provisions set forth in this Article shall apply. Layoffs shall be made only for the reason(s) asserted by the Board, and not to circumvent the other job security or discipline provisions of this Agreement.

Section 2. Layoff Notices and Effective Date of Layoffs.

(a) Prior to implementing any layoff(s), the Board shall notify the Association in writing of the position(s) which it has determined to reduce.

(b) Layoffs of teachers shall be implemented in accordance with a time frame consistent with the provisions of sec. 118.22, Stats. The Board shall give written notice to the teachers it has selected for layoff for the ensuing school year on or before March 15 of the school year during which the teacher holds a contract. The layoff of each teacher shall commence on the date that he or she completes the teaching contract for the current school year.

(c) The Board shall simultaneously provide the Association with copies of all layoff notices which it sends to employes pursuant to this section.

Section 3. Selection for Reduction.

In the implementation of staff reductions under this Article, individual teachers shall be selected for full or partial layoff in accordance with the following steps:

Step 1 Attrition. Normal attrition resulting from employes retiring or resigning will be relied upon to the extent it is administratively feasible in implementing layoffs.

Step 2 Preliminary Selection. The Board shall select employes for a reduction in the grade level, department or subject area affected by such reduction(s) in the order of the employe(s) length of service in the District, commencing with the employe in such level, department or area with the shortest service (least seniority).

The provisions of this Article shall not be interpreted to preclude the Board from retaining, in case of staff reduction, a staff of teachers who are qualified by virtue of their certification to teach the instructional areas or subjects in the District's curriculum.

Step 3 Bumping. Any employe who is selected for reduction pursuant to Step 2, above, may elect in writing, within ten (10) days of receipt of a layoff notice, to assume the assignment, or that portion of the assignment which will allow the employe to retain a position substantially equivalent in hours and compensation to the position the employe held prior to receiving notice of layoff, of the employe with the shortest length of service in the District who holds an assignment for which the former employe is certified. Any employe who is replaced pursuant to this Step may similarly elect to replace another employe in the District as provided in this Step. The Board shall notify employes, in writing, of their selection through bumping, within 24 hours after it has occurred. The Board shall simultaneously provide the Association with copies of any notice which it is required to provide employes under this Step.

Step 4 Refusal of Partial Layoffs. Any employe who is selected for a reduction in hours (partial layoff) under Step 2 or 3, and who is not able to exercise bumping rights under Step 3 to retain a position with hours and compensation substantially equivalent to the hours and compensation the employe presently holds, may choose to be fully laid off, without loss of any rights and benefits as set forth in Sections 4 and 5 below.

The provisions of this Step shall not be construed to affect the rights to unemployment compensation provided in Chapter 108, Stats., if any, of an employe choosing to exercise the right described herein.

Section 4. Seniority.

For purposes of this Article, the commencement of an employe's service in the District shall be the first day of employment under his/her initial contract and, where two (2) or more employes began employment on the same day, their respective levels of training (degrees and degree credits) shall be used to establish their length of service (i.e., the employe with the greater level of training shall be considered more senior); provided that, if there still remain two (2) or more

employes subject to layoff selection who have equivalent levels of training, such selection shall be determined among such employes on a lottery basis.

For purposes of this Article, an employe's service in the District shall not include any period of time in which the employe has worked for the District in a non-bargaining unit, administrative or managerial capacity. Regular part-time employes shall accrue seniority on a pro-rata basis, based upon the percentage of a full-time contract worked by the employe. Ninety-six (96) full days of employment during a school year shall constitute one year of District service for purposes of calculating an employe's seniority.

An interruption in continuous District employment due to a leave of absence, medical leave, maternity, child-rearing or adoption leave, or layoff shall not cause the loss of prior accumulated seniority. An interruption in employment due to other causes shall result in the loss of prior accumulated seniority; provided, however, that an employe entering a non-bargaining unit position with the District shall be allowed to retain prior accumulated seniority for two (2) years.

No later than December 1 of any school year, the Board and the Association shall develop a mutually-agreeable seniority list, which shall rank all employes, including both active employes and employes on full or partial layoff, according to their length of service in the District, as determined above. Such list shall also state the teaching assignments, if any, presently held by such employes, and the areas in which such employes are certified.

Section 5. Recall.

If the District has a vacant position or a portion of a position available for which a laid off employe is certified according to the District's records, the employe shall be notified of such position and offered employment in that position, commencing as of the date specified in such notice. Under this section, employes on layoff will be contacted and recalled for a position in reverse order of their layoff. In the event two (2) or more employes who are so certified were laid off on the same date, the Board shall select the employe who has the longest service in the District as determined pursuant to Section 4, above. Recall rights under this section shall extend to employes on partial layoff (i.e., those employes hours have been reduced).

Within fourteen (14) days after an employe receives a notice pursuant to this section, he or she must advise the District in writing that he or she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice pursuant to this section shall be mailed by certified mail, return receipt requested, to the last known address on the employe in question as shown on the District's records. It shall be the responsibility of each employe on layoff to keep the District advised of his or her current whereabouts. The Board shall simultaneously provide the Association with copies of any recall notices which are sent to employes on layoff status pursuant to this section.

Any and all recall rights granted to an employe on layoff pursuant to this Article shall terminate upon the earlier of (i) the expiration of such employe's recall rights period, or (ii) such employe's failure to accept within fourteen (14) days an offer of recall, as provided in this section, to a position substantially equivalent in hours and compensation to that from which the employe was laid off. For purposes of

this Article, the term "employe's recall rights period" is five (5) years following the employe's most recent layoff, the five-year period ending on the first day of the sixth school year after such layoff.

A full-time employe on layoff status may refuse recall offers of part-time, substitute or other temporary employment without loss of rights to the next available full-time position for which the employe is certified. Full-time employes on layoff status shall not lose rights to a full-time position by virtue of accepting part-time or substitute appointments with the District.

No new appointments may be made by the District while there are employes who have been laid off or reduced in hours who are available and certified to fill the vacancies.

Section 6. Benefits During Layoff.

Employes who are laid off shall remain eligible for inclusion in all of the District's group insurance programs under the same terms and conditions as are applicable to all regular members of the bargaining unit, during the summer immediately following the employe's layoff notice.

No employe on full or partial layoff shall be precluded from securing other employment while on layoff status.

Employes on full layoff will be eligible for inclusion in all of the District's group insurance programs, to the extent such policies allow their eligibility, provided the laid off employe reimburses the District for the full premium for such coverage. Such eligibility shall continue during the employe's recall rights period, except that it shall be suspended while the employe is employed on a full-time basis for another employer.

Employes on full layoff shall retain the same amount of seniority, based upon length of service in the District as set forth in Section 4, above, and the same amount of sick leave as she or he had accrued as of the date she or he was laid off. If a laid off employe is recalled, such employe shall again begin to accrue full seniority and sick leave.

Partially laid off employes, who were laid off from full-time employment, shall have all the rights and privileges of full-time bargaining unit members under this Agreement, with the exceptions of salary and retirement contributions (which shall be prorated), shall accrue full seniority while on partial layoffs, as set forth in Section 4, above, and shall accrue full sick leave.

Section 7. Grievance Procedure.

If an employe or the Association contends that the Board has violated any of the provisions of this Article, they may file a grievance beginning at the District Administrator level (Step 2) of the Grievance Procedure under this Agreement, no later than sixty (60) days after receiving final notice of layoff under Sections 2 and/or 3, above.

Personnel File of Teacher

(6) Section 1. A teacher shall have the right, upon request, to review the contents of his/her personnel file; to have a representative of the Association accompany him/her during such review; to receive copies of any material contained in that personnel file; to respond in writing to any material which the District has included in the teacher's personnel file, and to have that written response included in the

personnel file; and to secure the removal of any inaccurate informational material contained in the teacher's personnel file. The provisions of this section shall not be interpreted or applied in a manner which is contrary to state law (e.g., Chapter 19 and section 103.13, Stats.) and shall not require disclosure or review of material which the District has determined is exempt under section 103.13, Stats.

Working Conditions

(7) Section 1. The District shall determine the number and type of work assignments (within a teacher's area(s) of certification) which teachers shall perform during the regular teacher workday. The District shall establish the amount of student-contact time (e.g., classroom instruction, study halls, and student supervisory periods) and preparation time within the regular teacher workday to which a teacher is assigned. The District will endeavor to provide relatively equal work loads.

(8) Section 2. Regular Teacher Workday.

a. The regular teacher workday for employes covered by this Agreement shall be as follows:

Elementary (grades pre-K - 6): 8:15 a.m. to 3:00 p.m.

Secondary (grades 7-12): 7:45 a.m. to 3:45 p.m.

The regular teacher workday shall include a duty-free lunch period consisting of thirty (30) minutes.

b. All work assignments scheduled for performance outside the regular teacher workday shall be considered overtime assignments. Unless compensation for such overtime assignments is provided for elsewhere in this Agreement, teachers assigned such overtime assignments shall be compensated, in addition to their scheduled salaries, at the rate of $10.00 per hour, with a one-hour minimum payment per assignment.

c. As used in this Article, a teacher's regular hour rate of pay shall be determined by dividing the teacher's yearly salary by the product of 190 (contract days per year) x 8 (hours per workday).

(9) Section 3. Elementary School Grades Pre-K - 6).

a. Elementary school teachers (grades Pre-K - 6) to whom the District does not provide five (5) hours of preparation time per week during the student school day shall receive compensation, in addition to their scheduled salaries, at the teacher's regular hourly rate of pay for each such hour less than five (5) per week provided by the District.

b. 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 day ends but before the regular teacher workday ends.

Section 4. Secondary School (Grades 7-12).

a. Secondary school teachers (grades 7-12) who are assigned no more than five (5) hours of classroom instructions or student supervision (e.g., study hall, laboratory, or other supervision) per workday, averaged on a semester basis, shall be compensated in accordance with the provisions of the Salary Schedule, unless otherwise provided in this Agreement.

b. The District may assign work to secondary school teachers in addition to the basic assigned workload described above in subsection a. Teachers whose workloads exceed those compensated by the Salary Schedule, as provided above in subsection a., shall be compensated, in addition to their scheduled salaries, as follows: A teacher to whom the District chooses to assign more than five (5) hours of classroom instruction and student supervision per workday, averaged on a semester basis, shall receive additional compensation at the teacher's regular hourly rate of pay for each additional hour of assigned classroom instruction or student supervision in excess of five (5) per workday.

c. Study Halls. In the event that only one teacher is assigned to a study hall at the secondary school level to which more than fifty (50) students are assigned, that teacher shall receive compensation in addition to the teacher's scheduled salary at the rate of one-half (1/2) times the teacher's regular hourly rate of pay for each such study hall period.

Section 5. For teachers with less than full-time contracts with the District, the amounts of preparation time and/or workloads described above in sections 3 and 4, and the additional compensation provided in sections 3 and 4, shall be prorated according to the percentage of a full-time contract held by such teachers.

(10) Section 7. Class Size.

a. The parties recognize that the number of students assigned to a class 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 teaching and learning conditions are directly affected by class size and that the size of the class affects the conditions of employment and workload of teachers.

b. (1) Elementary school teachers who are assigned twenty-five (25) or fewer students per workday, averaged on a semester basis, shall receive wage compensation in accordance with the provisions of the Salary Schedule.

(2) Teachers at the secondary school levels who are assigned thirty (30) or fewer students per class, excluding band, orchestra and choir classes, shall receive wage compensation in accordance with the provisions of the Salary Schedule.

c. (1) In the event the District chooses to assign more than twenty-five (25) students per teacher per workday at the elementary school level, the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation at the rate of one percent (1%) of their base salary per student in excess of twenty-five (25), per semester.

(2) In the event the District chooses to assign more than thirty (30) students per teacher per class at the secondary school level (excluding band, orchestra and choir classes), the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation in accordance with the following formula:

$$\frac{\text{Number of students in excess of 30}}{30} \times \text{Teacher's Regular Hourly Rate of Pay} \times \text{Number of Periods (Classes) of Class Overloads}$$

d. For elementary school teachers with less than full-time contracts with the District, the class size workload described above in paragraph b.(1), and the additional compensation provided for in paragraph c.(1), shall be prorated according to the percentage of a full-time contract held by such teachers.

e. Where class size overloads occur as the result of exceptional circumstances (e.g., flexible scheduling, team teaching, experimental programs, etc.), the work overload compensation provisions of subsection c., above, shall not apply; provided, that the Association has been advised of the situation by the District and agrees to waive the work overload compensation provisions.

f. During the first ten (10) school days of each school year/semester, class size overloads will be allowed without additional compensation to the teacher, while administrative schedule changes are being attempted. If class size overloads persist beyond the first ten (10) days of the school year/semester, the teacher shall receive additional compensation from the first day of the overload, including those days occurring within the first ten (10) days of the school year/semester, in accordance with the provisions of subsection c., above.

Section 8. Any additional compensation earned by a teacher under this Article shall be separately itemized and paid monthly by the District.

Reimbursement for Credits Earned

(11) Section 1. Graduate and undergraduate credits, earned by a teacher at a college or university empowered to grant baccalaureate degrees as a result of a course or courses which satisfy the approval requirement(s) set forth below, shall be reimbursed by the Board at the rate of seventy-five percent (75%) of the UW-Whitewater first-semester tuition fee, upon satisfactory completion of the course or courses and filing of the proper transcript(s) with the District.

Section 2. For purposes of reimbursement and placement on the salary schedule, automatic approval will be given to a course which satisfies one or more of the following criteria:

a. The course is within a teacher's current subject area or curricular responsibility.

b. The course is an education course at the current level of the teacher's assignment.

c. The course is related to a teacher's co-curricular assignment.

d. The course is taken at the request of an administrator, with a copy of the request on file in the Personnel Office. Any course which falls within the school day or conflicts with inservice must have prior principal approval.

e. The course is with a graduate degree program in the field of education.

For purposes of reimbursement and placement on the salary schedule, a course approval form must be submitted (Appendix B).

Section 3. Reimbursement for credits earned pursuant to this Article shall be paid once-a-year, in November. This November payment shall cover reimbursement for all credits earned

before September 1 of that year, provided the official transcript of the credits earned is on file in the Personnel Office by October 31 of that year.

Section 4. Reimbursement shall be paid pursuant to this Article for all approved courses begun or completed by the teacher prior to the teacher's receipt of any layoff notice.

Extra-Duty Assignments

(12) Section 1. All extra-duty work assignments 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-duty activity, other than the involuntary assignment of the activity to an employe in the bargaining unit. The District shall make every reasonable effort to obtain qualified bargaining unit volunteers for all extra-duty work assignments before subcontracting or making involuntary assignments.

As used in this Article, "extra-duty work" shall mean the duties of curriculum leaders, unit leaders, instructional managers, chairperson of the Professional Growth Committee, elementary/-secondary school building assistants, and athletic coaching and/or co-curricular assignments.

Section 2.

a. In the event that the District, after reasonable efforts, is unable to secure a qualified bargaining unit volunteer for an extra-duty work assignment, the District may subcontract such assignment to non-bargaining unit personnel; provided, however, that such subcontracting may not result in the layoff, reduction in hours, or nonrenewal of any bargaining unit employe.

b. If the District chooses not to subcontract the assignment, and is unable to secure volunteers, the District then may make an involuntary assignment of the extra-duty work to a qualified bargaining unit member. All such involuntary assignments shall be to the least senior, qualified employe on the roster of employes for the extra-duty work involved (see Section 3., below); provided, that employes once involuntarily assigned to a duty shall not be involuntarily assigned a second time until all qualified employes have been assigned.

c. No employe shall be involuntarily assigned more than one extra-duty work assignment per year, unless the District can demonstrate that there are no reasonable alternatives available in the bargaining unit in order to provide the extra-duty activity.

Section 3. Roster. For each extra-duty work assignment, the District shall prepare and maintain a roster of all bargaining unit employes 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. Any grievances regarding the placement of employes on rosters shall be filed no later than thirty (30) workdays after the posting of the roster. Grievances regarding the roster shall enter the grievance procedure at the District Administrator level.

Section 4.

a. Within a reasonable time after the District has knowledge that a vacancy in a extra-duty work assignment will occur, it shall post a notice announcing that vacancy in a conspicuous place in each school building and furnish a copy of the notice to the Association.

b. No extra-duty 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) workdays. This requirement shall not be interpreted to prevent the District from immediately filling a vacant extra-duty work assignment on a temporary emergency basis.

Term of Agreement

(13) This Agreement shall have a term of the school years commencing July 1, 1983, and ending June 30, 1985 (the 1983-84 and 1984-85 school years).

In the event that the parties do not reach a written successor agreement to this Agreement by the expiration date of this Agreement, the provisions of this Agreement shall remain in full force and effect during the pendency of negotiations and until a successor agreement is executed; provided, however, that this Agreement shall not have a duration of more than three years.

(14) School Calendar.

SEE APPENDIX A

6. That disputed proposals 1 (in part), 2 (in part), 3 (in part), 4, 5 (in part), 6, 7 (in part), 8, 9, 10 (in part), 11, 12 (in part), 13 and 14 (in part), as set forth in Finding of Fact 5, are primarily related to wages, hours and conditions of employment.

7. That disputed proposals 1 (in part), 2 (in part), 3 (in part), 5 (in part), 7 (in part), 10 (in part), 12 (in part) and 14 (in part), as set forth in Finding of Fact 5, primarily relate to educational policy and/or school management and operation.

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

## CONCLUSIONS OF LAW

1. That the proposals referenced in Finding of Fact 6 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

2. That the proposals referenced in Finding of Fact 7 are permissive subjects of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

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

## DECLARATORY RULING 1/

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

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1/ (See Footnote 1 on page 13)

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

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

I dissent in part and concur in part as to Proposal 14 and fully concur as to the remaining proposals.

_____
Gary L. Covelli, Commissioner

I separately concur as to proposal 5 and fully concur as to the remaining proposals.

_____
Marshall L. Gratz, Commissioner

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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

(continued on Page 14)

(Footnote 1 Continued)

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the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

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

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily", "fundamentally", "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of the "establishment of educational poliicy" affecting the "wages, hours and conditions of employment." The Court found that bargaining is not required with regard to "educational policy and school management and operation" or the "'management and direction' of the school system." Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977) and City of Brookfield v. WERC, 87 Wis. 2d 819 (1979).

The District herein asserts that the Association has, in some instances, submitted proposals the basic economic thrust of which would tend to inhibit exercise of employer discretion in matters primarily affecting educational policy. The District has asserted that such proposals are not mandatory "impact" proposals simply because a dollar figure is used to impose the Association's policy preference. The District alleges that an "impact" proposal is mandatory only where the Association demonstrates that a policy decision (1) has an actual impact on the workload of a teacher; (2) there is a primary correlation between that impact and the proposal under examination; and (3) the impact predominates over the educational policy involved.

The District asserts that the instant proceeding ultimately involves a determination as to who will set educational policy within the Janesville School District. It asserts that the Association has proposed a myriad of restrictions upon the management of the District's facilities, its management techniques, its ability to match teacher skills and experiences to student's needs, the size of its classes, and the quantity and quality of the educational services to be provided. The District contends that in some cases the Association's proposals seek to directly intrude on managerial prerogatives. In other instances, the District asserts that the Association gives lip service to the managerial prerogative but then affixes dollar disincentives to the exercise of discretion for the purpose of effectively precluding the exercise of that discretion. The District contends that although its objections to Association proposals are numerous, its position is not that bargaining should be restricted to the point it becomes a fiction. However, the District argues that bargaining should not be required where it involves a proposal which proceeds on an assumption of impact where none appears on the record. Bargaining should not be required, in the District's opinion, where it interferes with the "still valid concern 'for the integrity of the political processes'." Blackhawk Teachers Federation v. WERC, 109 Wis. 2d 415 (Ct. App. 1982) at 428, citing Racine, supra, at 99.

Our analysis of the monetary impact proposals at issue herein differs from that proferred by the District. We initially conclude that, in general, proposals which specify varying wage levels for teachers and related professionals who, if ever, perform different types and amounts of work are primarily related to wages. Although the Association's compensation proposals differ from the traditional forms for setting teacher wages, they are nonetheless a method for determining the compensation level to be received by an employe.

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

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

As to the District's assertions that the presence of binding arbitration under Sec. 111.70(4)(cm)6, Stats., yields some alteration of the standards by which proposals are adjudged mandatory or permissive, we reject same. Our review of the Supreme Court's holdings in Brookfield, Blackhawk, Glendale Professional Policeman's Association v. City of Glendale, 83 Wis. 2d 90 (1978), and Professional Police Association v. Dane County, 106 Wis. 2d 303 (1982), all of which involved collective bargaining relationships where access to binding arbitration was available under Secs. 111.77 or 111.70(4)(cm)6, Stats., yields no indication of any judicial inclination to have differing standards depending upon the availability of interest arbitration. In that regard, we also note that the Legislature carried forward the definition of the scope of collective bargaining in Sec. 111.70(1)(d), Stats., unchanged when it introduced final offer municipal interest arbitration and mediation-arbitration.

The first disputed proposal reads as follows:

(1) Teacher/Association Rights

> Section 1. The Association and its representatives shall have the right to use school buildings for organizational meetings and activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative, at reasonable hours and locations, provided that such use does not interfere with school functions or activities or previously scheduled community activities. The Association shall make prior arrangements for the use of school buildings with the Administration. Such use of school buildings on regular school days, during the hours that a custodial staff employe is on regular duty, shall be without cost to the Association. When the Association uses school buildings at other times, the Association shall reimburse the District for its custodial costs incurred as a result of such use.
>
> Section 2. The Association and its representatives shall not be denied access to school property for the purpose of engaging in organizational activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative, provided that such access and activities do not interfere with school functions

or activities or previously scheduled community activities. Association representatives who are not employes of the District shall notify the Administration of their presence and purpose in any school building.

Section 3. The Association shall have the right to post notices of activities and matters of Association concern on teacher bulletin boards. Subject to all applicable rules and regulations of the U.S. Postal Service, the Association shall have the right to communicate with bargaining unit members regarding matters related to the Association's responsibilities and functions as the exclusive collective bargaining representative, through use of the District mail service and teacher mail boxes.

Section 4. Each school year, the Association shall be provided with ten (10) days of paid released time to be used by employes of the District who are officers or representatives of the Association for the transaction of Association activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative. The use of such paid released time shall be at the discretion of the Association, provided that the Association gives the Administration at least twenty-four (24) hours advance notice of the intended use of such paid released time and that the use of such paid released time by Association representatives or officers does not unreasonably interfere with normal school functions. The Association shall assume the cost of substitute teachers, employed by the District to replace employes utilizing the paid released time authorized herein.

The District generally argues that the first three sections of the proposal seek to establish special and, in some cases, exclusive rights and privileges to and for the use of school buildings and facilities in disregard of the needs for safety, privacy and confidentiality. The District argues that the proposal seeks even more than the District has authority to give and exposes School Board members to liability for injury to property and for expenses incurred as a consequence of Association use of the buildings, bulletin boards and mail service. In this regard, the District notes that Article I, Section 24 of the Wisconsin Constitution permits the Legislature to grant the use of public school buildings to civic, religious, and charitable organizations during non-school hours "upon payment by the organization to the School District of a reasonable compensation for such use.", and that Sec. 120.13 (18), Stats., requires that the user of the school facility be primarily liable for any injury to property and for any expense incurred by consequence of the use of a school building for any public meeting, and further provides that the board members be secondarily liable.

Under Sections 1 and 2 of the proposal, the District contends that the right to use the facilities would permit the Association to usurp the prime building space and times for a variety of functions including political rallies, strike votes, organizational meetings and trials of dissident members, or politically provocative speakers, without any duty to protect against the potential for injury to people and damage to property. As to the Association's assertion that use of the building is essential to its ability to perform effectively as a union, the District contends that such an assertion is not the equivalent of proof and something more should be required before unions can insist on preferential use to the possible exclusion of other persons or groups. The District rejects the Association's contention that City of Sheboygan 19421, (3/82), supports the Association's position. The District contends that in that case there was no discussion of a potential exclusion of citizenry in the application of that proposal. The District asserts that such concerns are legitimate and warrant a requirement that the degree of intrusion represented by the instant proposal be, at a minimum, balanced against a proven relationship to the Association's ability to function as the exclusive bargaining representative. The District alleges that a claim of impoverishment is not enough. The District also draws the Commission's attention to a recent holding in Milwaukee Board of School Directors, 20093-A (2/83), where the Commission held that a school district is not required to bargain over a proposal which would require that facilities be provided for "meetings to discuss

internal (union) matters." The District contends that the Association misreads this case when it attempts to distinguish it on the basis that it involved the creation of new or additional facilities.

As to the access to school property granted to non-employe representatives through Section 2, the District contends that the proposal is not "carefully defined and qualified" and goes too far in interfering with the orderly management of the District's facilities. The District contends that the notice requirement could presumably include "after the fact" notification, in which circumstances the District would have to tolerate unidentified persons on the premises.

Unlike Section 1 and 2, the District alleges that the Association, in its Section 3 bulletin board proposal, makes no attempt to tie the provisions to its role as bargaining representative. To the contrary, the District asserts that the Association's proposal would permit the posting of any and all "matters of Association concern", a term impliedly if not explicitly broader than those functions essential to the discharge of the Association's statutory bargaining obligations. The District argues that "matters of Association concern" could and presumably would encompass social activities, endorsement of political candidates and causes, and other matters extraneous to the bargaining role. The portion of the proposal dealing with mail service is, the District argues, permissive because it usurps the District's right to manage school property.

The District asserts that the paid leave time required under Section 4 of the Association's proposal is permissive. The District contends that it cannot be compelled to bargain about a proposal that will allow a labor organization to interfere with the school's normal function--which is educational, for students--subject only to an uncertain limitation to be determined by an arbitrator, probably months later, as to whether such interference was "unreasonable". The District argues that a loss of educational opportunity to students--whether the interference is found to be reasonable or unreasonable--is not remediable by arbitration. The District asserts that the opportunity is lost educationally. The District notes that the proposal as worded would tolerate any "reasonable" interference with "normal" school functions while any interference (reasonable or not) has to be tolerated vis-a-vis special school functions.

The District points out that the NLRB has recently expressed concern about contract clauses that seek to confer special status on Association officers not involved in grievance processing or other on the job contract administration responsibilities. Gulton Electro - Voice, 226 NLRB No. 84, 112 LRRM 1361 (1983). The District notes that the NLRB recognized that such clauses unjustifiably discriminate against employes for Association-related purposes. The District contends that the Association's Section 4 proposal suffers from the same infirmity: it tends to reward an employe's association service. The proposal is not limited to such "use" as would directly further the administration of the bargaining agreement. The District also argues that the Iowa Supreme Court has held that a proposal allowing grievance committee members of the union to investigate and process grievances without loss of wages was not a mandatory subject of bargaining. Charles City Community School District v. PERB, 275 NW 2d 766 (Iowa Sup. Ct. 1979).

The District contends that the Association presented no evidence that Section 4 relates even indirectly, much less primarily, to the wages, hours and conditions of employment of the employes. The District contends that Section 4 is too broad and confers an advantage--paid leave for work for purposes solely determined sufficient by the Association--on employes who belong to the Association. The District notes that the proposal is also subject to the vagaries of its "transactional qualifier", and for that reason, the Association's reliance on City of Madison, 16590, (10/78) and various private sector cases is also misplaced. The District argues that City of Madison dealt with grievance processing, and was, moreover, limited to attendance at an arbitration hearing. As such, the District argues that the proposal created a narrowly defined situation in which paid leave was to be accorded. The District argues that the private sector cases similarily dealt with grievance processing or negotiations. In the instant case, the District contends that paid leave time is not specifically limited to collective bargaining or grievance processing. The District argues that the phrase "for the transaction of Association activities directly related to the Association's responsibilities and functions as exclusive collective bargaining representative" was a conscious effort by the Association to

create a favorable ambiguity and thereby increase the arguable reach of the proposal's provisions. The District contends that the phrase employed is ambiguous and that ambiguity should be construed against the Association. For example, the District argues that a meeting to set strategy in dealing with a rival election petition would not involve collective bargaining but would relate to the Association's exclusive representative status. Given the undisputed, indeed presumed, potential for some forms of interference with school operations, the District argues the Commission should find the proposal represents unreasonable intrusion into the operation of the schools and that it is therefore permissive.

As a general proposition, the Association argues that its proposal constitutes a mandatory subject of bargaining because it is primarily related to the Association's legal status, responsibilities and functions as the exclusive collective bargaining representative of the District's professional employes. The Association contends that the proposals give substance to the statutory rights granted to municipal employes by Sec. 111.70 (2) Stats., and provide the means for the Association to effectively fulfill its representational obligations and functions. The representational duties which state law imposes on the exclusive bargaining agent form the basis for defining its communications with, access to, and activities on behalf of teachers as matters primarily related to employe working conditions. Since the effective functioning of their union is the sine qua non of the employes' negotiation of their wages, hours and working conditions and the administration of their collective bargaining agreement, the Association's proposal which is essentially and directly related to the effective operation of the union is itself thus primarily related to the employe wages, hours and working conditions. The Association asserts that the principle that the proposal which primarily relates to the union's "authority and responsibility as the exclusive collective bargaining representative" likewise relates to mandatory subject of bargaining, has been recognized by the Commission. City of Sheboygan, supra.

In addition, the Association contends that its proposal must be considered a mandatory subject of bargaining because it does not primarily relate to the formulation or management of public policy. Clearly, the proposal has no relationship to, or adverse impact on, the District's formulation or implementation of educational policy. The express qualifications included in the Association's proposal recognize and accommodate the District's legitimate managerial interests (e.g., advance notice, use and/or access to District property at reasonable times and locations, the avoidance of interference with school or community functions and activities, reimbursement of custodial costs, etc.). Thus, although the rights granted by the proposals affect the management of the District's property and facilities, the proposals cannot be said to "primarily" relate to the management or direction of the school district as a governmental entity.

Furthermore, the Association asserts that mandatory subjects of bargaining include not only those that regulate the relationship between the employer and the employes, but also those that regulate the relationship between the employer and the union. Gorman, Basic Text on Labor Law, page 506, (1976). The Association also argues that the proposals are mandatory subjects of bargaining for reasons similar to those underlying the well established holdings that union security provisions are mandatory subjects of bargaining.

More specifically, the Association asserts that there can be no dispute that use of school property for meetings by community groups and teacher organizations is a widespread and long standing practice in this state and in this District. It argues that the right to use District buildings for meetings is essential to the Association's ability to effectively perform its obligations as exclusive representative of all of the District's teachers. The Association asserts that union locals cannot afford to own their own building or to rent commerical facilities without substantially reducing the economic resources available for the purpose of funding negotiations and contract administration. Since the membership dues and fair share contributions which pay for the Association's representational functions derive from employe wages, free use of the District's public buildings directly increases the employes' retained earnings.

Section 2 and 3 of the Association's proposal provide a contractual guarantee of the Association's statutory rights of access to, and communication with, bargaining unit members at their work sites. The Association asserts that these carefully defined and qualified rights are inextricably related to the

Association's ability to effectively carry out its representational responsibilities and duties, and to the employes' practical and meaningful exercise of their rights under Sec. 111.70 (2), Stats. The Association asserts that its proposals are drafted so as to eliminate any interference or conflict with school or community functions or activities. It argues that the express qualifications and limitations contained in the proposals prevent the kind of interference with or disruption of normal educational operations recognized by the courts as one of the few legitimate bases for restrictions on employes' associational rights. See, e.g., Tinker v. Des Moines Independent Community School District 393 US 503, (1969). The Association asserts that its proposals do not conflict with the District's right to deny the use of its' property, where such use would interfere with regular school activities and student instruction. Particularly where the District makes its buildings and property available to other community groups, the Association argues that the District cannot assert any legitimate interest in denying the Association access to its property for the purpose of fulfilling its representational obligations and supporting the employes exercise of their statutory rights. The Association contends that a reasonable balancing of the impact of the proposals on the District's legitimate interests and managerial functions and on the Association's ability to effectively carry out its representational responsibilities, requires the conclusion that the proposals are primarily related to the meaningful functioning of the Association and thereby necessarily, to the employes' wages, hours and conditions of employment.

The Association cites City of Sheboygan, supra, and NLRB v. Proof Co., 242 F. 2d 560, 562, (7th Cir. 1957), cert. denied, 355 U.S. 831 (1957) as authority for the mandatory status of its bulletin board proposal. The Association also directs the Commission's attention to NEA Topeka v. USD 501, 101 LRRM 2611 (1979), where the Kansas Supreme Court, applying an "impact test" substantively equivalent to Wisconsin's "primary relationship" standard, held that contract proposals authorizing the transaction of union business in the schools during non-duty or planning time, the union's right to use local inter-school mail systems without charge to the extent permitted by law, and the maintenance of a pool of 100 days of leave with pay for the performance of union duties or activities by union officials and representatives, constituted mandatory subjects of bargaining.

The Association asserts that the District's challenges to its proposal are premised upon obvious and extreme distortions of the proposal's meaning and effects. Contrary to the District's assertion, the Association's proposal does not require that the District provide bulletin boards and mail service. The proposal merely grants the Association access to and use of the District's existing communication systems. Similarly, the Association asserts that the proposal does not require the District to comply with the rules and regulations of the United States Postal Service. Obviously, the Association could neither require nor excuse such compliance. To the contrary, the Association contends the proposal subjects the Association's use of the District mail service and teacher mail boxes to all applicable Postal Service regulations in order to protect the District's legal obligations with respect thereto and to indicate clearly that the right embodied in the proposal may not be exercised in a manner which contravenes the law. As to the District's disingenuous and ambiguous suggestion that state law requires that a fee be charged for the use of the school buildings, the Association asserts that even a cursory reading of the Wisconsin Constitution and Wisconsin Statutes clearly reveals that, while the District may be empowered to charge a fee for the use of its facilities, it is not legally required to do so. Sec. 120.13 (20), Stats. The Association also argues that its proposal with respect to the usage rights and with respect to the matters of fees and insurance is consistent with District policy and past practice.

The Association contends the District's citation of Milwaukee Board of School Directors, supra, is misleading in that the Association's proposal in this case and the contract provision in dispute therein are distinguishable. The Association asserts that its proposal does not require the District to create or provide special facilities for teachers to meet, and only requires that the District continue to permit the Association to use existing school buildings when they are not otherwise in use. The Association argues that its proposal imposes no affirmitative action or expense whatsoever on the District. As in the City of Sheboygan case, the Association asserts that its proposals do not primarily relate to the management and operation of the school district, but do primarily relate to

the Association's legal status, responsibilities and functions as the bargaining unit's exclusive representative. Accordingly, the Association asserts that its proposals deal with mandatory subjects of bargaining.

As to its paid leave time proposal, the Association notes that the number of days proposed is extremely limited; the economic impact on the District is minimal, since the Association assumes the cost of substitute teachers employed by the District to replace employes utilizing the paid leave time; and the operation of the proposal is carefully qualified so as to preclude any undue interference with District managerial decisions or the conduct of the District's educational program. The Association contends that the fact that the proposal would allow employes who are Association officers or representatives to carry out necessary Association functions without the loss of pay cannot reasonably be viewed as "discriminating" against fellow employes who are thereby relieved of the need to devote their time to such Association responsibilities. On the other hand, the Association asserts the proposal is primarily related to facilitating the Association's performance of its representational duties and responsibilities and, accordingly, deals with a mandatory subject of bargaining. The Association asserts that the payment of wages for the time employe representatives of the union spend in negotiations, grievance processing or other union representational functions is a mandatory subject of bargaining. City of Madison, supra, Axelson, Inc., 234 NLRB No. 49, (1978), American Shipbuilding Corp., 226 NLRB, 788 (1976). In addition to the arguments set forth above regarding the proposal's primary relationship to the effective functioning of the collective bargaining representative, the "union leave" proposal is a mandatory subject of bargaining for the same reasons that paid release time for negotiations and grievance processing have been held to constitute mandatory subjects, since the Association's proposal is not meaningfully distinguishable from the provisions at issue in the above cited cases. The Association argues that paid release time is a mandatory subject of bargaining because, as suggested in City of Madison, it is conceptually analogous to paid leave provisions, vacation or holiday pay provisions, educational convention provisions, and educational release time provisions, all of which are mandatory subjects of bargaining. City of Madison, supra; Madison Metropolitan School District 16598 (10/78); City of Wauwatosa, 15917 (11/77); Board of Education v. WERC, 52 Wis. Sec. 625 (1971); NEA - Topeka v. USD 501, supra.

As the paid release time proposal is primarily related to the effective performance by the Association of its representational duties and responsibilities and to the meaningful exercise of statutory and contractual rights by bargaining unit employes, the Association contends that it is a mandatory subject of bargaining.

Discussion of Proposal 1

Our analysis of Sections 1 and 2 of the Association's proposal begins with the recognition that school districts are statutorily obligated to have "the possession, care, control and management of the property and affairs of the school district, . . . .". Secs. 120.12 and 120.75, Stats. However, this statutory obligation does not automatically remove the question of the use of school property from the realm of collective bargaining. As the Court noted in Fortney v. The School District of West Salem, 108 Wis. 2d 167, (1982) "while school boards are vested by statute with the primary responsibility for school district management, see chs. 118 and 120, Stats. 1977, they also have the power, pursuant to sec. 111.70, Stats., to limit their statutory powers by means of a collective bargaining agreement entered into with a Union composed of their employees." Furthermore, contrary to the District's assertions, the applicable statutory provisions do not require a payment of a fee for all organizations who wish to utilize school district property and do mandate, irrespective of any use of the school buildings by organizations, that the District maintain insurance on school property. See Secs. 120.12 (6), (9), (10), and 120.13 (17), (18), (19), (20) and (21), Stats. Thus, the Association's proposal does not conflict with existing statutory provisions and will be analyzed to determine whether it primarily relates to wages, hours and conditions of employment or to the management of District facilities or educational policy determinations.

Looking first at Section 1 of the Association's proposal, we concur with the Association's assertion that the right to use school buildings for "organizational meetings and activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative" does relate to

employe wages, hours and conditions of employment. While we do not agree that the right to use buildings for meetings is "essential" to the Association's ability to effectively perform its obligations as the exclusive representative of all of the District's teachers, we do conclude that use of such buildings does facilitate the Association's ability to communicate with the employes it represents regarding collective bargaining and contract administration matters and thus assists the Association in meeting its statutory obligations to represent employes as to matters concerning wages, hours and conditions of employment. As will be discussed in greater detail later, the Commission has found that proposals which primarily relate to a union's "authority and responsibility as the exclusive collective bargaining representative" have been found to be primarily related to wages, hours and conditions of employment absent a showing of substantial relationship to the management of the employer's facilities. City of Sheboygan, supra.

When determining whether the above noted relationship to employe wages, hours and conditions of employment predominates over a relationship to management prerogatives and control of facilities, we are confronted with District assertions that Section 1 of the proposal would permit the Association to usurp prime building space and times to the exclusion of other persons or groups for purposes such as political rallies and speakers. The District has also asserted that the proposal does not protect District concerns for public safety. Finally the District cites the Commission's decision in Milwaukee Board of School Directors, supra, pp. 47-48 for the proposition that the Commission has already determined that the use of school buildings for "union" meetings is not a mandatory subject of bargaining.

As to the District's contention that the Association's proposal allows the Association to usurp prime building space and times to the exclusion of other community groups, we note that the Association's proposal specifies that the right of use is limited to "reasonable hours and locations,. . . that . . . does not interfere with school functions or activities or previously scheduled community activities." The proposal also requires that the Association make prior arrangments for the use of school buildings. Given these limitations upon the right of use, the proposal cannot in our judgment be reasonably interpreted as interfering in any meaningful sense with school functions or activities or the availability of the school building for other community activities. Furthermore, as the purpose for the "use" is limited to "activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative," we do not concur with the District's concern that the proposal would allow the Association to conduct political rallies or to have meetings at which "politically provocative" speakers held forth. We also have no basis in this record for concluding that Association use of building facilities will jeopardize public safety to an extent that is any greater than the jeopardy which may be caused by use of such facilities by other organizations. In this regard we note that the existing District policy does not require that all organizations which utilize District facilities acquire additional insurance above and beyond that which the District is statutorily obligated to possess. Thus, although it is clear that any use of District facilities by non-school organizations interferes in a general sense with the District's management and control of its facilities, we do not find this interference to be significant because use by the Association under this proposal can not interfere with school activities or with the ability of community organizations who have expressed an interest in using district facilities to utilize same. As to our decision in Milwaukee Board of School Directors, supra, the Commission was confronted with contractual language which specified: "Facilities shall be provided for teachers in each unit to meet". The Commission held:

> "The Board asserts that proposals requirement that it provide facilities for teachers to meet, relates to the Board's ability to manage and control its physical facilities and thus is a permissive subject of bargaining. Blackhawk VTAE, supra. The provision as worded does not characterize the purpose of the teacher meetings and therefore might encompass meetings not required by the Board, such as meetings to discuss internal MTEA matters. Therefore, we deem the provision to be permissive. If the provision were worded to apply only to meetings required by the Administration, the provision would be mandatory."

The Commission's holding in that case was in response to a proposal which contained no limitation upon the purpose for which a meeting might be held and no safeguards against interference with school functions. While we continue to conclude that a proposal such as that which confronted the Commission in Milwaukee would be permissive due to the lack of any demonstrable relationship to either meetings required by the employer or meetings which are directly related to the Union's responsibilities and functions as the exclusive bargaining representative which do not interfere with the school functions or activities, we are not confronted with such a proposal herein. As we have previously discussed, the activities for which school buildings may be utilized are limited to those which facilitate the Association's performance of its statutory responsibilities in circumstances which do not interfere with the educational process. Thus, we do not find our decision in Milwaukee to be a basis for concluding that the instant proposal is permissive.

In summary, we are confronted with a proposal which has a significant relationship to the Association's ability to meet its statutory obligations as the exclusive collective bargaining representative of employes and which has no significant detrimental impact upon educational policy or the District's ability to manage and control its facilities. Therefore, we conclude that this proposal is a mandatory subject of bargaining.

Related to the right to use school facilities for organizational meetings and activities is the Association's Section 2 proposal giving the Association and its representatives access to school property "for the purpose of engaging in organizational activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative". As with the issue of the right to use facilities, we conclude that the right of access to school property and thus to the employes does facilitate the performance of the Association's statutory obligations to collectively bargain on behalf of the employes as to their wages, hours and conditions of employment and to administer any contract so bargained. The right of access will also make meaningful the right to Association representation which we will in part find to be a mandatory subject of bargaining later in this decision. The District contends that the right of access proposal exposes the District to having unidentified persons on the premises and thus interferes with the orderly management of the District's facilities. We do not agree that the proposal can be reasonably so interpreted. The proposal specifies that non-employe representatives shall notify the District of their presence and the purpose for such presence. We conclude that such notification under this proposal will occur prior to the employe contact and thus will not expose the District to situations in which unidentified persons are on the premises. A contrary conclusion would run afoul of the language in the proposal which also specifies that the access and activities will not interfere with school functions or activities inasmuch as after the fact notification could likely lead to such interference. As the right to access is carefully limited and as the right to access cannot interfere with school functions or activities or previously scheduled community activities, we conclude that the relationship of this proposal to employe wages, hours and conditions of employment predominates over any interference with management control over its facilities or with the educational process.

Turning to Section 3 of the Association's proposal, which deals with the right to post notices on teacher bulletin boards and the right to communicate with bargaining unit members through the District's mail service, we commence our analysis by noting that in City of Sheboygan, supra, the Commission concluded that a proposal which gave a union the right to install and maintain bulletin boards in fire stations was a mandatory subject of bargaining. The Commission reasoned:

> We are not persuaded by the City's argument that the installation of a union bulletin board relates to the City's management of its facilities, or in any other way primarily relates to the management and operation of the City's firefighting facilities and capabilities. Such a bulletin board would be utilized for posting items such as notices relating to departmental job openings, union meetings and grievance meetings with management personnel pursuant to contractual grievance procedure, all of which relate to wages, hours and working conditions. Thus, we conclude that such a

> bulletin board proposal primarily relates to Local 483's authority and responsibility as the exclusive collective bargaining representative of the non-supervisory firefighters in the employ of City and relates to a mandatory subject of bargaining.

This decision recognizes the impact which effective communication between the exclusive collective bargaining representative and the represented employes has upon the bargaining representative's ability to meet its statutory responsibilities to represent the employes' interests in matters concerning employe wages, hours and conditions of employment. When balancing this above-noted relationship to wages, hours and conditions of employment against any interference with the District's ability to manage its facilities, we are confronted with the District's contentions that the Association's bulletin board proposal would require the District to provide the boards and would further allow the Association to post matters of "concern" which may have no relationship to "collective bargaining and contract administration". The District has also asserted that the mail service proposal requires compliance with the United States postal service regulations and thereby usurps District control over the facilities and exposes the District to potential expenses related thereto.

Looking first at the bulletin board portion of this proposal, the Commission concludes that the District is correct when it argues that the potential use to which the bulletin board might be placed is broader in scope than matters which relate to collective bargaining and contract administration. Unlike the mail service proposal also contained in Section 3, the right to post notices is not limited to "matters related to the Association's responsibilities and functions as exclusive collective bargaining representative." If the bulletin board proposal were so limited, we would conclude that its provisions which allow use of existing bulletin boards would be a mandatory subject of bargaining under the rationale expressed in City of Sheboygan, supra, because the relationship to effective collective bargaining and thus to employe wages, hours and conditions of employment would predominate over the minimal intrusion into control over facilities. However, as the right to post notices expressed in this proposal is overbroad and allows the posting of matters which have no substantial relationship to the Association's responsibilities and functions as exclusive collective bargaining representative, we find this portion of the proposal to be permissive.

As to the proposal's specification of a right to the use of District mail service and teacher mail boxes, we concur with the Association that the reference to the United States Postal Service can most reasonably be interpreted as an assurance to the District that the Association's right of use will be subject to any applicable rules and regulations. Thus, we reject the District's argument that the proposal imposes some District duty to abide by applicable rules and regulations which may create additional burdens or expenses for the District. As the right to use of mail services is limited to "matters related to the Association's responsibilities and functions as the exclusive collective bargaining representative", and as the District has not presented any persuasive argument as to how this use will interfere in any significant way with its management of District facilities, we conclude that this portion of the proposal is a mandatory subject of bargaining because the above discussed relationship to communication which enhances bargaining over employe wages, hours and conditions of employment predominates.

Our conclusion is in accord with that of the Commission in Milwaukee Board of School Directors, 9258-A (11/74) wherein the following proposal was found to be an appropriate subject for collective bargaining:

> Allow the exclusive bargaining representative the right to post on bulletin boards and distribute through mailboxes materials pertaining only to functions of the exclusive bargaining representative, i.e., the status of negotiations, including positions of the parties as relating to wages, hours and working conditions and the status of grievances being processed through the negotiated grievance procedure. No other material on any other subject may be distributed by any labor organization if such policy is adopted. Furthermore, if the material to be distributed in the above manner by the exclusive bargaining representative should also contain

> information regarding subjects not pertaining to the functions of the exclusive bargaining representative, such as increased dues or an improved union insurance plan, such matter may not be posted on bulletin boards or distributed by the school mailboxes.

As to Section 4 of the Association's proposal, the Commission in City of Madison, supra, concluded that it was a mandatory subject of bargaining to propose that union stewards and employe witnesses would not lose pay for time spent in arbitration hearings which occurred during the employes' normal work periods. The Commission reasoned that such a proposal was mandatory because it furthered the process of peaceful resolution of disputes and did not impact in any significant sense upon employer prerogatives. While the proposal before us herein is broader in scope than that before the Commission in Madison, as it extends to "the transaction of Association activities directly related to the Association's responsibilities and functions as exclusive collective bargaining representative", we believe that the Association leave proposal nonetheless has a significant relationship to employe wages, hours and conditions of employment. In this regard we find persuasive the analysis of the National Labor Relations Board in Axelson, Inc., 234 NLRB No. 49, 97 LRRM 1234 (1978) wherein the Board was confronted with the question of whether the payment of wages lost by employe members of union bargaining committees during negotiations is a mandatory subject of bargaining. The Board held:

> The Administrative Law Judge found that the renumeration of 'employes for performing union functions goes more to the relationship between union and employer than to that between employe and employer,' and that, therefore, the payments in question did not involve mandatory subject of bargaining. The Administrative Law Judge was in error. Such a matter concerns the relations between an employer and its employees in that it is related to, the representation of the members of the bargaining unit in negotiations with an employer over terms and conditions of employment.
>
> We have previously found that the performance of similar union functions can vitally affect an employees relationship with his or her employer. For instance, under circumstances similar to the instant case, we have found that wages paid to employees during the presentation of grievances constitutes a mandatory subject of bargaining. . . . Similarly, we have found that the union related functions such as super-seniority accorded to union representatives, union security, and check-off provisions are also mandatory subjects of bargaining. These union related matters inure to the benefit of all the members of the bargaining unit by contributing to more effective collective bargaining representation and thus 'vitally affect' the relations between an employer and employee.
>
> We see no distinction between an employee's involvement in contract negotiations and involvement in the presentation of grievances. In one situation an employee is implementing a contractual term or condition of employment and the other situation an employee is attempting to obtain or improve contractual terms or conditions of employment. In both situations the activity is for the benefit of all of the members of the bargaining unit. Accordingly, we find that the payment of wages to employees negotiating a collective-bargaining agreement 'constitutes an aspect of the relationship between the employer and employees' and is therefore a mandatory subject of bargaining. (footnotes omitted)

The Fifth Circuit Court of Appeals affirmed the Board's conclusion in Axelson, Inc. v. NLRB, 599 F.2d 91, 101 LRRM 3007 (1979) and concluded:

> "It is clear from a perusal of these cases that the issues qualifying as mandatory subjects of bargaining are very diverse. However, a common theme seems to run throughout; the

qualifying subjects benefit all of the members of the bargaining unit through encouraging the collective bargaining process and vitally affecting the relationship between the employer and employees.

The Board, in its decision, emphasized the similarity of the benefits inuring to the Union members in the instant case with those involved in the presentation of the grievances. It advances the theory that effectiveness of the collective bargaining process will be greatly diminished by permitting companies through unilateral action to discourage seasoned and well qualified union representatives from participating in collective bargaining. The Board argues that many highly skilled negotiators will be reluctant to continue to serve on the committee if they are required to negotiated only during off-time or lose their production pay. These arguments do not fall on deaf ears. We are not unaware of the reluctance a person might have to make such sacrifices. The similarity of employees attempt to improve contract terms or conditions of employment through collective bargaining with an employees' attempt to insure implementation of a contract term or condition does not go unnoticed.

Keeping in mind the necessary deference accorded the Board's statutory interpretation, we are persuaded that the Board's conclusion that the instant case involved a mandatory subject of bargaining is 'legally defensible and factually acceptable'." (footnote omitted)

The Association's proposal herein allows the use of the leave time for "the transaction of Association activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative." Clearly the processing of grievances and bargaining of contracts discussed persuasively in Axelson fall within the parameters of the above quoted term. While it is clear that other matters may well fall within the scope of the above quoted phrase, we are satisfied that, given the requirement that such activities be "directly related" to the Association's responsibilites and functions as the exclusive collective bargaining representative, such additional activities for which leave may be utilized are also related in a significant fashion to employe wages, hours and conditions of employment.

The District contends that the use of paid leave time under the proposal substantially interferes with the educational process and that this interference predominates over any relationship to employe wages, hours and conditions of employment. The interference to which the District refers focuses upon the negative impact which the absence of a teacher will cause. An examination of the Association's proposal indicates that the use of the release time has attached to it various safeguards designed to insure that any interfere with normal school functions is minimized. The Association is required to give the District at least twenty-four hours notice of intended use and, even when notice is provided, use of the leave cannot unreasonably interfere with normal school functions. The intrusion into educational activities caused by this proposal is no different than that which might be caused by a proposal seeking personal holidays or other types of leave for employes. While it is true that the absence of a regular teacher from a class may well cause some lessening of the quality of education received by the students on that day, we conclude that on balance, especially in light of the safeguards written into the proposal, the proposal is a mandatory subject of bargaining because of the relationship to employe wages, hours and conditions of employment predominates. The merits of the proposal, of course, are for the bargaining table and, if necessary, mediation-arbitration.

We would also note that we find unpersuasive the District's argument to the effect that such a clause may be illegally discriminatory against employes who are not "officers or representatives" of the Association. As we noted in City of Madison, supra, Sec. 111.70(3)(a)2 Stats. explicitly authorizes the payment of wages to employes "for the time spent conferring with the employes, officers or agents." Thus, we believe it is clear that the Legislature has concluded that the payment of wages to employes who are performing functions directly related to the collective bargaining process does not constitute illegal discrimination under the

Municipal Employment Relations Act. We also note that the Gulton Electric case is limited to super-seniority and thus does not overturn the holding in Axelson which we have quoted earlier. Lastly we would point out that the decision of the Iowa Supreme Court in Charles City Community School District v. PERB, 275 N.W. 2d 766 (1979) cited by the District was premised upon specific statutory provisions which define the scope of bargaining as well as the rights of employers and which differ substantially from those in Wisconsin. We do not find that decision to be applicable or persuasive herein.

The disputed provision is as follows:

(2) Section 5. Right to Association Representation.

a. All employes shall be entitled to Association representation, upon request, at any meeting, interview or conference with the District or its agent(s) which is reasonably likely to result in disciplinary action against the employe or to adversely affect or jeopardize the employe's wages, hours or conditions of employment, or which has as its purpose the gathering of information intended to or reasonably likely to have such results.

b. The District shall advise the employe of his/her right to Association representation, and the purpose(s) of the meeting, at the time that the employe is directed to meet with the District or its agent(s).

c. In the event that an Association representative is unavailable to meet with the employe and the District's agent(s) at the scheduled time and place, the District shall make a reasonable effort to reschedule the meeting in order to accomodate the employe's right to have Association representation.

d. An employe shall have the right to consult privately with his/her Association representative prior to any meeting, interviews or conference which falls within the criteria described above in subsection a.

e. No employe may be disciplined for refusing to participate, without an Association representative, in any meeting, interview or conference which falls within the criteria described above in subsection a.

Section 6. No employe may be disciplined or discriminated against in regard to terms or conditions of employment by the District on the basis of the employe's exercise of any of the rights or provisions of this Agreement.

. . .

The District asserts that Section 5 seeks to regulate District-employe communications by imposing upon the District the following obligations:

1. To predict in each and every case whether a planned or spontaneous meeting, interview or conference is "reasonably likely to result in disciplinary action" or to "adversely affect or jeopardize" an employe's wages, hours or conditions of employment;

2. To predict in each and every case whether information it seeks to gather is "reasonably likely to result in disciplinary action" or to "adversely affect or jeopardize" an employe's wages, hours or conditions of employment;

3. To predict these things correctly or violate the contract and Wisconsin law (Sec. 111.70 (3) (a) 5, Stats.);

4. To advise the employe, if the prediction indicates it is appropriate, of a "right to association representation";

5. To advise the employe "at the time" the meeting, interview or conference is set up or attendance is otherwise "directed";

6. To reschedule the meeting, etc. if an Association representative is "unavailable" to meet at the scheduled time and place;

7. To reschedule the meeting--or be prepared to show a "reasonable effort" at doing so--at such time as might be convenient to an Association representative;

8. To delay such meeting, etc. while the employe "consults privately" with the representative.

While "all this fiddling is taking place," the District asserts that "Rome may be in flames." It argues there is no provision for emergencies, matters of student public health or safety, countervailing parental urgency, or substantial risks of District liability. The District contends that the proposal has no exception for remedial conferences and that the District's right to get facts from its employes would be subordinated to a scheme that would regulate the information gathering process as though the sole concern was the impact on the employe. The District argues that any of the myriad of administrator initiated inquiries, which occur on a daily basis, could, depending upon the employe's answer, adversely affect or jeopardize an employe's employment. The District contends that it is unrealistic to grant a super- Weingarten - type of right to representation based on a public school administrator's ability to predict whether such an effect is "reasonably likely" as to each and every contact with a teacher. See, NLRB v. J. Weingarten 420 U.S. 25 (1975).

Under the Association's proposal, the District argues that it could be thwarted in its efforts to find out quickly and accurately how or why a student got injuried, or to gather facts to inform an anxious and vitally interested community. The District contends that educational policy can be seriously affected by teacher-caused delay in information gathering: the teacher's credibility can become suspect, the teacher-administrator relationship becomes adversary, students can assume a similarly uncooperative attitude when called upon to give information. The District argues that conferences to discuss evaluation or teacher motivation or issues directly intertwined with the employer's basic mission could be delayed or cancelled altogether because of the red-tape or uncertainty presented by the Association's proposal. The District contends that the community could easily lose interest in supporting its educational program under these circumstances.

The District argues that the proposal's restrictions are analogous to the teacher assistance proposal in Beloit, supra, which the courts found to be non-mandatory because the techniques employed by the district "reflect efforts to determine management technique rather than 'conditions of employment'." The District argues that the proposal is distinguishable from that in Beloit which limited itself to the Weingarten right, a right which is limited to an employe request for representation at a disciplinary or pre-disciplinary hearing. The District argues that Weingarten does not put a burden on the employer to ascertain whether discipline is likely to result from a teacher communication; it does not delay the ability of the District to get information; and it does not provide for representation, in any event, unless and until the teacher requests it. The District argues that Weingarten is a minimal intrusion on the employer's ability to determine its management techniques. The District argues that the Association's proposal here goes far beyond Weingarten.

The District also asserts that the proposal is far different from that in Professional Policemen's Protective Association of Milwaukee v. City of Milwaukee 14873-B, 14875-B, 14899-B, (8/80). The District argues that none of the factors articulated in City of Milwaukee, supra, are involved in the Association's proposal here. The District contends that the range of administrator-teacher communications stymied by this proposal is staggering. It asserts that unless the District is willing to delay and make adversarial almost all teacher-administrator communications, it would have to learn why students were not performing, why injuries occurred, why lesson plans were not submitted and why students were not following established procedures without asking the teacher. The District alleges that the Association's proposal exaggerates the employe's interest in such communications and the value of the representation. The District argues the fatal flaw in the Association's proposal is its potential "impairment"

of the employer's ability to determine and implement its management techniques. The District asserts that the ability to operate and manage schools would be substantially undermined, and the administrator's relations with teachers would require a near total reorientation. Citing Waukesha County, 14662-A (1/78), the District contends that the balancing of interest requires, at a minimum, that any right to representation proposal which intrudes so directly on the rights of management to determine and implement its management techniques, (and therefore intrudes upon the educational and operational interests of the school system), be found to be a permissive subject of bargaining.

While agreeing with the Association that Weingarten reflects a determination as to the extent of permissible intrusions into managerial techniques, the District asserts that the Association's description of its proposal as nothing more than a contractual embodiment of Weingarten rights should be rejected. In this regard, the District contends that Weingarten rights do not arise until the employe requests same and that the right is not present unless there is an investigatory element to the meeting and the investigation is likely to result in discipline. The District argues that meetings for the purpose of announcing a previously decided disciplinary action, meetings which are preceded by assurances of no disciplinary action, and meetings designed to announce or discuss job assignments, do not give rise to Weingarten rights. The District contends that Weingarten does not require or impose a duty to announce to employes a right of representation and to reschedule meetings. More critically, the District asserts that the Association's proposal is not limited to investigatory interviews or disciplinary actions. Indeed, the District contends that under the Association's view of the educational arena, each and every managerial decision could be viewed as adversely affecting working conditions. As to the Association's attempt to attach its own interpretation to its proposal by arguing that it should be interpreted in accordance with Weingarten, the District contends that that assertion begs the question because it is the wording of the proposal, not the proponent's view which is determinative. Racine Unified School District, 19980-B, 19981-B (1/83); Nicolet High School District, 19386 (2/82). As worded, the District asserts that the Association's proposal arguably extends to every district-employe communication which could involve a change disliked by the employe. The District contends that the proposal represents an unreasonable intrusion into managerial techniques and is therefore a permissive subject of bargaining.

As to Section 6 of the proposal, the District contends that it obstructs the District's ability to function and accomplish its mission according to its educational policy judgments and its obligations to the public. For example, the District argues that if an employe exercised a right to apply for a vacant position, and received it on the basis of seniority, he/she could be insulated from discipline if his/her performance thereafter was judged unsatisfactory. Or an employer could be precluded from taking action against an employe who misrepresented facts in a meeting with an administrator, based on advice he received or claimed he had received from his union representatives. Or, given the Association's proposal as to access to school property, could the employer discipline and employe who engaged in illegal or inappropriate conduct while on premises pursuant to this "access" protection? The District argues that Section 6 seems to say that discipline under these circumstances could be challenged. The District argues that its list of examples could extend almost endlessly. It asserts that Section 6 is not necessary under Wisconsin law which already protects employes in the exercise of their statutory rights and insures that employers will not violate master contracts. To the extent Section 6 grants protections beyond Section 111.70 individual rights, the District contends that its protections embrace conduct to which protection is inappropriate. In addition, the District argues that the proposal would arguably permit an employe to refuse an assignment which he or she believed violated the contract and, in that regard, the proposal substitutes job action for the practice of "work now, grieve later." The District asserts that the fact that an employe acts at his or her ultimate peril in refusing an otherwise proper directive is little consolation to the students who must wait out the litigation to see if the services will or will not be provided. The District argues that an abandonment of the requirement to work first and grieve later is ill-advised and represents an unwarranted intrusion which renders the proposal permissive. The District argues that the Association's contention that the proposal is limited to a teachers exercise of rights "which are not

related to the adequate performance of a teacher's job duties and responsibilities" suggests a clairvoyance not shared by the District. The District notes that nowhere is the text of the proposal so limited and that it is the text of the proposal, not the proponent's characterization which controls.

The Association responds by asserting that when stripped of the hypotheticals which the District attempts to pass off as logical and plausible interpretations of the Association's proposal, the District's arguments are hollow, devoid of any substance whatever, and unsupportive of the District's assertions that the proposal is permissive. The Association contends that it is entitled to have the Commission interpret the disputed proposal pursuant to an assumption of good faith actions by both the employes and the District. Under such an assumption, the Association contends that most of the specious arguments raised in the District's brief need not be addressed because they are premised on the rejection of just such an assumption. For example, as to the District's argument that implementation of the proposal would require the District to "predict" the likely result of the meeting, interview or conference, the Association argues that it is difficult, if not impossible, to conceive of any situation wherein the person calling for a "meeting, interview or conference", i.e., the employer, would not know the purpose or intent of such a meeting. The Association contends that the only requirement imposed on the District in this instance is that it convey to the employe this intent when it is "reasonably likely" the meeting would have an adverse effect on the teacher's wages, hours or working conditions. Moreover, the Association points out that discretion is afforded the District through the use of the terms "reasonably likely to result in disciplinary action". Thus the Association argues that no mystical "prediction" is called for or contemplated by the express language of Section 5. As to the District's contention that the proposal would result in "fiddling", the Association asserts that the idea of the defense of employe rights constitutes "fiddling" is an affront to employes in Wisconsin and ought not be seriously considered by the Commission. In addition, the Association argues that there is little, if any, likelihood that all of the events outlined by the District could or would occur and that even if those events did all occur, it is unreasonable to view the aggregate obligation on the part of the District as infringing upon management functions based on the District's conjectural assumption of time. The Association argues this latter fact is true because, as the District notes, such a combination of procedures would occur only where a major problem is the subject of the meeting, e.g., teacher non-renewal. The Association contends that its proposal simply does not suggest, nor does the Association claim, that any of the District's distorted results would flow from a reasonable application of the proposal. Accordingly, the Association urges the Commission not to give significant weight to the District's speculative concerns when applying the appropriate test for determining mandatory/permissive subjects of bargaining.

The Association contends that its proposal requires a very simply analysis to establish its mandatory nature: First, do the "meetings" contemplated by the proposal at issue, constitute a sort of meetings addressed in the line of cases derived from NLRB v. J. Weingarten, Inc., supra; second, if they are meetings to which Weingarten protections attached, has the Commission adopted Weingarten in its interpretation of MERA; and third, if the Commission has adopted Weingarten, may the Association demand, and is the District obligated, to bargain over the inclusion of the procedural rights embodied in Weingarten and its progeny in a collective bargaining agreement pursuant to the tests set forth in Beloit? The Association contends that the answer to all three questions is yes and that Section 5 is mandatorily bargainable because it primarily relates to employe's wages, hours and conditions of employment.

The Association asserts that the "meetings" referred to in Section 5 are without question Weingarten sorts of meetings. The Association also contends that Weingarten establishes that the employer may adopt a reasonable standard in responding to employe demands for representation at a meeting called by the District. Thus, the Association alleges that there is nothing in its proposal to prevent the employer from immediately investigating a student injury, for example, to ascertain the extent of that injury, to prevent the worsening of that injury, and to prevent injury to other students. However, further proceedings to determine possible responsibility for injury would not be unreasonably interfered with by requiring the employer to inform the affected employe of the potential for discipline and to offer that employe Association representation at an investigatory interview called by the employer. As always, the Association points out that this employer reasonableness would be subject to interpretation by an

arbitrator. Indeed, the Association notes that the conduct of an employer with respect to employe discipline and the presence of a union representative during a meeting called by an employer to discuss that discipline is already subject to review by the Commission pursuant to MERA. Therefore the Association argues that the only distinction of this case is the forum for review, not to the review of itself. The Association also argues that nothing in the proposal as written suggests that a reasonable interpretation of this provision would make it applicable to the "shop-floor" contacts between management and teachers which the District asserts would be affected. The Association denies that the proposal calls for any "super- Weingarten -type of right to representation" which the District seems to find hidden in the language.

The Association asserts that Weingarten is clearly applicable in Wisconsin labor cases. City of Milwaukee (Police Department) 13558-B, (1976); Waukesha County, supra; and Menomonee Falls (Police Department), 15650-C, (1979). Moreover, the Association notes that in City of Milwaukee, supra, the Commission, while again affirming the statutory right to representation enjoyed by municipal employes under MERA previously announced in Waukesha County, supra, said, "it should be noted that additional protections may be negotiated contractually". Thus, the Association asserts that the Commission has already suggested, albeit in dicta, that proposals of the sort set forth in Section 5 are mandatorily bargainable.

The Association contends that the rights to union representation embodied in its proposal are derived from Weingarten, inherent in Section 111.70(2), Stats., and guarantees the right of employes to act in concert from mutual aid and protection. The Association argues that the fact that the rights granted by Section 5 are embodied in and protected by Section 111.70(2) Stats., and that a District violation of Section 5 would therefore violate MERA, is immaterial to the proposal's bargainability. The Association alleges that the existence of non-contractual remedies and forums for the redress of violations of the employes' statutory rights is totally irrelevant to the question of whether the Association can mandatorily bargain for contractual protection of those rights and does not affect the fact that the proposal is primarily concerned with protecting an employe's employment status. For example, the Association notes that teachers who are discharged during the term of their employment contract with the school district may maintain an action in circuit court for breach of contract. Millar v. Joint School District No. 2, 2 Wis. 2d 303 (1957). Nevertheless, the Association points out that the Supreme Court held in its Beloit decision that a contract provision requiring "just cause" for the discharge of a teacher constituted a mandatory subject of bargaining. In addition, the Association argues that providing contractual protection to employes against infringement of their statutory rights by their employer has long been a primary purpose of collective bargaining. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). As to the District's contention that the enforcement of statutory rights is extraneous to collective bargaining, the Association contends that the arbitration process offers a number of distinct advantages to employes who have been discriminated against or disciplined for their exercise of legal rights. It argues that arbitration is less expensive (particularly since the union, rather than the employe, bears the costs), swifter, less complicated, less formal, more flexible, and often more comprehensible to the employe than agency or judicial proceedings. The Association emphasizes that the Court in Blackhawk supra, held that "the availability of courts as alternative forums to resolve constitutional law disputes also does not preclude the resolution of the underlying issues of the bargaining table . . . ." As in Blackhawk, supra, the Association contends that its proposal merely attempts to afford contractual protections from employe rights already guaranteed elsewhere; that is, under MERA. It argues that the only step remaining is for the Commission to apply the Beloit test to the proposal to determine whether it is primarily related to wages, hours and conditions of employment.

Under Beloit, supra, the Association argues that Section 5 (a) is mandatory because, by itself, it imposes no obligation on the District except to allow an employe who is called to any meeting which may adversely affect that employe's wages, hours and employment conditions to be accompanied to such a meeting by an Association representative at the request of the employe. As noted above, the Association asserts that this language merely incorporates the substance of Weingarten which has been adopted by the Commission. It argues that there can be no doubt as to the "primary relationship" of this Section, for by its terms it applies only to those situations where an employe's wages, hours and conditions of

employment may be placed in jeopardy. Secondly, the Association argues that Section 5 (b) simply requires that the District's agent inform the affected employe of the rights guaranteed by Section 5 (a) when the employe "is directed to meet with the District or its agents". While on its face the subsection suggests some possible intrusion into management technique, such an intrusion is clearly minimal and insufficiently related to management prerogatives to tip the balance in favor of permissiveness. The Association contends that recent NLRB decisions which found violations of the NLRA where an employer refused to permit employes to consult with union representatives prior to conducting investigatory interviews and to be informed of the purpose of the meeting before the meeting commenced, suggest that employes enjoy the right of being informed by the employer, in the advance of any disciplinary meeting, of the employe's right to union representation of that meeting. Pacific Telephone and Telegraph Co., 110 LRRM 1411 (1982) and 110 LRRM 1416 (1982). The Association contends that Section 5(c) is mandatory because it provides a mechanism for implementing the rights guaranteed by the previous two subsections. It contends that the right to representation could well be meaningless without the opportunity of "reasonable" scheduling to accomodate that right. The Association argues that both the NLRB and the Commission have found this right to exist to a reasonably limited extent under the NLRA and MERA. For example, the Association notes that in Horicon Joint School District No. 10, 13765-B, (1/78), aff'd Dane Co. Cir. Ct. (11/78) the Commission said in the context of a private conference conducted pursuant to Sec. 118.22, Stats.,

> "in our view, the private conference was an extension of the collective bargaining process, and the duty in that regard is to meet at reasonable times and places. Were the issue properly here, we would examine more closely into the flexibility of the parties in the other administrative hearing to call this witness at another time and the alternative available to Employer to schedule a private conference at another time."

See also, Super-Valu Xenia, 236 NLRB 1581 (1978); Meharry Medical College, 236 NLRB 1396,(1978); Coca-Cola Bottling Co., 227 NLRB 1276 (1977). As with other subsections of this proposal, the Association notes that the District would be entitled to apply these contractual provisions on a reasonable basis and in a reasonable manner. The Association also asserts that as with all other aspects of the proposal, the exercise of the contractual rights to Association representation may not interfere with legitimate District prerogatives.

Section 5 (d) is mandatory in the Association's view because it applies only to the affected employe. Application of this provision, if adopted by the parties, would bear virtually no relation to the conduct of an actual meeting scheduled by the employer, except for a reasonable period of delay at the outset of the meeting during which period the affected employe could consult with his/her Association representative. As such, this reasonable accomodation merely helps to implement the purposes of the right to representation pursuant to MERA. The Association contends that recent NLRB cases have found this right to consult privately to be a part of the employe's Weingarten rights. Pacific Telephone and Telegraph Co., supra. Moreover, from a practical view, the Association argues that it would make no sense at all to afford an employe a right to union representation but to deny him/her the opportunity to consult with the representative prior to the meeting. As to Section 5(e) of the Association's proposal, the Association argues that it is mandatory because it again embodies the protection set forth in Weingarten and Waukesha. After the Commission's Beloit decision, the Association contends that there can be no reasonable argument that a contractual provision forbidding a municipal employer from disciplining its employes for the exercise of their statutory right to union representation does not directly and primarily relate to the conditions of employment of those employes. Moreover, the Association argues that the District can have no legitimate interest in refusing to bargain such contractual protections.

In summary, the Association contends that Section 5 is legally undistinguishable from the union representation proposal held mandatorily by the Commission in its Beloit decision. The Association contends that Section 5 incorporates employe's Weingarten rights, as developed by the WERC, the NLRB and the courts, and provides contractual recognition and protection from the statutory rights guaranteed by Section 111.70(2), Stats. It contends that Beloit

establishes that such protection are primarily related to employe wages, hours and working conditions and are mandatory subjects of bargaining. The Association contends that its proposal makes no impermissible intrusion whatsoever into the legitimate exercise of the District's managerial rights: Section 5 simply affords the District's employes some measure of contractual procedural protection in situations where their wages, hours or employment conditions may potentially be affected adversely during a meeting with the employer. Despite the continual references in the District's brief to alleged impairment of the employer's ability to determine and implement its management techniques, the Association asserts that the District simply offers no realistic explanations of such impairment, unless the "technique" suggested is that of isolating indiviudal teachers from Association's assistance during a disciplinary meeting. The Association alleges that the types of rules and "line drawing" of which the District complains exists in the law under MERA anyway, and would only be embodied in the collective bargaining agreement by the Association's proposal. Furthermore, the Association argues that the Commission can reasonably conclude that Section 5 will be interpreted and applied consistent with the Weingarten line of cases, adopted by the Commission-since the rights incorporated in Section 5 are derived from those cases and will not penalize the reasonable District actions, nor require unduly burdensome efforts by the District.

Turning to Section 6, the Association notes that the entire argument of the District consists of nothing more than idle speculations as to those things the proposal "could" do which might obstruct the District's ability to function. As the Association has previously indicated, little is to be gained from countering the District's dubious speculations. The Association contends that the District's managerial authority to control its work force its restricted by the Association's proposal only to the extent of precluding discipline or discrimination based upon a teacher's exercise of legitimate and protected rights which are not related to the adequate performance of the teacher's job duties and responsibilities. While the proposal, of course, is not unrelated to managerial decision making, the Association alleges that its prohibition against discipline or discrimination based on criteria unrelated to the employe's work performance is not primarily related to the formulation of educational policy or the management of the school district. The Association asserts that the District can claim no legitimate managerial or educational policy interest in disciplining employes or discriminating against them with respect to their exercise of rights conferred by the collective bargaining agreement. The Association contends that its proposal neither purports to limit nor would in fact limit the District's legitimate exercise of rights to require and enforce adequate work performance and to discipline any employe for insubordinate or otherwise improper conduct or behavior. The Association reiterates its belief that the necessity for its proposal, as argued by the District, is immaterial to its mandatory status. Blackhawk, supra.

The Association contends that it proposes only that the District's teachers not be disciplined for the simple exercise of rights negotiated as part of the parties' collective bargaining agreement. It argues that this protection is a logical extension of the right to engage in lawful concerted activities guaranteed by Sec. 111.70(2), Stats. The Association asserts that it is well established that it is a violation of Sec. 111.70(3) Stats. for an employer to retaliate against an employe for processing a grievance pursuant to a collective bargaining agreement. Fennimore Community School District, 18811-A, (1/83). The Association notes that the NLRB has held that the efforts of an individual employe acting alone to enforce the provisions of the collective bargaining agreement will be deemed "concerted" and thus protected, at least when the individual's interpretation of the agreement has a reasonable basis. The Association asserts that the rationale for this rule is that the implementation of a collective bargaining agreement by an employe is but an extension of the concerted activity giving rise to that agreement. Interboro Contractors, Inc., 157 NLRB 1295, (1966) enf'd, 388 F. 2d 495 (2d Cir. 1967). Similarly, the Association contends that recent federal cases have found violations of the NLRA where employers retaliated against employes for the exercise of rights under provisions of an agreement other than a grievance procedure. B.B. Anderson Construction Co., Inc., 110 LRRM 1364 (1982); Babcock and Wilcox Co., 111 LRRM, 1064, (1982). The Association asserts that the Interboro rule is the correct state of the law in Wisconsin. Union High School District, City of Lake Geneva, 17939-A 4/82; Village of West Milwaukee, 9845-B (10/71); Milwaukee County 12153-A,B (3/75) and 13479-A,B (12/75); Waunakee Joint School District, 14749-A (2/77). Accordingly, the Association argues that sound public policy exists in favor of the

contractual, as well as statutory, protection of employes who seek to implement the provisions of the collective bargaining agreement. Applying Blackhawk, supra to the instant proposal requires the conclusion that a bargaining proposal which provides contractual protection for the exercise of rights guaranteed by Sec. 111.70, Stats., is a mandatory subject of bargaining.

Discussion of Proposal 2

While the parties arguments as to Section 5 of the Association's proposal have, to a large degree, focused upon the extent to which the proposal parallels existing statutorily derived rights found to exist by the Commission in Waukesha County, supra, and City of Milwaukee, supra, and by the NLRB and federal courts in Weingarten and its progeny, the task for the Commission remains one of determining whether a proposal is primarily related to wages, hours and conditions of employment or to the formulation or management of public or educational policy. If a proposal is mandatory due to a primary relationship to wages, hours and conditions of employment, the extent to which the proposal may or may not parallel the law need not be decided. Only where a proposal is initially found permissive when scrutinized under the "primary relationship" test does a possible parallel with existing statutory rights become a necessary inquiry because, if a proposal mandates compliance with statutory provisions or statutorily derived rights which relate to wages, hours and conditions of employment, that proposal will be found to be mandatory even though the relationship to wages, hours and conditions of employment does not predominate. Racine Unified School District, 20652-A, 20653-A (1/84) p. 17. See also Milwaukee Board of School Directors, 20093-A (2/83) p. 64.

When balancing the relationship of the Association's proposal to wages, hours and conditions of employment against the proposal's relationship to the formulation management of educational or public policy, we are confronted with the Association's recitation of the benefits to an employe of being represented in instances where that employe's wages, hours or conditions of employment may be placed in jeopardy (i.e., the likelihood of more effective presentation of the employe's disagreement, if any, with management's views of relevant facts and arguments; presentation of additional facts, issues, arguments and pertinent contractual provisions which may support the employes interests; ability to persuade the employer to modify the action contemplated etc.) and the District's recitation of the intrusions into management technique and prerogatives which such representational rights would represent. The intrusion which the Association's proposal represents generally focuses, in the District's view, upon the potential delays and inconvenience which would ensue if the District were obligated to honor the representational rights present in the proposal. In essence, the District argues that the employer/employe relationship would be less efficiently managed.

The Association proposal as it is reflected in Section 5(a) provides representational rights in two broad areas. First, the Association proposes to provide a right to Association representation, upon request, "at any meeting, interview or conference with the District . . . which is reasonably likely to result in disciplinary action against the employe . . . or which has as its purpose the gathering of information intended to or reasonably likely to have such results." (emphasis added) Second, the Association proposes to extend representational rights upon employe request to any meeting, interview or conference with the District "which is reasonably likely to . . . adversely affect or jeopardize the employe's wages, hours or conditions of employment, or which has as its purpose the gathering of information intended to or reasonably likely to have such results." (emphasis added)

We will address these two broad areas separately.

Looking first at the right to representation as it relates to potential disciplinary action, we note that in Beloit, supra, the Commission found the following proposal to be a mandatory subject of bargaining:

> "A teacher shall at all times be entitled to have present a representative of the Association when he is being reprimanded, warned or disciplined for any infraction of rules or delinquency in professional performance. When a request for such representation is made, no action shall be taken with respect to the teacher until such representative of the Association is present."

The Commission reasoned:

> "Since a reprimand, warning or discipline given to a teacher may very well result in a more severe action affecting a teacher's employment status, and since the discipline of a teacher affects his employment status we conclude that the Association's proposal regarding the right of representation, prior to the taking of such action by the School Board or its agents, is a mandatory subject of bargaining."

We find that this holding reflects the paramount employe interest in seeking to protect him or her self from employer actions which could ultimately support termination of the teacher's employment status. The Association's proposal differs from that in Beloit, supra, in that its focus upon disciplinary meetings extends to those which are "reasonably likely" to result in disciplinary action as well as those whose purpose is "the gathering of information intended to or reasonably likely to have such results." However, if anything, the benefit derived by the employe may well be greater at the preliminary investigatory stages when the employer action could, with the assistance of union representation, potentially be altered or eliminated, then when, as in Beloit, the disciplinary decision has already been made. While it could be argued that the right of union representation in meetings which ultimately do not result in disciplinary action against an employe is less compelling when balanced against the interference with management prerogatives, we find that the use of the phrase "reasonably likely" is sufficient to swing the balance in favor of a primary relationship to the employe working conditions. In addition, given the importance to the employe of having union representation at a meeting which does generate disciplinary action, and the reality of the fact that an employe cannot always predict with total accuracy whether discipline may result, we conclude that the "reasonably likely" standard represents a reasonable accomodation of the employer interest in efficiency and the employe interest in representation. Thus we find the discipline related portions of Section 5 (a) to be mandatory subjects of bargaining, the merits of which are to be resolved at the bargaining table and, if necessary, through mediation-arbitration.

In part, Sections 5 (b), (c), (d) and (e) constitute efforts by the Association to make more meaningful the Section 5 (a) right to representation in discipline-related interactions with supervision. (Those provisions also represent a similar effort to enhance the proposed right to representation in the other broad grouping of interactions addressed by Section 5 (a), which we are separately addressing below.)

Section 5 (b) requires that the District notify the employe of the purpose of the meeting. Such a requirement does not appear unduly burdensome or intrusive upon management techniques. Indeed in most instances we would expect that such an identification of the purpose for which a meeting/conference interview is being called by management would be given as a matter of course. By constrast, a requirement for such a statement of the purpose of the meeting has significant wage, hour and condition of employment dimensions, in that it is an important element in assisting the employe in assessing the likely results of the meeting as it relates to his or her rights to or preference for the presence of an Association representative. Thus, we find this announcement-of-purpose requirement, as an enhancement of the discipline-related representation right specified in Section 5 (a), is a mandatory subject of bargaining. Of course, the merits of that proposal is for the bargaining table and, if necessary, mediation-arbitration to resolve.

Section 5 (b)'s proposed requirement that the employer advise the employe of his/her right to Association representation is more troublesome on its face. The adverse impacts upon management's operations that would potentially flow from such a requirement appear substantial. For, the District would be violating a procedural requirement and thereby potentially jeopardizing the arbitral viability of actions that it takes based on informtion gathered in a given meeting if it fails to properly anticipate the course that the meeting will take and thus fails to give the required notification that the employe has a right to representation. Moreover, the proposal would require administrators to make a judgment at least each time they initiate a meeting/interview/conference with a bargaining unit member as to whether the anticipated interaction is reasonably likely to result in

discipline of the employe. Unlike identifying the purpose of the meeting, this requirement calls for frequent and difficult judgments that would seem quite removed from the norms of administrative functioning. In contrast, the employe benefit from such a proposal appears modest, since it is only a reminder of rights expressly set forth in the collective bargaining agreement to which the employe would presumably have access and about which the Association could previously have freely communicated with the employe. On balance, the intrusion upon management techniques inherent in the advise-of-representation-rights requirement outweighs the marginal wage, hour and condition of employe dimensions of that aspect of the proposal. Accordingly, we find that aspect of the proposal to be a permissive subject of bargaining under the "primary relationship" test. As we noted earlier, we must now examine the proposal against the status of the law to determine whether the proposal parallels the law and is mandatory on that basis. Examining the proposal against the rights set forth in Waukesha County, supra, and City of Milwaukee, supra, we conclude that no statutory right to be advised of a right to representation exists. Thus, the proposal remains a permissive subject of bargaining.

Section 5 (c) and (d) both provide assurances that the employe right to representation will be meaningful. Obviously, if the employer is free to proceed before an Association representative can be present at a meeting or before the representative and the employe can consult, the benefits which the employe can derive from having the Association representation become or less meaningful. While we recognize that these two procedural requirements, as contained in (c) and (d), do create the potential for delay and resultant inefficiency, we find, on balance, that the relationship to employe working conditions predominates. We also note in this regard that the rescheduling requirement is softened by the "reasonable effort" standard which was not present in the proposal found mandatory by the Commission in Beloit.

As to Section 5 (e), it is clear that if the employer could discipline an employe for insisting upon union representation at a meeting which the employe is directed to attend, the employe would be much less likely to attempt to utilize that contractual right. We find the prohibition against such discipline to be a mandatory subject of bargaining as it enhances the employe's rights in Section 5 (a) as implicitly limited in 5 (c).

In summary, we find the procedural aspects of this proposal (Section 5 (b) through (e)) to be roughly akin to the evaluation proposal which the Commission and the courts found to be mandatory in Beloit due to that proposal's relationship to the "just cause" standard for employe discipline. The Commission noted in Beloit that "it would indeed be specious to determine, as we do subsequently herein, that the Association's proposal for a 'just cause' standard is a mandatory subject of bargaining, but not required bargaining over such techniques as comprised the procedural aspects of said standard." We find that it would be similarly specious to determine, as we have, that the Association may propose, as a mandatory subject of bargaining, a right to representation in disciplinary meetings and investigations but not to require bargaining over the procedures which make that right meaningful.

Turning to the second broad aspect of the Association's proposal which provides a right to representation as to matters which "adversely affect or jeopardize the employe's wages, hours or conditions of employment," we initially note that this phrase is broad enough to encompass the "disciplinary" aspects of the proposal which we have just discussed. It is also clear that within the broad scope of the phrase in question, there are probably some employer actions which, although not disciplinary, would adversely affect employes wages, hours or conditions of employment to such a degree that the countervailing intrusion into management prerogatives would not render this aspect of the proposal permissive. However, it is equally clear that this portion of the proposal could cover almost any employer interaction with an employe. As we are not persuaded that, in instances in which the potential negative impact upon the employe is relatively slight, the benefits derived by an employe through union representation are sufficient to overcome the management inefficiency and delay which would result, we find this second aspect of the proposal to be a permissive subject of bargaining.

To the extent that the Association proposal in Section 5 (b) through (e) refers to the employe's right to representation in all situations which are

reasonably likely to "adversely affect or jeopardize the employe's wages, hours or conditions of employment, we find those derivative procedural proposals to be permissive in that regard as well.

As we noted earlier, the status of the law does become relevant upon a finding that a portion of this proposal is permissive. When examining the broad scope of this proposal against the statutorily derived rights to union representation which we have previously found to exist in Waukesha County, supra, and City of Milwaukee supra, we conclude that there is no statutory right to union representation in some of employer/employe contacts which would be covered by the Association's proposal. Thus, the status of the law does not provide a basis for our finding this portion of the proposal to be mandatory.

Turning to Section 6 of the Association's proposal, we view the language as simply constituting a refinement of a just cause standard for discipline or other adverse actions against employes. The proposal merely specifies that the employer cannot discipline or discriminate against an employe because that employe exercises his or her rights under the contract. Contrary to the District's arguments, we do not find that the proposal can reasonably interpreted as precluding the District from taking disciplinary action against employes in the circumstances listed by the District or in any other instance in which the employe's job performance, in the District's judgement, warrants discipline. As we held when discussing Section 5, it is specious to allow a union to seek to bargain contractual rights for employes if that union is prevented from bargaining provisions which make those rights more meaningful because the employe need not fear reprisals when exercising same. As we conclude that the relationship of this portion of the proposal to employe wages, hours and conditions of employment predominates over any interference with management prerogatives or educational policy choices, we conclude that it is mandatory.

The disputed proposal is as follows:

Section 2. Teacher-Initiated (Voluntary) Transfers.

. . .

(3) c. Vacant teaching positions and reassignment positions shall be filled by qualified bargaining unit applicants, unless good reason(s) exists to select a non-unit applicant over a bargaining unit applicant. Where two (2) or more qualified bargaining unit employes have applied for a vacant teaching position or reassignment position, the vacancy shall be filled by the qualified bargaining unit applicant with the greatest seniority (as determined pursuant to the provisions of Article VIII, Section 4).

Section 3. Administration-Initiated (Involuntary) Transfers.

a. No teacher will be involuntarily transferred by the administration without a conference followed by a written notice from the District Administrator which will include the reasons for the transfer.

b. No teacher may be involuntarily transferred without good reason(s). Where the District determines for good reason(s) to fill a vacant teaching assignment by involuntary transfer, and two (2) or more bargaining unit employes are qualified to fill that teaching assignment, the District shall select that employe with the least seniority (as determined pursuant to the provisions of Article VIII, Section 4) for the involuntary transfer.

c. In the event that a teacher does not receive notification from the District of his/her involuntary transfer until after June 1, that teacher shall receive additional compensation in the amount of $500.00, payable by the District within thirty (30) calendar days following notification of the transfer.

. . .

The District's objection is limited to Section 2 (c) and Section 3 (a), (b), and (c) of the Association's proposal. As to Section 2 (c) and Section 3 (b), the District generally contends that the seniority criterion intrudes impermissibly on the District's obligation to consider the educational needs and interests of the student, and unduly interferes with the educational process and management function of the District. The District contends that such interference is established in the record. As to Section 3 (a), the District's objection focuses upon an assertion that it primarily relates to the District administrator's job responsibilities and only indirectly, if at all, to the teachers wages, hours or conditions of employment. As to Section 3 (c), the District contends initially that the record does not reflect the "impact" to which the proposed stipend is aimed and thus the District asserts that the proposal is not an appropriate "impact" proposal. The District also notes that this portion of the proposal applies to all post-June 1 involuntary transfers notwithstanding the fact that such transfers are a basic, recognized fact of life in public education (and often required because of other unit employes' actions).

The District's primary objection to Section 3 (b) and Section 2 (c) is that both provisions purport to require the filling of teacher vacancies without allowing an assessment of the student's and program's needs. Who teaches what, and to whom, does not in the District's judgment primarily affect teachers; it primarily affects students being taught and the quality of educational program. While a teacher may prefer to teach at one school rather than another, such a preference does not, the District argues, override the District's interest in having the teacher teach the subject the students benefit from the most. The District contends that the proposal precludes it from giving consideration to legitimate factors such as the composition of student population, the composition of the existing faculty, the transferring teacher,s particular strengths and weaknesses, and the effective utilization of staff to achieve a well rounded curriculum. As the District's goal in transferring staff is to provide the best quality education possible for the students and therefore to provide the best possible teacher in every assignment, and as seniority would limit the District's ability to transfer and render it impossible to match teachers with student's needs, the District contends that this portion of the proposal must be found to be permissive.

Looking more specifically at Section 2 (c) and Section 3 (b), the District contends that these proposals dictate how vacant teaching positions will be filled and diminish, if not eliminate, the District's right to fill such vacancies from outside the unit. The District argues that transfers of teachers involve educational policy judgements by the District. It contends that the issue is not a labor or personnel one; rather, as the testimony makes clear, it is an educational policy issue involving an assessment of student educational needs and interests. The District sees the "good reasons" test as going to educational policy judgments which are permissive subjects of bargaining. The District contends that there is no basis for treating a transfer as a disciplinary action. A transfer does not affect status as an employe, as a termination or suspension does. The District asserts that reasons for transfer are not bargainable for the same reason that the choice of text books is not bargainable: the primary effect of these decisions is on the students not the teacher, and the basis for the decisions are educational policy considerations not disciplinary ones. The District alleges that the second sentence of Section 3 (b) would compel the District to select for involuntary transfer the least senior qualified teacher. The District notes that not only is the question of who is "qualified" up to an arbitrator when disputes arise (which removes it from the educational policy determination of the District) but also that the District is thereby forced to argue that one or more of its employes is not qualified for a position if disputes arise.

The District argues that the Association's proposal is more restrictive than the proposal confronting the Commission in Sheboygan County, 16843 (2/79) in which a proposal dealing with the filling of vacancies was held to be mandatory. The District contends that in Sheboygan County, the union proposed that seniority be one of the factors considered in filling the vacancies among unit employes; other factors were enumerated, and other unspecified factors could also be considered. In the instant case the District alleges that seniority would be the dispositive if not the sole factor considered. Thus, the District asserts that the Association's proposal intrudes too far into basic educational policy and decision making, and is a permissive subject of bargaining.

Turning to Section 3 (a), the District contends that the proposal, by requiring a conference followed by a written notice from the District Administrator prior to transfers, seeks to require bargaining about who is involved in determining who will be transferred. The District views the proposal as requiring a "conference" (for no apparent purpose), presumably involving District Administrator, and a written notice "from the District Administrator" which must include "the reasons" for whatever action is commenced by the notice. While the proposal, in the District's opinion, only indirectly (if at all) relates to conditions of employment of the teacher, it relates directly to the job responsibility and work-time allotment of the District Administrator. Even if other administrators could hold the required "conference" under the Association proposal, the District Administrator would be required to solicit all relevant facts and articulate the "reasons". The District doubts that other administrators could hold such conferences; if the Association intended they could, the District does not understand why the Association required that all notices of transfer be from the District Administrator. The District asserts that the record contains no evidence as to how this proposal relates to the teachers wages, hours or working conditions. The District alleges that if the proposal only required the District to notify the teacher in some fashion of the reasons for the transfer, the proposal might not be overly intrusive. However, the District contends the proposal imposes a duty on a particular administrator, requires a written notice, all prior to the transfer. As such, the District asserts that the proposal intrudes upon the District Administrator's job to such an extent that, absent evidence of impact on teacher's wages, hours or working conditions, the proposal must be found to be permissive.

The District contends that Section 3 (c) is a permissive subject of bargaining for a number of reasons. Initially, the District argues that the proposal is in essence a penalty which does not withstand scrutiny as an "impact" proposal. The District asserts that the Association did not establish that post-June 1 involuntary transfers affect workload. The District argues that the Association has simply taken a date before which it wants transfers made, and proposed a penalty if that date is not met. The District submits that that does not necessarily amount to a lawful "impact" proposal. The District contends that the Association's attempt to create an "impact" fell short of the mark. The Association apparently premises the $500.00 penalty figure upon the amount of work which it believes an involuntary transfer after June 1 would generate. However, the District argues that the record does not contain any evidence that such additional work is necessary or that all post-June 1 transfers require additional work (or that such work is not necessary when the transfer occurs prior to June 1). The District also notes that the transfer proposal does not apply only to transfers involving a change in subject matter where additional preparation might be necessary or a change in building assignments where teachers belongings might arguably have to be moved. To the extent that the Association contends that this proposal is in essence an overtime proposal, the District contends that the choice of who is going to teach which kids does not generate the payment of overtime. The District also asserts that even if the evidence established an "impact" caused by an involuntary transfer, the June 1 date is arbitrary as to any such "impact". The District contends that the Association has failed to show that the right to know by June 1 the building to which an employe will be assigned primarily relates, in any significant way, to conditions of employment. As a change of assignment after June 1 does not have any significant "impact" on the employes, but does have an "impact" upon the District's ability and obligation to provide the best educational program possible to the students, the District contends that this portion of the proposal should also be found to be permissive.

The Association contends that the Commission has consistently ruled that intra-unit transfer provisions which give preference to current employes and establish seniority as the selection criterion for filling vacancies are mandatory subjects of bargaining, provided that the criterion of seniority would control only among qualified applicants and that the clause applies only to situations where at least one bargaining unit member is an applicant. The Association asserts that the portions of the Association's proposal challenged by the District are legally indistinguishable from transfer provisions previously held to constitute mandatory subjects of bargaining by the Commission. Oconto County, 12970-A (3/75) Sheboygan County, supra; Milwaukee Sewerage Commission, 17025, (5/79). Contrary to the District's assertions, the Association alleges that the clause at issue herein is not more restrictive than that in Sheboygan County. In Sheboygan, the Association contends the clause in question required that openings be filled "on the basis of qualification (e.g.,

training, relative experience, certification and the like), and seniority." Here, the Association contends that seniority comes into play only where the applicants are qualified. Thus, the Association alleges that, if anything, the clause at issue herein is less intrusive than that in Sheboygan County. The Association notes that the Commission recently reviewed a lengthy and elaborate reassignment and transfer provision in Milwaukee Board of School Directors, 20093 (2/83) and found that the provision, which set forth the selection criterion procedures for involuntary reassignments, voluntary transfers and the filling of vacancies, a mandatory subject of bargaining.

The Association asserts that, as with voluntary transfers, involuntary reassignments are a fundamental aspect of the employe's working conditions. The Association argues that Section 3 (a) is a proposal which is analogous to one providing for procedures in teacher evaluations, and has no measurable relation to the management decision itself. It contends that its proposal in this regard is solely related to the effect on the employe designated for transfer by the District. Like evaluations, the Association asserts that the transfer can affect a teacher's continuing functioning as an employe and the teacher should be entitled to a conference and written notice of the action. As to the District's assertion that the due process rights contained in this portion of the proposal might become time consuming, the Association initially asserts that these arguments are not determinative or even material to the question of whether the proposal is nonetheless mandatory. Furthermore, the Association argues that the proposal does not require that the conference be conducted by the District Administrator, but by the relevant "administration" supervisor involved in the particular transfer. The Association asserts that the District Administrator is only required to provide the written notice setting forth the reasons for the transfer.

Although not disciplinary in nature, the Association asserts that as an involuntary transfer by its very definition involves the reassignment of a teacher against his/her preferences, Section 3 (b) requires that there be "good reason(s)" for such an action to provide some protection to the teacher from being reassigned for reasons that are arbitrary or without a basis. Thus, like a just cause standard, this "good reason(s)" requirement primarily relates wages, hours and conditions of employment. The Association asserts that its proposal provides the District, through the "good reason(s)" provision, with flexibility akin to that present in Milwaukee Board of School Directors, supra, and thus, is arguably no more intrusive upon managerial decision making than the clause therein found mandatory by the Commission. As to Section 3 (c), the Association asserts that the District's arguments go to the merits of the proposal. The Association asserts that the proposal is intended to compensate teachers involuntarily reassigned on short notice for the extra time and work required during summer to move materials and supplies to a new building or to prepare to teach new courses. The Association contends that the proposal is not a "penalty" any more than overtime premium pay is a "penalty". It alleges that the District's objections that the proposal is too broad or too expensive are irrelevant to the proposal's mandatory status. Therefore, the Association requests that the Commission find its proposal to be a mandatory subject of bargaining.

Discussion of Proposal 3

In Oconto County, supra, the Commission set forth the following comment upon the bargainability of transfer provisions:

. . .

Section 111.70(1)(d) of the Wisconsin Statutes and a mandatory subject of collective bargaining under the Municipal Employment Relations Act.

. . .

The Duty to Bargain Regarding Promotions and Transfers Within a Bargaining Unit - General Considerations

Seniority, promotions and transfers within a bargaining unit are recognized as mandatory subjects of collective bargaining in the private sector. Morris, The Developing Labor Law (BNA, 1971), p. 406; Collective Bargaining, Negotiations and Contract (BNA) Vol. 2, p. 58:1. The following observation is made at p. 68:1 of Collective Bargaining, Negotiations and Contracts:

> "Contract clauses dealing with job changes are included in the great majority of union agreements, and most of these recognize seniority as one of the factors entering into the selection of employees for promotion, demotion, or transfer within the bargaining unit."

Section 111.70(1)(b) of the MERA defines collective bargaining as ". . . the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment . . ." We have recently held that standards, qualifications and procedure for promotions within a collective bargaining unit of city law enforcement officers is a mandatory subject of bargaining under the MERA. City of Green Bay, (12352-B, C) 2/75. The ability of, and the circumstances under which, an employe may bid and be selected for a promotion to a vacant position within his/her collective bargaining unit is a condition of employment within the meaning of Section 111.70(1)(d). Accordingly, we conclude that the subject matter of Article IV, Section 2 of the collective bargaining agreements between the Union and the Municipal Employer is a lawful and mandatory subject of collective bargaining.

In Sheboygan County, supra, the Commission held:

"Professional Opportunities" Proposal

The disputed proposal reads as follows:

> Teachers interested in filling such vacancies, which occur during the school year, shall advise the administrator in writing within ten (10) days. Requests shall be granted on the basis of qualification (e.g. training, relevant experience, certification and the like), and seniority.

The Board, in its brief, concedes that "This item concerns assignment of teachers to certain teaching areas." However, the Board argues that "Where teacher skills are to be utilized is clearly the 'management and direction' of the governmental unit." The Union, on the other hand, argues that a proposal establishing the criteria for "transfers" and seeking inclusion of seniority among them is clearly a mandatory subject of bargaining.

Since there appears to be no question that the "vacancies" referred to in the proposal are assignments of bargaining unit work, and since there is no contention either that the proposal would require the Board to assign

> individuals lacking legally required certification to perform such assignments, or to apply contractually established qualification for initial hirings, we are satisfied that the instant proposal is a mandatory subject of bargaining. While the proposal would control the Board's selection as among various individuals for transfer or promotion within the bargaining unit, we have stated that such a proposal is a mandatory subject where, as here, it relates only to situations in which at least one employe-applicant within the bargaining unit is seeking the promotion or transfer.

Against this background we proceed to our analysis of the Association's proposal.

As to Section 2 (c) of the Association's proposal, we note initially that the term "qualified" is not defined and, unlike the Association's layoff and recall proposal which will follow, is therefore not, on the face of the proposal, limited in meaning to "certification". During the hearing, the Association asserted that the term "qualified" was a flexible one which would allow the District to consider the educational needs of students and the strengths and weaknesses of teachers when filling vacant teaching positions. Thus, we reject those District arguments which assume the contrary. While it remains true that District determinations as to which bargaining unit applicants are qualified for consideration for a vacant position under Section 2 (c) or are qualified for an involuntary assigment under Section 3 (b) will still be subject to potential arbitral review, that fact has no relevance to a mandatory/permissive determination. Given this absence of intrusion into the District's determinations as to the qualifications needed to teach a position, and the long standing Commission determination that selection criteria among qualified bargaining unit applicants are mandatory subjects of bargaining, we find the Association's proposal, which establishes seniority as the criterion to be utilized in the case of voluntary and involuntary transfers, to be a mandatory subject of bargaining. City of Madison, 16590 (10/78), Sheboygan County, supra, Milwaukee Sewerage Commission, 17302 (9/79), Brown County, 19042 (11/81). While the District correctly notes that under the Sheboygan County proposal the employer arguably could have filled a vacancy with an employe who had superior qualifications but slightly less seniority than another interested qualified teacher, this distinction goes to the merits of the instant proposal, not its bargainability.

The District has also objected to the Association's use of the term "good reason(s)" as a requirement when the District elects to fill a teaching assignment by an involuntary transfer or when the District elects to go outside the bargaining unit to fill a vacant teaching position. As to the unit work issue, we have held that a union has a legitimate and mandatorily bargainable interest in protecting what has historically been bargaining unit work if qualified unit employes are interested in filling the position. Milwaukee Board of School Directors, 20093-B, (8/83). The Association's proposal provides it with some protection in this area while giving the District discretion to go outside the unit to fill a position if good reasons, such as the lack of a qualified unit applicant, exist. Therefore, we find this portion of the proposal to be mandatory. As to the other use of this qualifier in the Association's proposal, we concur with the Association's assessment that an involuntary transfer, while not disciplinary in nature, nonetheless impacts upon employe conditions of employment. Given this impact, and the concomitant employe interest in protecting against arbitrary management decisions, we conclude that it is a mandatory subject of bargaining for the Association to require that the District have "good reason(s)" for making such a transfer. While it is again true that a District determination that such "reasons" exist would be subject to arbitral review, that consideration is not material to our determination herein.

Turning to Section 3 (a) of the Association's proposal, the Association contends and we concur that this proposal can most reasonably be interpreted as requiring a conference and written notice after the District has decided to make an involuntary transfer. Thus, we do not find that this proposal interferes in any way with the District's decision making process in this regard. As the proposal does not specify the administration member with whom the conference referenced in the proposal will be held, we conclude that the proposal does not interfere with the District's determinations as to the identity of management personnel who will represent the District's interests in such a conference. The requirement of a conference and written notice specifying the reasons for an

involuntary transfer provide the employe and the Association with a means for determining whether the contractual "good reason" standard has been met and we therefore conclude that these requirements do bear a relationship to employe conditions of employment. When this relationship is balanced against the District's assertion that such conferences and notices will be unduly time consuming, we conclude that the relationship to employe conditions of employment predominates over any such burden and thus that a conference and notice requirement is a mandatory subject of bargaining. However, we do not perceive any substantial employe interest in having such notice be from the District Administrator as opposed to any other management personnel to whom the District may choose to give said duty. As this designation does interfere with management's determination as to the use of management personnel and as we have been presented with no basis for concluding that the identity of the management signatory to the written notice has any impact on employe wages, hours and conditions of employment, we find that the specific designation of the District Administrator renders this portion of the proposal permissive.

As to Section 3 (c), the record reflects that involuntary transfers may require moving of the teacher's materials, preparing for new classes or grade levels and acquiring a familiarity with the teaching methodology and philosophy utilized by new co-workers and supervisory personnel. Thus, contrary to the District, we conclude that in general, the transfer to a new work-site or new class or new co-workers and administrative personnel does impact on employe conditions of employment. The Association's proposal constitutes an effort to compensate employes for that impact. The arguments which the District has raised as to the legitimacy of the June 1 deadline or the amount of compensation which will be received all go to the merits of the Association's proposal and not to a determination as to its mandatory or permissive status. Thus, while we are cognizant of the District's evidence demonstrating that there are instances which the District cannot notify the employe prior to June 1 of an involuntary transfer, this fact is no more relevant to our determination than the fact that even involuntary transfers announced prior to June 1 impact upon employe conditions of employment and the Association has chosen not to compensate such individuals. Thus, we find tht the Association's proposal contained in Section 3 (c) is a mandatory subject of bargaining as it has a relationship to employe conditions of employment and does not prevent the District from involuntary transfering any employe. As we have discussed and will discuss in greater length when dealing with other Association proposals, the attachment of monetary consequences to the timing or nature of a District decision which impacts upon employe wages, hours or conditions of employment does not provide a basis for determining that the proposal is a permissive subject of bargaining.

The disputed proposal is as follows:

Teacher Evaluation

(4) Section 1. Elementary and secondary teachers shall be evaluated pursuant to uniform evaluation criteria and written evaluation instruments, developed for their respective instructional levels, to insure that teacher performance is measured consistently by all persons charged with the responsibility for the evaluation of classroom teachers. No bargaining unit employee may be assigned to evaluate the performance of any other bargaining unit employee, for purposes of promotion, demotion, discipline and/or continued employment.

Section 3. Classroom Visitation.

a. Classroom visitation shall be one phase of the evaluation process and shall be done on a planned, systematic basis.

. . .

c. The District shall conduct at least two (2) classroom visitations each school year, as part of the evaluation process for first and second year teachrs. Teachers with three (3) yers or more experience shall have at least one (1)

classroom visitation each school year. All classroom visitations shall be for a minimum of thirty (30) minutes. Evaluator(s) shall be physically present during the classroom visitation.

. . .

The District's general objection to the first sentence of Section 1 focuses upon the District's assertion that the proposal seeks to require bargaining over the purpose of an evaluation and the appropriate evaluation criteria and also intrudes upon the job responsibility of the evaluator. As to the second sentence of Section 1, the District's objection is premised upon its concern that the proposal regulates unit employes' job responsibilities and thus constitutes a permissive bargaining proposal. Looking generally at Section 3 (a), the District contends that that portion of the proposal seeks to regulate what aspects of an employe's performance will be evaluated and precludes evaluation on an "as needed" basis. As to Section 3 (c) the District acknowledges that similar language was held mandatory in Beloit, supra, but asserts that the instant proposal is not related, as the proposals in Beloit had been, to job security concerns. The District also asserts that this portion of the proposal may operate to render inconsequential evaluator observations of teacher performance of less than 30 minutes, creating an intolerable insulation for the teacher against the legitimate consequences of inappropriate behavior or unsatisfactory performance.

More specifically, the District argues that the first sentence of Section 1 does not address the procedure of evaluation but rather speaks to the evaluation criteria themselves by seeking to require that such criteria be, on the one hand, "uniform" and on the other hand, developed for specific "instructional levels". The District contends that the platitudes and stated purposes of this sentence intrude upon educational policy choices and interfere significantly with the District's responsibility to assess performance to assure program and curriculum excellence. In this regard the District alleges that the primary purpose of teacher evaluation is to insure the maintenance of a quality educational program, and the improvement of teaching and learning. While such evaluation may affect the teacher's job security, that is neither its primary purpose nor its major effect. Thus, the District contends that the scope of the "procedure" as to which bargaining may be mandatory under Beloit, supra, must be narrowly construed. The District alleges that a broad interpretation of "procedure" would result in the procedural devouring the substantive aspects of evaluation, to the detriment of the District's management prerogatives and educational policies. The District argues that a non-expansive interpretation of "procedure" is supported by reference to those aspects of the evaluation proposal which were excluded from the mandatory category in Beloit. These included limitations on the selection of the appropriate evaluator, the qualifications of evaluators, assistance to teachers experiencing professional difficulties, and techniques relating to such assistance. The District asserts that the Association's proposal would divert evaluation from its primary purpose of maintaining a high level of educational program quality.

Looking specifically at the uniformity requirement contained in sentence 1 of Section 1, the District contends that uniformity of this sort does not have a single or clear meaning. It argues that where more than one evaluator is necessary, as it is in a district the size of Janesville which regularly utilizes more than 25 evaluators, it is impossible to ensure that each evaluator understands each criteria percisely in all situations. Furthermore, the District contends that with the wide variety of age and developmental levels of students in the public school system, evaluation criteria need to be developed to match the

directly intrude upon management and educational function. The District asserts that there is no evidence that such a proposal would affect, in any significant way, the teachers conditions of employment. In closing the District contends that a predominate relationship to job security concerns should be proven and not presumed and that, given the intrusion into management prerogatives and the absence of proof herein, the provision should be found to be permissive.

As to the second sentence of Section 1, the District contends that the absolute prohibition against use of unit employes, such as unit leaders and instructional managers, to evaluate teacher performance would significantly alter the existing job descriptions of those positions and weaken the District's established structure for the formulation of educational and management policies. The District argues that the current unit leaders and instructional managers are in a unique position to make professional educational judgments as to other unit employes. The District asserts that the proposal could also deprive the District of one of its important techniques to improve teacher performance. It argues that the Association's proposal could well be construed to prohibit the current practice of having a teacher who is having difficulty with a certain teaching technique visit the classroom of another teacher who has mastered that technique. Indeed, the District contends that a bargaining unit member could argue that the language here proposed insulates them from complying with any administrative assignment that might require the providing of information that could reflect upon the performance of other unit members. It notes that the prohibition is not limited to formal evaluations and, as such, any evaluation is arguably proscribed if it could be used for the purpose of evaluating continued employment. The District contends that the use of peers for evaluation purposes is an educational issue and that to require bargaining over the Association's proposal would end, for all practical purposes, debate that should continue as to matters of educational policy.

The District also argues that the prohibition against peer evaluation would apply nothwithstanding the teacher's continued non-supervisory status under Wisconsin law. It asserts that it is unaware of any Commission decision where a unit employe's responsibility to evaluate another employe was held to constitute, without more, supervisory status. Indeed, the District argues that the case law is to the contrary. South Shore School District, 16484 (8/78) (full-time teachers, who are also elementary principals, are not supervisors even though they perform evaluations); see to the same effect, Milwaukee Board of School Directors, 13787-G, 16009-D (11/79). The District contends that no impact on unit personnel has been shown to justify this intrusion on management's prerogative to assign traditional professional educator functions to professional educators who are teachers. Contrary to the Association, the District also asserts that the record reflects that the duty of peer evaluation is fairly within the scope of responsibilities performed by teachers in the Janesville District. Thus, the District asserts that a proposal, such as that in dispute herein, which would prohibit the assignment of such duties is a permissive subject of bargaining. Sewerage Commission of the City of Milwaukee, 17025 (5/79).

Turning to Section 3(a) the District objects to the requirement that classroom observation be a part of the evaluation process. It argues that whether classroom performance should be a required phase of evaluation is not a procedural matter but rather goes to the educational judgment of how to best determine, within the limited financial and professional resources available to it, whether the District is doing its best for the students. The District contends that whether a teacher's classroom conduct or performance is relevant in all instances to the advisability of an adverse employment action is a judgment that must be made by professionals accountable to the public to provide and maintain a quality total educational program. As to that part of the proposal which requires that any classroom visitation be conducted on a "planned, systematic basis", the District argues that this requirement primarily relates to the educational and management policy judgments as to whether a planned and systematic as opposed to spontaneous (i.e., fluctuating from building to building or from teacher to teacher according to the program's needs) evaluation procedure is the most appropriate manner to determine whether and to what extent the District is providing and maintaining a quality educational program.

The District's objection to Section 3(c) focus upon its assertion that the number of classroom visits and the length thereof are matters which primarily relate to the educational policy and management function choice as to the most appropriate and accurate means to develop and record information needed to assess

teacher performance where that performance is relevant to an administrator's concerns affecting a teacher's job security. The District contends that the length of time needed is a product of the activity and circumstances being evaluated. It argues that the activity in the classroom, the evaluator's experience, the presence of external stimuli (holiday proximity, weather,) and the teacher's prior experience are all relevant in assessing what is observed in the length of time appropriate to observe it. The District also contends that a primary effect of the proposal is on the effective utilization of administrative manpower. The District contends that if it were obligated to meet the contractual standards provided by this proposal, existing supervisors would be forced to expend resources currently devoted to other educational purposes. The District also notes that as a matter of educational program assessment, it is not necessary to visit all the teacher's classroom each school year. Indeed the District argues that it may not be necessary to visit first and second year teachers classrooms any particular number of times each year. It asserts that the frequency and length of classroom visitation should be determined by the quality of the educational program, the needs of the students and the needs of the teachers. Given the absence of any showing in the record that such mandated visitations perform a necessary function in all cases, the District contends that the intrusion into management prerogatives and educational policy choices warrants a finding that the proposal is permissive. The District also notes that there are other options which would be less intrusive and which would therefore primarily relate to teachers' wages, hours and conditions of employment. The District asserts that such "procedural options" adequately meet employe interests and do not significantly interfere with management's prerogatives. Under the instant proposal the District would be precluded from conducting any classroom visitation in a class which lasted only 25 minutes or from relying on any observation during a classroom visit of less than 30 minutes whether or not it was intended to be one of the required visitations. In constrast, a proposal which only required that visitations, when conducted, be of "reasonable duration" would accord the District with the flexibility to respond to different classroom situations. As the District contends that the substance of evaluation cannot be made mandatory under the label of procedure, the District asserts that the Association's proposal is permissive.

The Association counters by asserting that in their respective Beloit decisions, both the Commission and the Supreme Court recognize that the evaluation of a teacher's performance is significantly related to a teacher's working conditions inasmuch as the evaluation affects teacher transfer, retention, promotion and level of compensation. The Association argues that the Beloit decisions also stand for the proposition that a contractual proposal which seeks to protect a teacher's employment status is a mandatory subject of bargaining. In this regard the Association notes that as the Commission stated in its Beloit decision, "it would indeed be specious to determine . . . that the Association's proposal of a 'just cause' standard is a mandatory subject of bargaining, but not required bargaining over such techniques as comprised procedural aspects of said standard." Thus, the Association argues that a teacher's right to a fair, uniformly-applied and objective evaluation procedure is a mandatory subject of bargaining because that evaluation significantly affects the teacher's job security, compensation and conditions of employment. The Association asserts that for the same reasons that the job security standard of just cause is a mandatory subject of bargaining, the "standards" for teacher evaluation contained in the Association's proposal (that the evaluation criteria employed by the District be developed with respect to particular instructional levels of the teachers being evaluated; that the criteria be uniformly applied to the teachers in those respective instructional areas; that the measurement of teacher job performance be consistent; and that the classroom visitations be conducted on a planned and systematic basis), which are directly related to just cause, likewise are mandatory subjects of bargaining. While the proposal is not unrelated to managerial decision making, the Association asserts that its implicit prohibition against arbitrary, inconsistent and unplanned evaluation of teacher job performance is not primarily related to the formulation of educational policy or the management of the school district. It argues that the District can claim no legitimate managerial or educational policy interests in evaluating teachers in ways contrary to the matters specified in the Association's proposal. The Association concludes by asserting that all of the requirements of its proposal are rationally related to, and reflective of, the teachers' bargainable right to a fair and objective evaluation process.

As to that portion of its proposal which would prohibit the assignment of supervisory evaluative duties to bargain unit members, the Association asserts that such responsibilities are not fairly within the scope of unit employes in Janesville. It contends that as the Association cannot represent supervisory employes and as such employes cannot be members of the bargaining unit which includes non-supervisory employes, it would seem axiomatic that the supervisory evaluation of fellow unit employes is not "fairly within the scope of responsibilities applicable to the kind of work performed by" the District's non-supervisory teachers. The Association argues that not only do supervisory duties constitute no legitimate part of a unit employes' work load, but denying the District the use of its non-supervisory teachers as evaluators of their colleagues for the purposes of job advancement or continued employment can have only a minimal effect on educational policy. Accordingly, the Association asserts its proposal in this regard is a mandatory subject of bargaining.

By way of clarification, the Association asserts that Section 3(c) of the evaluation proposal is directed only at those evaluation situations where the evaluator is observing the teacher for the purposes of completing a visitation report. Thus, the Association asserts that nothing in its proposal prevents an evaluator from visting a teacher's classroom to talk to the teacher or to observe the atmosphere in the class for less than 30 minutes, as long as that visit is not considered a classroom visitation for the purposes of the proposal. The Association also contends that its proposal does not prohibit the District from soliciting or receiving input or observations from bargaining unit employes as to the teaching conduct or educational methods of fellow bargaining unit teachers. The Association argues that the intent of its proposal is to prevent a bargaining unit employe from being assigned to perform the job performance evaluation which will be utilized by the District for the purposes of determining promotion or discipline.

Discussion of Proposal 4

In Beloit, supra, the Commission was confronted with the following proposal:

Teacher Supervision and Evaluation

> "The parties recognize the importance and value of a procedure for assisting and evaluating the progress and success of both newly employed and experienced personnel for the purpose of improving instruction. Therefore, to this end, the following procedure has been agreed to in an effort to accomplish the goals.
>
> A. During the first three (3) weeks of school, the Superintendent shall orient all new teachers regarding evaluative procedures and instruments.
>
> B. Evaluation shall only be conducted by a qualified building principal or Assistant Principal or other qualified administrator. Each observation shall be made in person for a minimum of thirty consecutive minutes. All monitoring or observation of the performance of a teacher shall be conducted openly and with the full knowledge of the teacher.
>
> C. New teachers shall be observed for the purposes of evaluation at least three (3) times during the school year. These observations shall occur prior to February 15 of each year and be scheduled so that no more than one (1) observation is made in any thirty (30) day period. Experienced teachers shall be observed for the purposes of evaluation at least once every year.
>
> D. 1. Each teacher shall receive a copy of the classroom observation report at least two (2) school days prior to a conference between teacher and evaluator. This conference shall occur within five (5) school days after the classroom observation. A copy signed by the teacher and principal shall be submitted to the superin-

tendent within two (2) days after the conference. No teacher shall be required to sign a blank or incomplete evaluation form.

2. In the event that the teacher feels his evaluation was incomplete or unjust, he may put his objections in writing and have them attached to the evaluation report to be placed in his personnel file.

E. 1. Definite positive assistance shall be immediately provided to teachers upon recognition of 'professional difficulties.' For the purpose of this article the term 'professional difficulty' shall apply to deficiencies observed in classroom management, instruction skill, and/or professional preparation.

2. Beginning immediately with the conference after the classroom observation, specific approprite (sic) direction shall be offered to guide the individual toward the solution of his particular professional problem. Suggested actions shall include at least three of the following:

(a) Demonstration in an actual classroom situation

(b) Direction of the teacher toward a model for emulation, allowing opportunities for observation

(c) Initiation of conference with evaluator, teacher and area coordiator or department chairmen to plan positive moves toward improvement of professional classroom performance.

(d) Guidance for the teacher toward professional growth workshops

(d) Observation, continued and sustained, by the evaluator to note the day-to-day lessons and their inter-relationships.

(f) Maintenance and expansion of the collection of professional literature with assigned reading, designed to suggest possible solutions to identified problems.

F. Any complaints regarding a teacher, which may have an effect on his evaluation or his continued employment, that are made to the administration by any parent, student or other person shall be in writing and shall be promptly called to the teacher's attention. Said teacher shall have the right to answer any complaints and his answer shall be reviewed by the administrator and attached to the filed complaint."

The Commission found portions of the proposal to be mandatory and portions of the proposal to be permissive. It reasoned:

Teacher Supervision and Evaluation:

that it involves informing the teacher of how such performance is measured, and thus to the teacher's ability to maintain employment.

Likewise, the matter of length of observation period, openness of observation, number of evaluations, and frequency of observations are also mandatory subjects of bargaining. It would indeed be specious to determine, as we do subsequently herein, that the Association's proposal of a "just cause" standard is a mandatory subject of bargaining, but not require bargaining over such techniques as comprise the procedural aspects of said standard.

Similarly, the matters of copies of observation reports and conference regarding same, and teachers' objections to evaluations reflect the aspect of "just cause" which requires that, where appropriate, a teacher be allowed a fair opportunity to learn of his or her jeopardy, and possibly to defend his or her position. Thus, these matters are also held to be subjects of mandatory bargaining, as are matters concerning complaints made by parents, students and others.

On the other hand, the proposals involving the selection and qualifications of evaluators, assistance to teachers having professional difficulties, and the techniques to be employed in dealing with teachers found to be suffering professional difficulties, reflect efforts to determine management techniques rather than "conditions of employment." As such, they are not subjects of mandatory bargaining.

Upon appeal, Reserve Circuit Judge Currie agreed with the Commission's conclusion that the following five matters were mandatory subjects of bargaining:

(1) Orientation of new teachers as to evaluative procedures and techniques,

(2) Length of observation period and openness of observation,

(3) Number and frequency of observations,

(4) Copies of observation reports and conferences regarding same, and teachers objections to evaluations, and

(5) Notification of complaints made by parents, students and others.

Judge Currie noted that "these matters go to the reasonable expectation of teachers to notice of what is expected of them to be able to attain some security, to have notice of the deficiencies which may threaten that security, and the right to input into the procedures such as the timing and observation which might impair that security. No inherently managerial prerogative such as the selection of evaluators is touched."

Upon further appeal, the Wisconsin Supreme Court also upheld the Commission's determination concluding:

"A series of proposals relating to teacher evaluation were submitted to the school board's by the teacher's association as appropriate subjects for required bargaining. As to two of them, (1) who was to evaluate teacher performance, and (2) assistance to teachers who evaluations were poor, the commission held that they did not primarily involve 'wages, hours and conditions of employment' as to others, involving procedures to be used in evaluation, the commission held that they did primarily relate to 'wages, hours and conditions of employment'. The circuit court affirmed these holdings. Obviously the area of teacher evaluation relates to 'management and direction' as well to 'wages, hours and conditions of employment.' However, as to the procedures

followed, these matters go to the right of teachers to have notice and input into procedures that affect their job security. On the record that was before it, we uphold the conclusion that was reached by the commission to teacher evaluation procedures being mandatorily bargainable. 17/ (Footnote 16 omitted)

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17/ Clark County School District v. Local Government Employe Management Relations Board, supra, 10/, using the 'significantly related' test stating: ' . . . the evaluation of a teacher's performance is significantly related to a teacher's working conditions inasmuch as the evaluation affects transfer, retention, promotion and the compensation scale.'

The first sentence of Section 1 of the Association's proposal seeks to insure that teachers will be evaluated on a consistent basis by requiring that the evaluations be pursuant to "uniform criteria". The specification that the evaluation be recorded in writing allows the Association an opportunity to police the desired consistency. As the Commission noted in Beloit, supra, if the "just cause" standard is to be meaningfully bargainable, a union must be able to bargain over the procedural aspects of said standard. As we conclude that consistency of evaluation is as much a part of the just cause standard as the matters of length of observation period, openness of observation, number of evaluations, etc., found mandatory by the Commission and the courts in Beloit, we find the first sentence of Section 1 to be mandatory. We note that the District currently utilizes uniform evaluation criteria and written evaluation instruments for all teachers and that the proposal gives the District the flexibility to develop evaluation criteria and written evaluation instruments which differ from instructional level to instructional level. Thus, the District retains sufficient flexibility to measure the quality of education which is occuring in the classroom. As the required uniformity occurs only within groups of teachers who are teaching the same instructional level, we reject the District's contention that its need for flexibility overcomes the job security relationship which is present in this evaluation proposal. We conclude that the intrusion on management prerogatives - if any - represented by a requirement of a written evaluation instrument is, on balance, overcome by the employe interest in being able to see the record upon which his or her performance will be evaluated and the interests of the Association in being able to police the consistency requirement contained in this sentence of the proposal.

As to the second sentence of Section 1, the record establishes that the District currently utilizes unit employes, primarily unit leaders and instructional managers, to supplement the input which the District receives from supervisory employes as to the job performance of a teacher. We concur with the Association's contention that, as reasonably interpreted, this proposal would not interfere with that ongoing process of peer evaluation nor does it prohibit the District from soliciting or receiving input or observations from bargaining unit employes as to the teaching conduct or educational methods of fellow bargaining unit teachers. Instead, we interpret the Association's proposal as precluding the District from assigning a unit employe the responsibility for performing the formal evaluations which will be used by the District for the specific purposes of determining promotions, demotions, discipline and/or continued employment. The formal evaluation function in the Janesville District is not performed by teacher bargaining unit employes. That distinguishes the unit positions herein from the leadperson/teaching principal positions at issue in the election and unit clarification cases cited by the District. Since we thus conclude that such specific responsibilities are not fairly within the scope of the teachers' responsibility in this District, we conclude that it is a mandatory subject of bargaining for the association to propose that no such formal evaluation responsibilities be added to those currently performed by unit employes. In the context of the instant record, then, we find this proposal to be a mandatory subject of bargaining.

Turning to Section 3 (a) and (c), we conclude that the Commission's decision Beloit, as affirmed by the courts, renders these portions of the Association's proposal mandatory. We are cognizant of the impact which the required length and number of evaluations may have upon District supervisory resources. On the other hand, noted in Beloit, the length and frequency of formal observations by which employes will be evaluated are inherently and directly related to the employes' job security. Assuming without deciding that there could be proposed requirements of or limitations on the frequency and duration of formal evaluations and class visitations that would render the evaluation function ineffective or that would so undly burden supervisors with evaluation requirements as to render the District unable to effectively manage its affairs, we cannot so characterize the instant proposal.

While it could be argued that it is an educational policy decision as to whether to utilize classroom visitation as any part of the evaluation process, we note that the District currently places primary reliance upon this mode of evaluation and that the job security concerns of employes over-come, on balance, any educational policy or management prerogative choice to evaluate the performance of teachers without viewing the teaching process in their classroom. We reject the District's contention that this proposal would somehow preclude the District from taking action against an employe for conduct outside the classroom. As noted by the Association, the proposal is only directed at those visitations utilized by the District for complying with the contractually required visitations and does not prevent the evaluator from, in addition to the required evaluations, visiting a classroom for less than 30 minutes or for a spontaneous visitation. Instead, the proposal only requires that classroom visitation be a part of the evaluation process. We therefore find this portion of the proposal to be mandatory. In summary, for the reasons noted previously by the Commission and the courts in Beloit, we find these proposals to be mandatory.

The disputed language is as follows:

Article VIII. Staff Reduction

(5) Section 1.

In the event the Board determines to reduce the number of employe positions (full layoff) or the number of hours in any position (partial layoff) for the forthcoming school year, the provisions set forth in this Article shall apply. Layoffs shall be made only for the reason(s) asserted by the Board, and not to circumvent the other job security or discipline provisions of this Agreement.

Section 2. Layoff Notices and Effective Date of Layoffs.

(a) Prior to implementing any layoff(s), the Board shall notify the Association in writing of the position(s) which it has determined to reduce.

(b) Layoffs of teachers shall be implemented in accordance with a time frame consistent with the provisions of sec. 118.22, Stats. The Board shall give written notice to the teachers it has selected for layoff for the ensuing school year on or before March 15 of the school year during which the teacher holds a contract. The layoff of each teacher shall commence on the date that he or she completes the teaching contract for the current school year.

(c) The Board shall simultaneously provide the Association with copies of all layoff notices which it sends to employes pursuant to this section.

Section 3. Selection for Reduction.

In the implementation of staff reductions under this Article, individual teachers shall be selected for full or partial layoff in accordance with the following steps:

Step 1 Attrition. Normal attrition resulting from employes retiring or resigning will be relied upon to the extent it is administratively feasible in implementing layoffs.

Step 2 Preliminary Selection. The Board shall select employes for a reduction in the grade level, department or subject area affected by such reduction(s) in the order of the employe(s) length of service in the District, commencing with the employe in such level, department or area with the shortest service (least seniority).

The provisions of this Article shall not be interpreted to preclude the Board from retaining, in case of staff reduction, a staff of teachers who are qualified by virtue of their certification to teach the instructional areas or subjects in the District's curriculum.

Step 3 Bumping. Any employe who is selected for reduction pursuant to Step 2, above, may elect in writing, within ten (10) days of receipt of a layoff notice, to assume the assignment, or that portion of the assignment which will allow the employe to retain a position substantially equivalent in hours and compensation to the position the employe held prior to receiving notice of layoff, of the employe with the shortest length of service in the District who holds an assignment for which the former employe is certified. Any employe who is replaced pursuant to this Step may similarly elect to replace another employe in the District as provided in this Step. The Board shall notify employes, in writing, of their selection through bumping, within 24 hours after it has occurred. The Board shall simultaneously provide the Association with copies of any notice which it is required to provide employes under this Step.

Step 4 Refusal of Partial Layoffs. Any employe who is selected for a reduction in hours (partial layoff) under Step 2 or 3, and who is not able to exercise bumping rights under Step 3 to retain a position with hours and compensation substantially equivalent to the hours and compensation the employe presently holds, may choose to be fully laid off, without loss of any rights and benefits as set forth in Sections 4 and 5 below.

The provisions of this Step shall not be construed to affect the rights to unemployment compensation provided in Chapter 108, Stats., if any, of an employe choosing to exercise the right described herein.

Section 4. Seniority.

For purposes of this Article, the commencement of an employe's service in the District shall be the first day of employment under his/her initial contract and, where two (2) or more

employes began employment on the same day, their respective levels of training (degrees and degree credits) shall be used to establish their length of service (i.e., the employe with the greater level of training shall be considered more senior); provided that, if there still remain two (2) or more employes subject to layoff selection who have equivalent levels of training, such selection shall be determined among such employes on a lottery basis.

For purposes of this Article, an employe's service in the District shall not include any period of time in which the employe has worked for the District in a non-bargaining unit, administrative or managerial capacity. Regular part-time employes shall accrue seniority on a pro-rata basis, based upon the percentage of a full-time contract worked by the employe. Ninety-six (96) full days of employment during a school year shall constitute one year of District service for purposes of calculating an employe's seniority.

An interruption in continuous District employment due to a leave of absence, medical leave, maternity, child-rearing or adoption leave, or layoff shall not cause the loss of prior accumulated seniority. An interruption in employment due to other causes shall result in the loss of prior accumulated seniority; provided, however, that an employe entering a non-bargaining unit position with the District shall be allowed to retain prior accumulated seniority for two (2) years.

No later than December 1 of any school year, the Board and the Association shall develop a mutually-agreeable seniority list, which shall rank all employes, including both active employes and employes on full or partial layoff, according to their length of servie in the District, as determined above. Such list shall also state the teaching assignments, if any, presently held by such employes, and the areas in which such employes are certified.

Section 5. Recall.

If the District has a vacant position or a portion of a position available for which a laid off employe is certified according to the District's records, the employe shall be notified of such position and offered employment in that position, commencing as of the date specified in such notice. Under this section, employes on layoff will be contacted and recalled for a position in reverse order of their layoff. In the event two (2) or more employes who are so certified were laid off on the same date, the Board shall select the employe who has the longest service in the District as determined pursuant to Section 4, above. Recall rights under this section shall extend to employes on partial layoff (i.e., those employes hours have been reduced).

Within fourteen (14) days after an employe receives a notice pursuant to this section, he or she must advise the District in writing that he or she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice pursuant to this section shall be mailed by certified mail, return receipt requested, to the last known address on the employe in question as shown on the District's records. It shall be the responsibility of each employe on layoff to keep the District advised of his or her current whereabouts. The Board shall simultaneously provide the Association with copies of any recall notices which are sent to employes on layoff status pursuant to this section.

Any and all recall rights granted to an employe on layoff pursuant to this Article shall terminate upon the earlier of (i) the expiration of such employe's recall rights period, or

(ii) such employe's failure to accept within fourteen (14) days an offer of recall, as provided in this section, to a position substantially equivalent in hours and compensation to that from which the employe was laid off. For purposes of this Article, the term "employe's recall rights period" is five (5) years following the employe's most recent layoff, the five-year period ending on the first day of the sixth school year after such layoff.

A full-time employe on layoff status may refuse recall offers of part-time, substitute or other temporary employment without loss of rights to the next available full-time position for which the employe is certified. Full-time employes on layoff status shall not lose rights to a full-time position by virtue of accepting part-time or substitute appointments with the District.

No new appointments may be made by the District while there are employes who have been laid off or reduced in hours who are available and certified to fill the vacancies.

Section 6. Benefits During Layoff.

Employes who are laid off shall remain eligible for inclusion in all of the District's group insurance programs under the same terms and conditions as are applicable to all regular members of the bargaining unit, during the summer immediately following the employe's layoff notice.

No employe on full or partial layoff shall be precluded from securing other employment while on layoff status.

Employes on full layoff will be eligible for inclusion in all of the District's group insurance programs, to the extent such policies allow their eligibility, provided the laid off employe reimburses the District for the full premium for such coverage. Such eligibility shall continue during the employe's recall rights period, except that it shall be suspended while the employe is employed on a full-time basis for another employer.

Employes on full layoff shall retain the same amount of seniority, based upon length of service in the District as set forth in Section 4, above, and the same amount of sick leave as she or he had accrued as of the date she or he was laid off. If a laid off employe is recalled, such employe shall again begin to accrue full seniority and sick leave.

Partially laid off employes, who were laid off from full-time employment, shall have all the rights and privileges of full-time bargaining unit members under this Agreement, with the exceptions of salary and retirement contributions (which shall be prorated), shall accrue full seniority while on partial layoffs, as set forth in Section 4, above, and shall accrue full sick leave.

Section 7. Grievance Procedure.

If an employe or the Association contends that the Board has violated any of the provisions of this Article, they may file a grievance beginning at the District Administrator level (Step 2) of the Grievance Procedure under this Agreement, no later than sixty (60) days after receiving final notice of layoff under Sections 2 and/or 3, above.

Initially, the District contends that its objections to the Association's proposal can be placed in three general categories. First, the proposal affects the District's determinations as to the necessity for and timing of staff reduction by subjecting the basis for every layoff to third-party review and by specifying the date or time of year by which such decisions will be made for

the subsequent school year. The District asserts that these limitations substantially interfere with its right and obligation to make level of service and quality of service determinations on a rational or reasonable basis. Second, the District asserts that the proposal seeks to require that layoff and recall determinations be made only on the basis of certification and seniority and thus disregards other compelling interests such as the quality and scope of program to be provided and the students' best interests. In this way the District argues that the proposal intrudes impermissibly upon the District's basic educational policy judgments. Third, the District argues that several aspects of the Association's proposal require bargaining on provisions which are permissive because they would arbitrarily and discriminatorily interfere with the District's management function and educational policy.

More specifically, as to the proposal's impermissable limitations upon the reasons for staff reduction, the District asserts that the proposal's requirement that layoffs be "only for the reasons asserted by the Board" would allow for arbitration of an allegation that the layoff was for some other reason and would thus allow submission of layoff decisions to third-party review. The District contends that third-party review of its layoff decisions would have an adverse and detrimental effect on staffing judgments and would convey broad authority to persons other than the employer over the economic motivations of the policy-makers. The District asserts that it would make expression of the complex reasons for layoff into an unnecessarily fine art. As to the requirement that layoffs not be made "to circumvent the other jobs security or discipline provisions" of the contract, the District again notes that the proposal operates as an intrusion upon the District's discretion and ability to implement management decisions because it allows third-party review of the District's motivation and/or "reason". The District argues that the risk of litigation over portions of the proposal such as that just cited would chill the exercise of judgments necessary to effectuate reductions. The District asserts that with these uncertainties facing all staff reduction determinations, the District would be effectively precluded from exercising the discretion and judgment implicit in its representative function. Therefore, the District asserts that the proposed limitations on the District's necessity determinations are permissive subjects of bargaining.

Responding to the contention that the Association needs to know the reasons for the layoff in order to make sure the District is not violating another provision of the agreement and to bargain impact, the District contends that these assertions do not support the resultant intrusion into District prerogatives. The District contends that the Association can file a grievance if a given layoff is viewed with suspicion and, in such a forum, can ascertain the reasons for the layoff. However, the District contends that to require that each and every layoff be preceded with a recitation of the reasons therefor creates an unnecessary interference into the setting of educational policy. As the Association has offered no evidence to demonstrate that the normal informational channels of the grievance procedure are insufficient to police the agreement, the District contends that this substantial intrusion into its rights does not warrant a finding that this portion of the proposal is mandatory. As to the Association's desire to bargain impact, the District notes that as the contract will cover the subject of layoffs under either parties' proposal, there would be no obligation to bargain over such matters during the term of the agreement. The District notes that the Association's proposal would require that the layoff be "implemented" in accordance with "time frame" specified by Sec. 118.22, Stats., and would also require that a layoff only be effective upon the completion of the teaching contract i.e., at the end of a school year. The District contends that these limitations require that this portion of the proposal be found to be permissive. The District argues in this regard that late resignation, enrollment changes, budget uncertainties and necessary last minute adjustments in the educational program render it almost impossible to make more than an educated guess by a date certain as to the needs of the District for the 9 1/2 month school year beginning six months in the future. As all of the foregoing provisions of the Association's proposal substantially interfere with the District's ability to make level of service judgements in the best interest of the public, the District contends that they should be found to be permissive.

The District next contends that the Association's use of certification and seniority as the exclusive factors when determining order of layoff and recall primarily and adversely affects the educational policy decisions of the District. The District asserts that its interests in comprehensive program, the matching of special student needs with special teacher talents, the retention of teachers who

have demonstrated the greatest effectiveness as teachers, and the retention of teachers who have attained up-dated educational exposure are all educationally relevant considerations which would be ignored under the Association's proposal. The District asserts that certification in a given area is no assurance of an interest or competence in a particular subject matter categorized generally within that certification. Nor, the District argues, would a lifetime certification issued many years ago necessarily be a reliable indication of current competency, or interest. From the perspective of maintaining or enhancing the District's educational goals, the District asserts that a number of factors must be considered in reduction situations, all of which are ignored under the Association's proposal. For example, what kind of program is necessary to meet the District's educational purpose; what quality of program is desired; where are unique professional talents needed; where do special student needs compel an individualized staffing judgment. The District asserts that these determinations should be made before selection of staff, not afterwards, and that such determinations are too important to the educational process to be left to the arbitrary product of seniority. The District contends that after the educational goals are discussed and decisions made as to the depth and breadth of desired programs, and unique staffing-student needs are considered, the final step should be considered: who are the teachers best able to carry-out these needs and goals. The District asserts that the need is to identify which teachers are "most effective at working with students and motivating them to want to learn." The District contends that seniority is not a reliable reflection of a teacher's performance and that there is no correlation between quality of teaching or scope of unique talents and length of service to the District. The District finds the Association's assertion that a layoff clause is not the proper place to deal with "quality teachers" to be indicative of the Association's lack of concern about quality education. The District asserts that the Association wants the only relevant threshhold to be a line between totally unacceptable performance warranting non-retention, and all other teachers. The District does not concur that in the crucial and difficult educational decisions involving reduction in force, an unchallenging and disinterested but marginally adequate teacher should be retained while an excellent, challenging and interested teacher should be laid off only because one has been with the District longer than the other. The District also asserts that seniority has no bearing on the personal and professional "special qualities" necessary for the retention of its front line educational leaders, unit leaders and instructional managers. The District argues that seniority need not be rejected in its entirety but can be only one of many factors considered when determining the appropriate individual to layoff. The District alleges that the proposal cuts to the essence of the District's ability to have the best teachers it can bring to the task of providing student and program needs at as high a level as the community's financial resources and commitments allow. Given the Association's proposal's failure to allow for consideration of other factors which are essential to the District's educational mission, the District asserts that the proposal does not relate primarily to wages, hours and conditions of employment.

As to the Association's assertion that the Court's decision in Beloit supports the Association's contention that a layoff proposal tied to seniority and certification is mandatorily bargainable, the District asserts that the Association is too generous in its reading in both Beloit and its own proposal. The District notes that in Beloit the term "qualified" was not defined. The District contends that in Milwaukee Board of School Directors, 20093-A (2/83) the Commission observed that provisions for the determination of who is qualified, to be mandatory, must grant "to the Board certain flexibility in meeting educational needs which may exist and which require consideration of factors other than basic qualifications and seniority". As the District asserts that certification may, in a given case, bear no relationship to the teachers' interest or competency to teach a particular subject, the District asserts that the Association's proposal lacks the requisite degree of flexibility found necessary in Milwaukee Board of School Directors, supra. Thus, the Board contends that this portion of the proposal, as well others which hinge upon a teacher's certification, are unduly restrictive and invade the District's right to retain qualified "teachers". The District therefore contends that the proposal is permissive.

As to the bumping procedure proposed by the Association, the District reiterates its concerns as to the flaws inherent in a procedure which only allows for considerations of certification and seniority. It emphasizes that under the Association's proposal, it would not matter that the bumping teacher has no experience whatever in the "certified" area, or that the certification was issued

years ago and no educational up-dating of credentials or exposure to the subject matter has been attained, or that the certification was secured for the sole purpose of retaining employment when reduction in the teacher's actual area of interest or competence seemed imminent.

Turning to the portion of the Association's proposal which deals with unemployment compensation eligibility, the District asserts that the proposal could be construed as waiving the District's statutory objections to payment of unemployment compensation benefits to a laid off employe. As the proposal could be interpreted to provide that an employe could receive unemployment compensation benefits notwithstanding his/her refusal of suitable work, the District contends that the proposal maybe contrary to Wisconsin public policy and express statutory commands. Given this direct and troublesome relation to the public policy of the state and the employer's role in meeting the legisture policy choices, the District asserts that the indirect relationship to teacher's conditions of employment warrants a finding the proposal is permissive because it intrudes on the obligation of the District to properly manage its affairs.

The District argues that the "lottery" determination as to layoff selection in certain circumstances demonstrates the arbitrary nature of the Association's proposal and its lack of concern for the educational or governmental function of the District. The District contends that the Association's desire to ignore competency or policy issues in matters of layoff selection compel a finding that the proposal is permissive. The District further asserts that the Association's proposal as it relates to retention of seniority discriminates against those employes who chose to accept non-bargaining unit positions with the District and argues that it should have no duty to bargain over a proposal with such a patently discriminatory and irrational application. As to the Association proposals ban on "new appointments" while one or more laid off (or reduced) employes are "available and certified", the District again contends that this emphasis on the "certified standard" to the exclusion of other legitimate considerations, renders the clause permissive. Turning to that portion of the Association's proposal which would allow an employe on partial layoff to have additional employment elsewhere, the District contends that such a provision could excuse the teacher's unsatisfactory performance of his/her job with the District because, if such other employment resulted in a tardy or overly exhausted teacher, it is unclear whether the District could insist upon elimination of the problem -i.e., giving up of the second job-without being accused of interfering with the employe's right to secure other employment. The District asserts that it should not be required to wait and see how an arbitrator construes these protections. Due to the possibility of such an unwarranted intrusion upon the District's obligation to establish educational standards, the District contends that this portion of the proposal should also be held permissive.

In conclusion the District contends that the objectionable concepts permeate the Association's proposal. While a few aspects of the proposal may involve arguably mandatory subjects of bargaining, the District asserts that by themselves they do not constitute any type of coherent mandatory proposal. Thus, the District argues that the entire staff reduction proposal should be declared permissive. In the alternative, the District alleges that the challenged portions should be held to be non-mandatory.

The Association responds to the District's objections by initially noting that to the extent those objections are premised upon the potential for arbitral review of District actions, said objections simply do not constitute a recognized or rational basis for determining whether a contract proposal is a mandatory or permissive subject of bargaining. The Association points out that the application of virtually every contract provision is potentially subject to the grievance process. The Association alleges that it is the nature of the rights granted by a contract provision which must be analyzed for the purposes of determining whether that proposal is mandatory or permissive.

Turning to the District's objection as to the obligation to provide the reasons for a layoff, the Association asserts that this proposal in no way requires that the District negotiate with the Association as to the reasons the District may utilize to determine that staff reductions are necessary. The Association contends that this proposal restricts District layoff decision making only to the extent of prohibiting misuse of the District's otherwise unfettered right to layoff staff. In essence, the Association contends that its proposal serves two legitimate and mandatorily bargainable purposes: (1) prohibiting the

District from violating the contract's job security provisions and (2) requiring that the District state its unilaterally determined reasons for teacher layoffs in order that the Association may administer and enforce the proposal's non-circumvention provision. As job security provisions are mandatorily bargainable, Beloit, supra, the Association asserts that proposals such as these are mandatory in that they seek to insure that employe's receive the benefits of such provisions and that the employer cannot circumvent same through other means. The Association also notes that as the District is obligated to bargain over the impact of its layoff decisions, such bargaining must include the right to be advised of the reasons underlying the decisions whose impact is to be bargained. In this regard, the Association notes the Commission's holding in Milwaukee Board of School Directors, 20093-A (2/83) 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" and that a proposal "which would seek to require that the Board provided with notice of program decisions which will impact on wages, hours and conditions of employment and which would require the Board to meet at reasonable times to bargain impact would be found to be a mandatory subject of bargaining." Thus the Association contends that this portion of its proposal should be found to be mandatory.

Turning to that portion of its proposal which requires that layoffs be implemented in accordance with a time frame consistent with the provisions of Sec. 118.22 Stats., the Association asserts that such a contract provision has been held to be mandatory by the Court of Appeals in West Bend Education Association v. WERC, Case No. 82-1824 (Ct. App. 10/83). The Association contends that the Court's decision controls all declaratory ruling proceedings before the Commission which involved the same issue and thus, as a matter of law, the Commission is obligated to follow the Court's decision.

As to the District's arguments which focus upon the Association's seniority-based layoff and recall proposals, the Association asserts that these same arguments have been previously considered and rejected by the Commission and the Supreme Court. The Association contends that it is well established that a staff reduction proposal which bases selection for layoff and recall on employes seniority is a mandatory subject of bargaining, provided the proposal recognizes the school board's right to retain, in the case of layoff, teachers qualified to teach the particular subjects in its curriculum. Beloit, supra, at 58-60. The Association notes that its proposal expressly states: "The provisions of this Article shall not be interpreted to preclude the Board from retaining, in the case of staff reduction, a staff of teachers who are qualified by virtue of their certification to teach the instructional areas or subjects in the District's curriculum." The Association also asserts that there is no evidence in the record to support a contention that utilization of the Association's layoff procedure would prevent the District from staffing all the courses which it choses to offer its students with qualified teachers. Thus, the Association contends that this portion of this proposal is mandatory.

The Association asserts that the remaining District's objections to its proposal are insubstantial and/or based on erroneous interpretations of the Association's proposal and thus warrant little response. For example, the Association contends that the District's challenge to the bumping proposal (Section 3, Step 3) must be rejected for the same reasons just discussed. As to the unemployment compensation provision (Section 3, Step 4), the Association contends that the provision was included for the very purpose of precluding any contention that the proposal would conflict with the unemployment compensation eligibility standards of Chapter 108. It asserts that the proposal merely acknowledges that an employe selected for partial layoff who choses to be fully laid off will not have his or her rights to unemployment compensation enhanced by the fact of the full layoff. As to the District's objection to the proposal's use of "lottery", the Association asserts that while reasonable arguments can be advanced by both the District and the Association concerning the merits of this proposal, it remains the case that it is primarily related to the procedure for selecting employes for layoff or recall and thus, is a mandatory subject of bargaining where, as here, the selection pool consists exclusively of qualified unit teachers.

Responding to the District's allegation that the proposal is discriminatory in its treatment of employes who leave the bargaining unit to assume administrative or supervisory positions, the Association notes that its proposal distinguishes, as a general rule, between employes who interrupt their active

employment with the District but remain in the bargaining unit (e.g., employes on a leave of absence or on layoff status) and employes whose employment is interrupted by their leaving the bargaining unit (e.g., employes who have resigned or have been terminated or employes who have assumed non-bargaining unit positions with the District). The Association contends that employes in the former group are entitled to retain their accumulated seniority, so long as they retain their unit status, while those in the latter group lose their accumulated seniority when they give up their unit status. The Association contends that it has no obligation to bargain seniority retention rights for non-unit members, and that the distinction present in the proposal is both legal and reasonable. If the proposal discriminates, the Association contends that that discrimination is in favor of employes who accept promotion to District administrative or supervisory positions, since it treats them more favorably than employes who leave the bargaining unit for any reason other than those enumerated in the proposal. As to the District's challenge to the proposal's prohibition against hiring new employes while there are employes on layoff status who are available and certified to fill the vacancies, the Association contends that this challenge must be rejected for the reasons previously specified herein and because the Commission and the Supreme Court have expressly held such a proposal to be mandatory in Beloit. Lastly, as to the District's absurd and speculative objections to the portion of the proposal which specifies that employes may not precluded from securing other employment while on layoff status, the Association points out that the District's ability to deal appropriately with a teacher's unsatisfactory job performance (due to whatever cause) is not in anyway impaired by the proposal which the Commission held to constitute a mandatory subject of bargaining in its Beloit decision. Therefore, the Association requests the Commission finds its proposal to be mandatory in its entirety.

Discussion of Proposal 5

In Beloit, supra, the Commission found the following proposal to be a mandatory subject of bargaining:

> If necessary to decrease the number of teachers by reason of a substantial decrease in pupil population within the school district, the governing body of the school system or school may layoff the necessary number of teachers, but only in the inverse order of the appointment of such teachers. No teacher may be prevented from securing other employment during the period he is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new or substitute appointments may be made while there are laid off teachers available who are qualified to fill the vacancies.

The Commission reasoned:

> The matter of teacher layoffs, and their right to recall to active teaching status, have a direct and intimate affect (sic) on a teacher's working conditions including employment status, and as such the Commission concludes that the proposals relating to teacher layoffs and recall are mandatory subjects of bargaining, as are concomitants thereof, not limited to, but including such matters as the basis for layoffs, order of recall, qualifications for recall, and non-loss of previous service credits.

Upon review in Dane County Circuit Court, Reserve Circuit Judge Currie upheld the Commission's determination as follows:

> (d) Teacher Layoffs
>
> The Association's proposal on layoffs (Finding of Fact No. 4, p. 5) reads:
>
> ". . . If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population . . . (the employer) may lay off the necessary number of teachers,

but only in the inverse order of the appointment of such teachers. . . ."

WERC found this proposal primarily to relate to wages, hours and conditions of employment. Finding of Fact No. 8, E. Its rationale is that the proposal goes to being employed or unemployed. See Memorandum, p. 21. WERC was careful to limit its rulings to the specific proposals made by the Association.

Seniority is one of the most fundamental and important rights of working people. In Clark v. Hein-Werner Corp. (1959), 8 Wis. 2d 264, 273-274, 99 N.W. 2d 132, the Court noted that seniority rights which "were created solely by reason of the labor contract . . . constitutres a valuable property right and cannot be divested without due process of law." it has been said that "since seniority is so obviously a condition of employment--and is a condition commonly existing under union contracts, litigation questioning its mandatory status has been minimal." The Developing Labor Law, Sec. of Lab. Rel. Law, ABA, p. 406.

The School Board asserts that educational policy is implicated when layoffs become necessary because of decrease in pupil population as to: (1) what programs will be reduced, and (2) what staff qualifications are needed.

However, as pointed out in the Attorney General's brief, nothing in the Association's proposal governs the programs to be deleted or reduced. Further, nothing suggest a more senior Fourth Grade athletic teacher must displace a less senior Twelfth Grade physics teacher. The court deems that it would be an implied condition in the proposal as worded that such an absurd result was not required. Section 111.70(1)(d) would require a reasonable clarification to that effect be inserted in the collective bargaining agreement if proposed by the School Board. As so clarified the proposal is one which WERC could reasonably determine involved no basic educational policy and is primarily concerned with wages, hours and conditions of employment.

Upon further appeal, the Wisconsin Supreme Court also upheld the Commission's determination stating:

(6) (D) Teacher layoffs. The teachers' association submitted certain proposals in the field of teacher layoffs as mandatorily bargainable items. 24/ As to the decrease in the number of teachers "by reason of a substantial decrease of pupil population," the association's proposal was that such layoffs be "only in the inverse order of the appointment of such teachers." 25/ While the commission held all of the teacher layoff proposal to primarily relate to "wages, hours and conditions of employment," it is the proposal for seniority in case of layoffs that was challenged on review and is challenged on this appeal. The school board claims an impingement on the right of the board to determine what programs will be reduced and what staff qualifications are needed. The trial court held that nothing in the association proposal, as worded, went to what school programs were to be reduced or eliminated in case of layoff due to a decrease in pupil population. To the suggestion that "a more senior Fourth Grade athletic teacher must displace a less senior Twelfth Grade physics teacher," the trial court responded that "such an absurd result was not required." While terming it a clarification, it then modified the commission holding to require that "reasonable clarification to that effect be inserted in the collective bargaining agreement if proposed by the School Board." As so clarified and modified, the proposals stop well short of invading the school board's right

to determine the curriculum, 26/ and to retain, in case of layoff, teachers qualified to teach particular subjects in such curriculum. As so limited and modified, the proposal, we hold, is one primarily related to "wages, hours and conditions of employment," and hence required to be bargained.

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24/ The teacher layoff proposals can be summarized as follows: "Teacher Layoffs (1) The basis for layoffs, (2) Order of recall, (3) Qualification for recall, (4) Non-loss of previous service credits, and (5) No new or substitute appointments while qualified teachers are in layoff status."

25/ The actual proposal states in part: "If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population . . . (the employer) may lay off the necessary number of teachers, but only in the inverse order of the appointment of such teachers."

26/ See: Joint School Dist. No. 8 v. Wis. E. R. Board (1967), 37 Wis. 2d 483, 155 N.W. 2d 78, this court holding: The contents of the curriculum would be a different matter. Subjects of study are within the scope of basic educational policy and additionally are not related to wages, hours and conditions of employment."

Bargaining over layoffs was further clarified in City of Brookfield v. WERC 87 Wis. 2d 819 (1979) when the Wisconsin Supreme Court held that a municipal employer could not be required to bargain over an economically motivated decision to lay off five firefighters as a means to implement a fire department budget reduction. The Court concluded that economically motivated layoffs of public employes resulting from budgetary restraints are matters primarily related to the exercise of municipal powers and responsibilities and the integrity of the political process.

In West Bend Joint School District No. 1, 18512, (5/81) the Commission was confronted with the status of the following proposal, the underlined portions of which were in dispute:

ARTICLE XXVII. STAFF REDUCTION

1. If a reduction in the number of teachers for the forthcoming school year is necessary, the provisions set forth in this Article shall apply. The Board may layoff teachers only where such layoffs are made necessary for valid and unlawful reasons of educational policy and/or school system management and operation. The Board agrees that layoffs will be made only for the reasons stated by it, as provided in this paragraph and in paragraph 3, and not to circumvent the other job security provisions contained in this collective bargaining agreement.

   The Board will notify the WBEA of the position(s) which it considers necessary to reduce, together with all of the reasons and the supporting facts relied upon by the Board for the contemplated reduction, prior to the implementation of any layoffs. Such notice shall be sufficiently timely to enable the WBEA, at its option, To discuss with the Board the necessity of the proposed reduction in teaching positions and to bargain concerning the impact of any necessary reduction. Necessary layoffs of teachers shall be accomplished in accordance with the time frame and provisions of Section 1118.22, Wis. Stats. The Board shall inform the teacher(s) by

preliminary notice in writing that the Board is considering nonrenewal of the teacher's contract for reasons of layoff and shall provide such teacher(s) with the right to a private conference, as provided in Section 111.22, Wis. Stats. Employes nonrenewed under this Article shall have the rights to reemployment set forth in paragraphs 5, 6 and 7 of this Article.

. . .

4. The lay off of each teacher shall commence on the date that he or she completes the teaching contract for the current school year, and such teacher shall be paid for services performed under that contract to the date of such lay off in accordance with this Agreement. Also, if and only if such teacher exercises the conversion privilege under the District's group hospital-surgical insurance program, the District will continue to pay the single or family premium cost for the coverage of the personal medical insurance policy to which such teacher converts through the month of August immediately following the date of such teacher's lay off. Except as provided by this paragraph, such teacher's compensation and other economic benefits from the District shall cease as of the date of such teacher's lay off. The teacher shall not be precluded from securing other employment during such teacher's reemployment rights period.

The Commission found the disputed provisions to be permissive subjects of bargaining reasoning:

Discussion:

The Association's proposal ". . . to discuss with the Board the necessity of the proposed reduction in teaching positions . . ." is in the opinion of the Commission clearly permissive.

Our Supreme Court in City of Brookfield held that the decision to layoff municipal employes to implement budget cuts relates to a non-mandatory subject of bargaining, while the impact of said layoffs on the wages, hours and working conditions is a mandatory subject of bargaining. Here the employer has agreed to provide timely notice to enable the Association ". . . to bargain concerning the impact of any necessary reduction". The Association proposes more, however, in that it wants to discuss the actual necessity of any proposed reduction. As such, said proposal clearly primarily relates to the decision of reduction itself and not the impact of same. Since the District has no duty to bargain regarding the layoff decision it follows that it may not be required, as a part of its bargaining duty, to discuss the necessity of said layoffs. We agree with the Association's contention that it may have a consitutional right to be heard on educational policy, such as the need for teacher layoffs. However, as the court stated in Brookfield the bargaining table is not the appropriate forum for the formulation or management of public policy.

As to the remaining disputed portions of the Association's proposal, the threshold question, given the Brookfield decision, is whether said proposal, which concerned the timing and frequency of layoffs, are (sic) an integral part of the layoff decision and the public policy determinations leading to said decision and the implementation thereof 3/, or whether it is primarily related to the impact of the decision. We conclude that proposals relating to the timing and frequency of layoffs interfere with the actual decision concerning same and thus effectively prevents (sic)

the municipal employer from implementing public policy which the Commission and the Supreme Court have already determined constitute non-mandatory subjects of bargaining.

Here, we disagree with the Association's contentions that its layoff proposal which requires teacher layoffs to be accomplished in accordance with Section 118.22, Stats., is merely procedural and not primarily related to the layoff decision and, further, is similar to matters as to who will be laid off, which was found to be a mandatory subject of bargaining in Beloit 4/. A seniority provision, unlike the proposal herein, which provides for the timing of the layoff decision and its implementations, (sic) does not unduly interfere with the layoff decision by having to adhere to the time frame of Section 118.22, Stats., in deciding and implementing layoffs. Under the Association's proposal the District may have to either delay layoffs or initiate layoffs in advance of the facts and circumstances that necessitates (sic) the layoff, e.g. reductions in state and federal aid or unanticipated enrollment declines.

The Association's reliance on Mack for the proposition that the layoff proposal at issue herein is a mandatory subject of bargaining is misplaced, since the mandatory versus permissive nature of the layoff provision was not at issue in Mack. Therein the Court's focus was on the alleged illegality of the layoff provision to the extent that it was inconsistent with Section 118.22, Stats. When the court in Mack referred to the layoff provision as a mandatory subject of bargaining, it did so in the context of its decision in Beloit, which we have already distinguished from the proposal at issue herein. We agree with the District that the Court in Mack dealt with the distinction between layoff and non-renewals, pursuant to Section 118.22, Stats., and that the issues presented herein are controlled by the Court's decision in Brookfield.

The Commission concludes that the Association by tying the timing and frequency of layoffs of Section 118.22, imposes an unwarranted restriction upon the employer's right to lay off personnel. The Association's proposal and its reliance on Section 118.22 requires a preliminary notice and the right to private conference, before the layoff decision, all within a narrow specified time period during the school year 5/ and further limits the layoff to the end of the school year. Thus the Association's proposal requires more than just notice of impending layoffs but rather interferes with the Employer's right to determine when layoffs are to occur. We therefore conclude that the Association's proposal is primarily related to the formulation, implementation and management of public policy and not primarily related to wages, hours and conditions of employment.

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3/ The Commission has previously held that the determinations as to class size and student teacher ratios City of Beloit Schools, (11831-C) 9/74), affirmed sub nom City of Beloit v. WERC 73 Wis. 2d 43 (1976); the establishment or maintenance of certain employe positions City of Waukesha (Fire Department) (17830) 5/80 and Milwaukee Board of School Directors (17504 - 17508) 12/79; minimum manpower requirements City of Manitowoc (Fire Department) (18333) 12/80 and City of Brookfield (11489-B, 11500-B) 4/75; and the level of

services City of Brookfield (17947) 7/80 non-mandatory subjects of bargaining because they relate primarily to the formulation or management of public policy.

4/ In Beloit a proposal which provided for layoffs by seniority - "inverse order of the appointment of such teachers" - was found to be a mandatory subject of bargaining.

5/ Section 118.22(2) provides that "on or before March 15 of the school year . . . the board shall give the teacher written notice of renewal or refusal to renew his contract . . ." Section 118.22(3) provides that "At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contract."

Upon appeal in Washington County Circuit Court, Circuit Judge J. Tom Merriam affirmed the Commission's conclusion that there was no duty to bargain as to that portion of the proposal which mandated discussion of the necessity for a layoff. Judge Merriam reversed that portion of the Commission's decision which dealt with the requirement that layoffs be implemented in accordance with the procedures specified by Sec. 118.22 Stats. The Court also reversed the Commission's conclusion as to that portion of the proposal which provided that the layoff of a teacher would commence on the date that he or she completed the teaching contract for the current school year. The Judge Merriam's Order specified:

> IT IS FURTHER ADJUDGED that, although sec. 118.22, Stats., does not include the matter of the suspension of a teacher's employment resulting from a layoff, the petitioner's proposal requiring the District to implement layoffs of teachers in accordance with a time frame consistent with the provisions of sec. 118.22, Stats., is a mandatory subject of bargaining within the meaning of sec. 111.70(1)(d), Stats., and the declaratory ruling of the WERC to that extent is hereby reversed.
>
> IT IS FURTHER ADJUDGED that the Petitioner's proposal regarding the effective date of the implementation of teacher layoffs, which provides that the layoff of each teacher shall commence on the date that he or she completes the teaching contract for the current school year, constitutes a mandatory subject of bargaining within the meaning of sec. 111.70(1)(d), Stats., and the declaratory ruling of the WERC to that extent is hereby reversed.

The Commission and the District sought an appeal of the aforementioned portions of the Circuit Court's order. On October 25, 1983, the Wisconsin Court of Appeals, District II, in an unpublished decision, affirmed the Circuit Court's Order concluding:

> The Wisconsin Employment Relations Commission and West Bend Joint School District No. 1 appeal a judgment reversing in part a WERC declaratory ruling and holding that the district had to bargain a teacher layoff proposal made by the West Bend Education Association. The association proposed that the district comply with sec. 118.22, Stats., 1/ in laying off teachers and that layoff occur when the teaching

contract ends. We conclude that affirmance of the judgment is mandated by Mack v. Joint School District No. 3, 92 Wis. 3d 476, 285, N.W.2d 604 (1979).

In areas in which the WERC has special knowledge and expertise, a court will give deference to its conclusions unless they are without reason or are inconsistent with the purpose of the law. City of Milwaukee v. WERC, 43 Wis. 2d 596, 602, 168 N.W.2d 809, 812 (1969). Although a court should give great weight to the WERC's interpretation of statutes, it is not bound by them. Village of Whitefish Bay v. WERC, 103 Wis. 2d 443, 448, 309, N.W. 2d 17, 20 (Ct. App. 1981).

Here we may not defer to the WERC's interpretation because it is contrary to Mack. Once a layoff clause was included in prior collective bargaining agreements between the West Bend School District and the teachers, such a clause became a mandatory subject of bargaining. See Mack, 92 Wis. 2d at 488-92, 285 N.W.2d at 610-11. Without a bargained provision regulating the timing and implementation of layoffs, the district would be bound by the refusal to renew provision of sec. 118.22. 2/ See id.

On January 17, 1984, the Wisconsin Supreme Court granted the Commission's petition for review of the Court of Appeals' decision.

Turning to the specifics of the Association's proposal, which must be ruled upon within the context of the above quoted decisions, the Commission deems it appropriate to commence that consideration by stating that it remains the opinion of a majority of the Commissioner's that the Commission's decision in West Bend is applicable to the portion of Section 1 which refers to layoffs for the upcoming year and to Section 2 (b) of the Association's proposal and warrants a determination that those provisions are permissive subjects of bargaining for the reasons quoted earlier. The Commission, given the pendency of the appeal before the Wisconsin Supreme Court, does not believe itself to be bound by the unpublished Court of Appeals decision which upheld Judge Merriam's reversal of the Commission's initial determinations as to these matters.

As to the District's objections which focus on the requirement that layoffs be made only for the reasons specified by the District and, in any event, not to circumvent other job security or discipline provisions of the contract, we find the District's objections to be unpersuasive. To the extent that the District cites the possibility of arbitral review of District layoff determinations under this language, we find that possibility to be irrelevant when determining whether a proposal is mandatory or permissive. As the Association points out, that potential exists with respect to virtually every provision in a collective bargaining agreement and, if the District's argument were accepted, it would be a basis for rendering all provisions permissive. We also find no merit in the District's claim that it is an intrusion into its management prerogatives to be required to state the reasons for its layoff decision. Surely, once the District has determined that a layoff is required, that determination is premised upon some reason the revelation of which can in no way intrude upon the decision itself, which has already been made. As the Association notes, the right to know the reasons for a layoff provide the Association, and the employes it represents, with an opportunity to insure that the provisions of the agreement are followed and that the District is not utilizing a layoff to circumvent other provisions of the contract. The District's contention that the Association can always police the agreement by utilizing the grievance procedure does no more than establish that there are many approaches which a union may take when seeking to obtain and insure compliance with a contract. The Association has also properly noted that the reasons for a layoff constitute relevant information to which the Association is entitled so that it may have the opportunity to bargain the impact of the layoff, if appropriate. As we have noted in Sewerage Commission of the City of Milwaukee, 17302 (9/79); Milwaukee Board of School Directors, 20093-A (2/83) and Racine Unified School District, 20652-A and 20653-A, (1/84) the union has the right to obtain copies of permissive subject decisions, rules or policies taken or enacted by the employer in order that it may bargain on the impact thereof. In Racine, supra, we concluded that a proposal which specified that the union shall be given copies of all such decisions so that it could bargain the impact was itself a mandatory subject of bargaining. The District's contention that

there will be no need to bargain over impact during the term of the next contract because both parties have presented full layoff provisions is an irrelevant consideration to our determination as to whether this portion of the proposal is mandatory or permissive. The immediacy of the need for a contractual provision goes to its merits but not to its mandatory or permissive status. As to that portion of Section 1 which precludes "circumvention", the Commission concludes that this portion of the proposal in essence constitutes a variant of a just cause provision which seeks to insure that employes' job security is protected. As it is clear that a just cause provision is a mandatory subject of bargaining, Beloit, supra, we find this provision to be mandatory, as well. In conclusion, as to the District's objections to Section 1, we see no significant intrusion into District prerogatives and find that the objected to proposals have a significant relationship to employe job security and conditions of employment concerns. Therefore, we have found the provisions to be mandatory subjects of bargaining. We note in closing that in our view Section 1 does not constitute the sort of attempt by the majority representative to bargain over the decision to layoff employes which was found to be permissive by the Court in Brookfield, supra.

Several of the District's objections to the remainder of the layoff proposal focus upon the Association's use of "certification" as the definition of teachers who are "qualified" for teaching positions within the District. The District has in essence asserted that it should be free to consider a wide variety of factors in addition to certification when determining whether a specific teacher is qualified to hold a specific position. Initially, it should be noted that the layoff proposal before the Commission in Beloit, supra, on its face, specified that layoffs would occur by seniority and did not contain any reference to certification or qualification. That absence prompted by the Circuit Court and the Supreme Court to comment that seniority based layoff and recall provisions are mandatory so long as they do not prevent the school district from insuring that the remaining teachers are "qualified" to teach the particular subjects in the school curriculum which the district wishes to maintain. Here, the Association proposes that this requirement, which was imposed by the courts, can be met through a statement which provides that the layoff clause not be interpreted "to preclude the Board from retaining, in the case of staff reduction, a staff of teachers who are qualified by virtue of their certification to teach the instructional areas or subjects in the District's curriculum."

The employe interests at stake are substantial. As in the subcontracting situation in Racine Schools 2/ the employe interests at stake here involve job retention/job security. In that way, the instant case is distinguished from those in which it has been held that employer interests predominate as regards the establishment of minimum qualifications for initial hire, promotion, transfer, assignment to available extra-curricular work opportunities, etc. 3/

Here, we consider the employes' job security interests sufficient to warrant the right of their representative to bargain collectively to protect them, so long as the representative's proposal in that regard does not require the District to violate licensure requirements and does not prevent the District from providing courses or services that in the District's judgment ought to be provided and to retain a professional staff that is at least minimally qualified to perform the remaining work. Thus, in Beloit, the language of the Supreme Court's decision appears to have established that to be mandatory, a teacher layoff proposal must "stop . . . short of invading the school board's right to determine the curriculum . . . and to retain, in case of layoff, teachers qualified to teach particular subjects in such curriculum." 73 Wis. 2d at 59-60.

We think the issue of whether certification equals qualification is a close question with good arguments in support of both parties' positions. In the final analysis, while we are persuaded that in most cases certification would assure the District of qualified teachers for the curriculum and programs of its choice.

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2/ 81 Wis. 2d 89 (1977).

3/ E.g., City of Madison, 16590 (10/78); Milwaukee Sewerage Commission, 17302 (9/79); City of Waukesha, 17830 (5/80); Brown County, 19041 (11/81); Milwaukee Board of School Directors, 20093-B (8/83).

There may be situations where such a requirement would prevent the District from offering the curriculum and programs it desires or where certification alone does not permit the District to retain a minimally qualified teacher in all of the grades and subject areas desired.

Thus we conclude that the Association's instant proposal is permissive, but we would find a proposal defining qualified as "by virtue of their certification" mandatory if a proviso were added assuring that strict compliance with certification in layoff and recall decisions is not intended where it would interfere with the District's rights to offer the curriculum and programs of its choice and to retain a teaching staff that is minimally qualified to teach grades and subject areas offered by the District.

In addition, we think it appropriate to comment on the District's contention that in Milwaukee Board of School Directors, 20093-A, (2/83) the Commission held that consideration of factors other than basic qualifications and seniority may be considered when filling vacancies or when making reassignments or transfers. A close examination of our decision in that matter demonstrates that the Commission was interpreting the specific contractual language as granting the employer the flexibility to consider other factors and was not holding that it was a permissive subject of bargaining which the employer therein could unilaterally impose upon the union. Thus, our conclusion in that case is not inconsistent with that reached herein.

Turning to the District's objection which focuses upon its concern that the proposal may seek to alter employe's statutory rights to unemployment compensation, we view the Association's proposal (Section 3, Step 4), as merely specifying that the provision of the proposal will not affect an employe's statutory rights or lack thereof to unemployment compensation. Thus, contrary to the District, we see this proposal as only an effort by the Association to clarify that its intent is not that which the District has premised its objection upon. As we have previously found in Racine, supra, such expressions of intent, when attached to otherwise mandatory subjects of bargaining, are in and of themselves mandatory. Having rejected the District's assertion that this clause potentially conflicts with state statutes as they relate to unemployment compensation, we therefore find the proposal to be mandatory.

As to the District's contentions regarding the "lottery" which would be utilized to break ties in certain circumstances, we find that portion of the proposal to be mandatory as it is a selection method for determining the employment status of employes who are affected by a District decision to reduce staff. Clearly, some method must be utilized in those circumstances to select one employe over another and, although the District may believe that a better method exists, that belief does not preclude the Association from proposing that such situations be resolved by a lottery.

As to the contention that certain portions of the Association's definition of seniority are "discriminatory", it is noted that if one is going to utilize seniority as a criterion for determining the order of layoff and recall, it is necessary to specify how employes who have various employment statuses will be treated as to the continued accumulation of seniority. The Association is free to propose the method reflected in its proposal as the appropriate means of determining how employe seniority will be measured and under what circumstances employes who are not actually teaching will continue to receive unit seniority credit. As seniority is a mandatorily bargainable criterion which must be defined to be meaningful, we conclude that the Association's proposal in that regard is mandatory. If the District views the Association's definition of the term to be inappropriate, the District is of course free to propose that an alternate method be utilized.

As to those portions of the proposal which prohibit the hiring of new employes while there are employes on layoff status who are available and certified to fill the vacancies, we note that the Commission in Beloit, supra, found an essentially parallel provision to be a mandatory subject of bargaining. We are persuaded that that conclusion was correct given the intimate relationship between employe job security and such a proposal and the lack of any significant impact upon management prerogatives or educational policy. We again note however that this proposal requires that teachers on layoff be "certified" for such a vacancy. As with other portions of this proposal where "certified" may not be sufficient to

meet the District's need for a minimally "qualified" teaching staff, the use of this term renders this specific portion of the proposal permissive. As to the District's objection to the proposal's provision that an employe on partial layoff may not be precluded from securing other employment, the Commission in Beloit, supra, also found such a provision to be mandatory and we again confirm the continuing validity of that conclusion. As the Association has noted, the District is free to pursue its concern that such employes may not be able to adequately function on a part-time basis through the right to discipline employes who are performing unsatisfactorily.

CONCURRING OPINION OF COMMISSIONER GRATZ CONCERNING PROPOSAL 5

I am separately concurring as regards the status of Article VIII. Sec. 2 (b) of the Association's Staff Reduction proposal requiring that layoffs of teachers be implemented in accordance with a time frame consistent with the provisions of Sec. 118.22, Stats., that the Board give written notice to the teachers it has selected for layoff on or before March 15, and that the layoff of each teacher shall commence on the date he or she completes the teaching contract for the current school year.

I wish to make it clear that I agree with my colleagues' holding herein that those proposal portions are nonmandatory subjects of bargaining only if and so long as the majority opinion in Mack remains a controlling precedent.

Understandably, the parties and the Commission in its decision, above, have all approached these issues on the premise that the majority opinion in Mack is a controlling interpretation of the relationship between MERA and Sec. 118.22. However, Mack was a 5-4 decision, there have been post-Mack changes in the composition of the Supreme Court, and that Court has recently accepted West Bend on Certiorari. In the event that the foregoing may signal a possible reconsideration of underlying viability of the majority opinion in Mack, it seems to me worth noting my view that if the dissenting opinion in Mack were to become the controlling rule of law, then the above-noted proposals would be mandatory subjects of bargaining as written.

The four dissenting Justices in Mack argued that the job security provided by the individual teaching contract provisions and related procedural requirements of Sec. 118.22, Stats., (as it then read) ought not be subject to diminution or change through bargaining, individual or collective, mandatory or nonmandatory. So viewed, Sec. 118.22 would render an unlimited Brookfield right to layoff inapplicable to employes covered by that Section and would, instead, require compliance with the provisions of Sec. 118.22 as the means--aside from discharges--for affecting the job security of employes covered by Sec. 118.22. The Legislature's post-Mack addition of Sec. 118.22(4), Stats., would enable permissive subject bargaining to alter those statutory job security provisions, but it would not permit either party to compel collective bargaining on such matters.

Accordingly, given the addition of Sec. 118.22(4), if the Mack dissent were to become the controlling rule of law, then layoff proposals concerning teachers covered by Sec. 118.22 which deviate from the time frame and other job security protections set forth in Sec. 118.22 would be permissive subjects of bargaining, but proposals such as those at issue herein that conform precisely to Sec. 118.22 would be mandatory subjects of bargaining.

Given the present state of the law, however, the instant proposal must be viewed in the context of the Mack majority's perspective that statutory nonrenewal and layoff are processes wholly independent from one another. In that context, Sec. 118.22 constitutes no impediment to applying the Brookfield rule to layoffs of Sec. 118.22-covered teachers, the same as it would be applied to layoffs of any other MERA-covered employes. Since--for the reasons noted by the Commission in West Bend--the instant proposal portions do impermissibly interfere with a Brookfield right to layoff, the instant proposals are nonmandatory subjects of bargaining.

In sum, so long as the Mack majority opinion remains the law, the District enjoys a Brookfield right to layoff despite the language of Sec. 118.22, and proposals of the sort involved herein are nonmandatory subjects because they impermissibly interfere with the District's exercise of that right. If the Mack

dissent becomes the law, however, the instant proposals would be mandatory subjects of bargaining because Brookfield would be rendered inapplicable to employes covered by Sec. 118.22.

The disputed proposal is as follows:

Personnel File of Teacher

(6) Section 1. A teacher shall have the right, upon request, to review the contents of his/her personnel file; to have a representative of the Association accompany him/her during such review; to receive copies of any material contained in that personnel file; to respond in writing to any material which the District has included in the teacher's personnel file, and to have that written response included in the personnel file; and to secure the removal of any inaccurate informational material contained in the teacher's personnel file. The provisions of this section shall not be interpreted or applied in a manner which is contrary to state law (e.g., Chapter 19 and section 103.13, Stats.) and shall not require disclosure or review of material which the District has determined is exempt under section 103.13, Stats.

The District objects to this proposal because it asserts that it impermissibly obstructs management control of records. The District also contends that the matter of the removal or retention of claimed inaccurate material contained in the personnel record does not primarily affect wages, hours and conditions of employment. The District alleges that this proposal would allow a teacher to exercise the right of review of a file out of the presence of the official custodian of the records and that a proposal which could compel the District to part with an official District record does not primarily relate to wages, hours and conditions of employment, particularly so where, as here, the removal from the custodian is not limited in length of time. The District also asserts that as the proposal does not limit the District's obligation to provide the file to normal business hours or normal business days, an issue arises as to whether the proposal puts the District in the position of bargaining as to when non-bargaining unit employes will be available to accomodate unit employes and/or their Association's representatives. The District argues that further intrusion into management prerogatives is reflected in the proposal's attempt to limit the District to maintenance of a single personnel file for each teacher. The District asserts that this specification obstructs management's right to retain official records or copies of same in a number of locations for the convenience of other District personnel. The District also contends that this portion of the proposal could preclude the District from retaining any personnel record, note or document not up to "personnel file" standards. The District asserts that the proposal also seeks a right to unlimited copies of "file material" and thus interferes with the District's right to impose reasonable limitations and rules on numbers or frequency of copies, or the cost of copies. At a minimum, the District alleges that any attempt to impose limitations or controls upon access to records and copies would be subject to arbitration, with its uncertainties, expenses and delays. The District argues that the public custodian's authority over official records cannot be exposed to the vagaries of labor arbitration. Thus, the District asserts that either directly or by implication, the proposal transfers control of District records for all practical purposes to individuals whose responsibilities and interests may not be consistent with the District's obligation to preserve and maintain all records.

Turning to that portion of the proposal which would require removal of inaccurate material, the District notes initially that it does not object to the portion of the proposal which recites a teacher's right to respond in writing to any material which is inserted in the personnel file and to have such a response also inserted into said file. The District argues that the instant proposal goes much farther than the proposal found mandatory in Beloit, supra, when it includes an obligation to remove inaccurate materials. The District contends that the primary effect of such a proposal is that the District either removes whatever the teacher claims is inacurrate or invests the time and resources necessary to establish accuracy. The District asserts that the primary effect of this proposal has little to do with teachers' wages, hours and conditions of employment. Under the proposal, the District argues that it would not matter that the teacher had

failed to object to the insertion of the material initially, or that the teacher could have but did not file a written response to the challenged material, or that the person responsibile for the disputed material had moved out of the state and the cost of returning him/her would be substantial, or that the author was deceased, or indeed that the decision to challenge "accuracy" seemed to be a product of the very unavailability of the person(s) who could establish accuracy. The District alleges that this portion of the proposal would require the diversion of huge personal and financial resources by the District and would chill administrators from inserting anything in a teacher's file which might later be challenged for any reason. The District contends that ultimately it would only be in the most unusual circumstance that the District could justify the costs of litigation when balanced against a teacher's claim of inaccuracy.

The District also contends that any mention of parental complaints in the file would now be subject to a forum where disclosure of the parent's identity could be compelled dispite reasonable concerns of the effect on the student. Of course, the District asserts that it could balance these consequences and not force disclosure by removing the challenged material. The District asserts that the Association failed to present any evidence to establish any primary relationship between this proposal and teachers' wages, hours and conditions of employment.

The District further argues that unless the District retained "removed" information and documents in a separate file, the proposal would require destruction of same. The District asserts that this may be contrary to statute, Secs. 19.21(6), 19.35(5), 16.61(3)(b)(e), and 946.12, Stats. Yet retention might violate the "one file only" requirement contained in the proposal. The District further asserts that it is not necessary, nor mandatory, to bargain about converting official District personnel files into sanitized, meaningless records. Nor, the District contends, is the effect of doing so one which relates primarily to employes wages, hours and conditions of employment. The District argues that conditions of employment concerns are met by the right to file a written response, which assures a balanced factual record and puts users of the file on notice of factual disputes. Such proposals also, however, allow personnel files to remain repositories of information the District determines merits retention. The District asserts that the Association's proposal here does not.

As to the Association's contention that this proposal is "conceptually and substantively identical" to the proposal held to be mandatory in Beloit, supra, the District asserts that the Association misreads both its own proposal and the Court's decision in Beloit. The District notes that in Beloit the proposal was limited to only those documents "which have effect on evaluation or continued employment". The District asserts that in this case the record is silent as to the breadth of the Association's proposal. The District also argues that unlike the proposal in Beloit, which permitted the removal of material determined by the District to be "obsolete", the instant proposal compels removal of "any inaccurate informational material". The District contends that such compulsion would presumably require the District to discard entire documents simply because of one inacurrate item. At a minimum, the District asserts that it would be faced with the prospect of turning its records into pieces of swiss cheese as it excised the offending word or phrase. Where, as here, the employe can respond, in writing, to any material in the file, the District argues that the compulsion of removal adds nothing to concerns of "evaluation or continued employment". The District argues that said compulsion does, however, interfere with the District's right to manage its property and records and thus, requests that the Commission find this proposal to be permissive.

The Association asserts that its proposal is conceptually and substantively identical to the teacher files proposal held to constitute a mandatory subject of bargaining by the Commission and the Court in Beloit. The Association contends that the only difference between the two proposals is that the proposal herein contains an express proviso that it may not be interpreted or applied in a manner contrary to Wisconsin's public records laws. The Association asserts that not one of the District's arguments in support of its assertion that the proposal "impermissibly obstructs management control of records" is supported by either the language or the intent of the Association's proposal. The Association denies that its proposal would allow the teacher to exercise the right of review out of the presence of the official custodian of the records or that the proposal requires or even implies that the teacher could compel the District to comply with the obligations set forth therein at a time outside the normal District business hours

and days. The Association argues that the District's contention that the proposal, simply by its use of the singular "file", could reasonably be interpreted to obstruct "management's rights to maintain official records in multiple locations" is patently absurd. Even more outrageous in the Association's view is the District's assertion that the proposal's use of the term "copies" gives teachers the right to unlimited copies of file material and "amounts to a blank check on the public treasury". The Association asserts the proposal is clearly intended to grant a teacher the right to receive at District expense one copy of any particular written matter contained in the file. The Association asserts that this right was held to constitute a mandatory subject of bargaining in Beloit. Finally, the Association asserts that the right to secure removal of any inaccurate information or material contained in the file, as stated in this proposal, was upheld as mandatorily bargainable in Beloit. The Association therefore requests that the Commission find the proposal to be mandatory.

Discussion of Proposal 6

In Beloit, supra, the Commission was confronted with determining the status of the following proposal:

> "G.1. A teacher shall have the right, upon request, to review the contents of his personnel file and to receive copies at District expense of any documents contained therein. A teacher shall be entitled to have a representative of the Association accompany him during such review. At least once every two (2) years, a teacher shall have the right to indicate those documents and/or other materials in his file which he belives to be obsolete or otherwise inappropriate to retain. Said documents shall be reviewed by the superintendent or his designee and if, in fact, they are obsolete or otherwise inappropriate to retain, they shall be destroyed.
>
> No material derogatory to a teacher's conduct, service, character or personality shall be placed in his personnel file unless the teacher has had the opportunity to review the material. The teacher shall acknowledge that he has had the opportunity to review such material by affixing his signature to the copy to be filed with express understanding that such signature in no way indicates agreement with the contents thereof. The teacher shall also have the right to submit a written answer to such material and his answer shall be reviewed by the superintendent or his designee and attached to the file copy."

The Commission found the foregoing proposal to be a mandatory subject of bargaining concluding that "These proposals, as those pertaining to teacher evaluation and supervision, relate directly to the teacher's ability to respond to 'threats' to continued employment."

Upon review in Dane County Circuit Court, Reserve Circuit Judge Currie upheld the Commission's determination. When doing so, Judge Currie held as follows:

> (b) Teacher Files and Records
>
> The Association proposed that all complaints against teachers be written, called to the teacher's attention, and review given to a teacher's answer. Only complaints which "may have an effect on (a teacher's) evaluation or his continued employment" are covered. See Finding #4, F., p. 4. In addition, the Association proposed that a teacher could review his file; that obsolete or otherwise inappropriate matters be deleted; that a teacher have notice of derogatory matter included in his file and an opportunity to include a written answer. See Findings of Fact #4, G., p. 4.
>
> WERC found these proposals primarily to relate to wages, hours, and conditions of employment. See Finding of Fact #8, B., and its amendment of October 17, 1974. Its rationale

incorporated the rationale as to teacher supervision and evaluation, and added (Memorandum, p. 20):

> ". . . These proposals . . . relate directly to the teacher's ability to respond to 'threats' to continued employment."

The School Board's brief makes this attack upon WERC's ruling:

> "Limitations as to the form of the complaints and their availability to teachers would inhibit the community in reacting to the education being provided for it. The School Board has a legitmate interest and perhaps even an absolute responsibility to keep open all lines of communication and to encourage frank and candid expressions of opinion among those it serves. . . .
>
> "Limitations as to the scope and contents of files and mandatory teacher access thereto would intrude drastically upon the relationship between the School Board and its administrators. . . ."

It should be noted that the Association's proposal would not prohibit the School Board from receiving verbal complaints against a teacher or investigating them. Only those which have effect on his evaluation or continued employment are required to be in writing. The Court is unable to perceive why limiting the scope and contents of a teacher's personnel file, and giving access to the teacher to his file record, intrude drastically upon the relationship between the School Board and its administrators. This argument fails to distinguish between the process of administrators reaching a determination as to whether a matter is material enough to warrant placing it in a teacher's file, and the actual placing of it in the file. The School Board concedes that the use of its files against a teacher is bargainable.

The purpose of keeping teacher files is for the purpose of evaluating teachers and may well effect (sic) their continued employment.

The Court determines that WERC's ruling with respect to teacher files and records not being concerned with basic educational policy but primarily affecting wages, hours and conditions of employment, rests on a rational basis.

The Wisconsin Supreme Court also confirmed the Commission's holding as follows:

> (4) (B) Teacher files. The teachers' association suggested as required bargaining matters certain proposals concerning teacher files and records. 18/ The commission found these proposals to relate primarily to "wages, hours and conditions of employment," with bargaining required. The commission incorporated the rationale of its holding as to teacher evaluation, and the reviewing court affirmed, holding the purpose of keeping teacher files to be "for the purpose of evaluating teachers and may well affect their continued employment." Once again it is clear that the proposals relate to "management and direction" as well as to "wages, hours and conditions of employment." However the trial court noted that the proposals go only to those complaints or files which have effect on evaluation or continued employment. So limited, the scope of a teacher's personnel file and the right of teacher access to it would appear to relate primarily to "wages, hours

and conditions of employment." At least, on the record before us, we affirm the commission holding as to teacher files and records.

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18/ The proposals can be summarized as follows: "Teacher Files and Records (1) Review of personal files and copies of contents therein, and entitlement to representation to representation of such review, (2) Identification of obsolete matters in teacher files, and if obsolete, or otherwise inappropriate to retain, the same shall be destroyed, (3) Prior review of derogatory material and right to submit written answer thereto, the latter to be included in personnel file, (4) Conclusion of final evaluation prior to severance, and exclusion of material, received after severance or following receipt of notice of resignation or notice of 'consideration of non-renewal' from teacher files, (5) Limitation on establishment of more than one file per teacher, and (6) Notification, in writing, to teacher of alleged delinquencies, indication of expected correction, and time period therefor, as well as notification of breaches of discipline, and, where possibility of termination exists, notification thereof to Beloit Education Association."

We initially note that, as the Association has argued, all portions of its proposal which precede the specification that the proposal shall not be interpreted or applied in a matter contrary to law, have been ruled upon and found mandatory in Beloit, supra, by both the Commission and the Wisconsin Supreme Court. We nonetheless feel it is important to comment on several aspects of those decisions as well as certain arguments raised by the District herein.

When interpreting the Association's proposal in Beloit, supra, Judge Currie also looked to an Association proposal which specified:

> F. Any complaints regarding a teacher, which may have an effect on his evaluation or his continued employment, that are made to the administration by any parent, student or other person shall be in writing and shall be promptly called to the teacher's attention. Said teacher shall have the right to answer any complaints and his answer shall be reviewed by the administrator and attached to the filed complaint.

Although he had previously found this above quoted language to be mandatory, Judge Currie nonetheless included reference to it in his discussion of the Teacher Files and Records proposal, presumably due to the interrelationship between the two proposals. We note that neither the proposal in Beloit, nor the proposal at issue herein specify that only complaints which "have effect on evaluation or continued employment" are covered by the proposal. Instead, the proposal in Beloit and here simply specifies the right to review etc. whatever written materials are placed in a "personal" or "personnel" file. When the Supreme Court reviewed the teacher files proposal, it read Judge Currie's discussion of the issue as if the proposal in question did contain an explicit statement that the scope of the proposal was limited to complaints or files which have an effect on evaluation or continued employment. The Court then proceeded to find that given this limitation, the proposal primarily related to "wages, hours and conditions of employment."

We do not view the absence of such a restriction in the proposal herein to place that proposal outside the scope of the Court's holding in Beloit. Instead, the Supreme Court in Beloit properly focused upon the reason why a proposal, such as that herein and that in Beloit, are primarily related to wages, hours and conditions of employment. That relationship is established because matters in a personnel file may well be utilized to evaluate a teacher for the purpose of

deciding whether that teacher should continue to be employed, or whether that teacher should be subjected to some lesser form of discipline. As the Commission found in Beloit, the proposal there (and the proposal here) relate "directly to the teacher's ability to respond to 'threats' to continued employment." As it is reasonable to conclude that the District might attempt to utilize the entire content of an employe's personnel file may be utilized for the purposes of evaluating the employe's job performance, we do not view the Court's decision as imposing any explicit requirement that a proposal such as that herein contain a statement that it only applies to the content of a personnel file which may "have effect on evaluation or continued employment."

As to those District arguments which assert that compliance with this proposal may conflict with the District's obligations under the law, we find that the specification in the proposal that it shall not be "interpreted or applied" in a manner which is contrary to law to dispose of the merits of such arguments. As to the District's contentions regarding the administrative or cost burdens which such a proposal may impose, or the inhibiting effect it may have on District personnel we find such contentions to go to the merits of whether such a proposal should appear in a contract and not to its mandatory or permissive status. Under the District's arguments, a "just cause" provision would be found to be permissive because of the great expense and uncertainty which would face the District when it chose to discipline an employe under that standard. We find no support for such an argument in either prior Commission decisions or in the holdings of the courts. We also find that the proposal, as reasonably interpreted, does not require the destruction of documents; does not preclude the District from having a non-unit person present during review of the file; does not require that the District make the file available during non-business times or days; does not preclude the District from keeping copies of an employe's personnel file in several locations; and does not give the Association the right to more than one copy of any material contained in the file. We also again note that arguments such as these go to the merits of the proposal and not to its mandatory/permissive status. Given the foregoing, we find this proposal to primarily relate to wages, hours and conditions of employment and thus to be a mandatory subject of bargaining.

(7) The disputed language herein is as follows:

> Section 1. The District shall determine the number and type of work assignments (within a teacher(s) area of certification) which teachers shall perform during the regular teacher workday. The District shall establish the amount of student-contact time (e.g., classroom instruction, study halls, and student supervisory periods) and preparation time within the regular teacher workday to which a teacher is assigned. The District will endeavor to provide relatively equal work loads.

In Section 1, the District alleges that the Association proposes bargaining over the "number and type of teacher work assignments", the amount of assigned "student-contact time . . . and preparation of time", and an obligation for the District to provide "relatively equal work loads". The District asserts that these subjects are permissive under Wisconsin law. Milwaukee Board of School Directors, 20093-A (2/83); Oak Creek Education Association, 11827-D,E (1974). The District argues that teacher assigments involve assessments of student needs and staff abilities and availability. It contends that the questions of who teaches what, to whom, and when require first and paramount consideration to the needs of the students. It argues that talk of "equal workloads" in this context is meaningless. The District asserts that in public education, the concept of "equal workloads" for teachers defies definition because of differences in students creativity, maturity, general behavorial characteristics and academic subject areas. Technological innovation and limited equipment access similarly affect the workload issue. As it contends that these matters are basic to educational policy, the District asserts that this portion of the Association's proposal is permissive.

In its supplemental brief, the District renews its contention that this proposal contains an implied restriction on the ability of the District to make assignments outside the regular teacher work day. The District points out that during the February 24, 1984 hearing, counsel for the Association noted that if the Commission found all of proposal 7 permissive, it would be of no consequence

and that references to the "regular teacher work day" were "unnecessary and may be misleading." The District therefore requests that the Commission find proposal 7 to be a permissive subject of bargaining.

The Association asserts that proposal 7 is intended to make it clear that the Association does not wish to intrude upon the District's ability to determine the nature and number of work assignments to be given to a teacher or how those assignments will be distributed during the teacher work day. The Association asserts that this intention becomes clearer when one refers to proposals 9 and 10 which set forth the economic consequences, if any, of various District determinations as to the teacher's class sizes and work day allocation. Thus, while admitting that the disclaimer portion of this proposal is not, standing alone, a mandatory subject of bargaining, the Association asserts that the relationship of this disclaimer to other proposals should be a basis for the Commission concluding that this portion of the proposal is mandatory if the provisions to which the disclaimer relates are found to be mandatory. The Association alleges that proposal 7 has two substantive aspects: (1) a requirement that teacher assignments be limited to those which a teacher can legally perform without risk of job loss; and (2) that the District will endeavor to provide relatively equal workloads during the regular teacher work day. As to the first requirement, the Association asserts that it is only attempting to parallel the status of the law and provide teachers with job security protections which will preclude the District from making illegal assignments. As to second requirement, the Association asserts that the equal work load requirement is a very weak intrusion into the District's ability to make assignments which represents something akin to a philosophical statement of the desirability of relatively equal workloads for employes. The Association argues that both substantive portions of proposal 7 should be found mandatory as well.

As to the concerns expressed by the District as to whether proposal 7 can reasonably be interpreted as preventing the District from making assignments outside the regular teacher work day, the Association expressly disclaims any such intention. In this regard, the Association directs attention to proposal 8 which, in Section 2 (b), makes reference to "work assignments". The Association contends that it clearly remains the District's prerogative to make work assignments outside the regular work day under Section 2 (b) and that proposal 7 should be interpreted in light of this subsequent contractual language.

Dicussion of Proposal 7

We reject the District's assertion that the first two sentences of Section 1 constitute an attempt by the Association to bargain over the allocation of the teacher work day, the number and type of work assignments, or the amount of student contact time and preparation time which a teacher may receive. Rather we see these two sentences as an effort by the Association to make clear that the intent of proposals 9 and 10 is to avoid dictating any specific educational policy choice in these areas. These two sentences, like the first sentence of Section 7 (a), which will be discussed in the context of Association's proposal 10, form a basis for ascertaining a proponents intent when making a proposal and, if the subject of that intent is a mandatory subject of bargaining, introductory prefaces such as these two sentences are also mandatory. As our later discussion will indicate, we have found the subjects of these interpretative sentences to be mandatory and thus these sentences are mandatory as well.

We turn now to the sentence which proposes a District duty "to endeavor to provide relatively equal work loads". While the Association can mandatorily bargain to protect its bargaining unit members from being singled out with an unusually heavy workload arbitrarily or for illegal or other specified impermissible reasons, and can further bargain for compensation in the event that a teacher's load varies from a specified workload, the instant proposal goes beyond such protection. In our view, it interferes with educational policy judgments which may often legitimately yield unequal work loads. Accordingly, we find this sentence, as written, to be a permissive subject of bargaining. We also find permissive the portion of the proposal which limits District assignment discretion to "area of certification". While the purpose expressed by the Association regarding this requirement, protection of job security by prohibiting illegal assignments, is mandatory, the instant proposal expresses that concern so broadly as to impermissibly interfere with District prerogatives to seek temporary

licensure from the Department of Public Instruction. See Racine Unified School District, supra, page 17. Thus we find that portion of the proposal permissive as well.

(8) The disputed language is as follows:

Section 2. Regular Teacher Workday.

a. The regular teacher workday for employes covered by this Agreement shall be as follows:

Elementary (grades pre-K-6): 8:15 a.m. to 3:00 p.m.

Secondary (grades 7-12): 7:45 a.m. to 3:45 p.m.

The regular teacher workday shall include a duty-free lunch period consisting of thirty (30) minutes.

b. All work assignments scheduled for performance outside the regular teacher workday shall be considered overtime assignments. Unless compensation for such overtime assignments is provided for elsewhere in this Agreement, teachers assigned such overtime assignments shall be compensated, in addition to their scheduled salaries, at the rate of $10.00 per hour, with a one-hour minimum payment per assignment.

c. As used in this Article, a teacher's regular hour rate of pay shall be determined by dividing the teacher's yearly salary by the product of 190 (contract days per year) x 8 (hours per workday).

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

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

As to the Association's reliance on the Commission's decisions in City of Wauwatosa, 15917 (11/77), Madison Metropolitan School District, 16598 (10/78) and City of Brookfield, 17947 (7/80), the District notes that each of those cases recognize that the impact on working conditions had to be measured against the impact on "decision-making as to the delivery of services". Moreover, the District argues that while the Commission has held that the impact of the proposal

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

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

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

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

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

would have a harmful impact on the District's ability to honor student's educational needs.

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

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

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

As to proposal 8, the District contends that it does not have a "regular teacher work day" although it does have an availability requirement that teachers be present in the building fifteen minutes before and after the commencement and conclusion of the student class. The District asserts that this requirement only establishes the minimum access requirement of teachers to the students they teach and that state law vests in the District the exclusive authority under Sec. 120.12 (15), Stats. to establish the normal school day. The District alleges that there are many professional teacher duty assignments which are either can not be performed or which are ill-suited to performance during the normal school day. It also contends that the starting and ending times for the school day are matters of educational policy which change according to the District's needs. Under the

Association's proposal, the District argues that it would not be able to change the regular teacher work day and thus necessarily could not change the normal student day. Although it is aware that the Association contends that the District retains the unrestricted right to schedule the hours of students and teachers, the District reasserts its position that the term "regular" seems to raise a question as to the reasonableness of such an interpretation of the Association's proposal. The District further argues that there is no evidence in the record of this case that changing the starting and ending times but retaining a constant length of the regular work day has an impact on teachers. It asserts that it should not be required to bargain over such a proposal simply because it involves the concept of "hours".

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

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

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

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

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

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

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

Discussion of Proposal 8

We initially conclude that the Racine Education Association's memorandum was properly excluded from the record by the Examiner. The proposals before us here will be examined based upon the word choice and arguments of the Janesville

Education Association and not the post decision propaganda distributed by a labor organization in a different case.

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

We commence our consideration of proposal 8 by concluding that the proposal can reasonably be interpreted as allowing the District the discretion to assign teachers duties outside the hours specified therein. Indeed, the Association asserts and we concur with a conclusion that the District retains the discretion to require any or all teachers to perform work assignments on a daily basis outside the hours specified in the proposal. Thus, while the specified times currently parallel the existing student school day and the record further reflects that the District has no current plans to alter that day, the District could, without violating this proposal, establish a school day outside the parameters of the hours set forth in the proposal subject only to the payment of the overtime rate contained therein. Thus, we reject the District's contention that this proposal could prevent the District from requiring that teachers be present during a school day the times of which were different than those specified in the proposal. Therefore, contrary to the District's claim, we find that this proposal has no effect in the District's prerogative to schedule school at times and for lengths of time which it deems educationally appropriate and does not prevent the District from providing the basic service for which it utilizes the teachers.

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

The Association's proposal also establishes the starting and ending times of the work day for which an employe will receive his or her basic salary. The District has argued that there is no impact upon employe wages, hours and conditions of employment involved in this portion of the proposal. We disagree. Although we have earlier concluded that this proposal does not prevent the District from requiring employes (even on a daily basis) to perform duties outside of the hours specified in the proposal, we have also noted that under the terms of the proposal, such would be compensable by overtime pay in addition to the teacher's salary schedule compensation. Employe interests in being compensated if the starting and ending time of his or her work day fall outside those preferred by the employe relate to employe preferences as to the scheduling of their own non-work activities with family members or friends. The Association's proposal

presumably reflects an employe interest in not working--except at overtime rates--at times such as evening or night which might conflict with the non-work time of family or friends or early morning which might conflict with daily family preparations or other preferred personal or transportation routines. Since we have earlier concluded that this proposal does not prevent the District from requiring employes to perform duties (even on a daily basis) outside of the hour's specified in the proposal, we find tht this proposal does not interfere with management prerogatives or educational policy choices. Thus, we find the proposal to be a mandatory subject of bargaining.

The disputed language is as follows:

(9) Section 3. Elementary School Grades Pre-K-6).

a. Elementary school teachers (grades Pre-K - 6) to whom the District does not provide five (5) hours of preparation time per week during the student school day shall receive compensation, in addition to their scheduled salaries, at the teacher's regular hourly rate of pay for each such hour less than five (5) per week provided by the District.

b. 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 day ends but before the regular teacher workday ends.

Section 4. Secondary School (Grades 7-12).

a. Secondary school teachers (grades 7-12) who are assigned no more than five (5) hours of classroom instructions or student supervision (e.g., study hall, laboratory, or other supervision) per workday, averaged on a semester basis, shall be compensated in accordance with the provisions of the Salary Schedule, unless otherwise provided in this Agreement.

b. The District may assign work to secondary school teachers in addition to the basic assigned workload described above in subsection a. Teachers whose workloads exceed those compensated by the Salary Schedule, as provided above in subsection a., shall be compensated, in addition to their scheduled salaries, as follows: A teacher to whom the District chooses to assign more than five (5) hours of classroom instruction and student supervision per workday, averaged on a semester basis, shall receive additional compensation at the teacher's regular hourly rate of pay for each additional hour of assigned classroom instruction or student supervision in excess of five (5) per workday.

c. Study Halls. In the event that only one teacher is assigned to a study hall at the secondary school level to which more than fifty (50) students are assigned, that teacher shall receive compensation in addition to the teacher's scheduled salary at the rate of one-half (1/2) times the teacher's regular hourly rate of pay for each such study hall period.

Section 5. For teachers with less than full-time contracts with the District, the amounts of preparation time and/or workloads described above in sections 3 and 4, and the additional compensation provided in sections 3 and 4, shall be prorated according to the percentage of a full-time contraCt held by such teachers.

In Section 3 (a) of the proposal, the District contends that the Association seeks to regulate the allocation of the elementary teachers' time. The District contends that the Association does so by calling for additional compensation at a rate calculated pursuant to Section 2 (c) for any week in which at least five

hours of preparation time is not provided. As the allocation of the time and energies of teachers is a consequence of basic educational policy decisions, the District asserts that this proposal is not a mandatory subject of bargaining. Oak Creek-Franklin Jt. School District, 11827-D,E (9/74) aff'd Dane Co. Cir. Ct. (11/75) Milwaukee Board of School Directors, 20093-A (2/83).

The District asserts that Section 3 also does not constitute an appropriate "impact" proposal. First, the District argues that there is no evidence of impact when an elementary teacher fails to have five preparation periods per week. It alleges that there is no evidentiary basis for concluding that a teacher without five preparation hours a week during the students school day must work harder or do more than a teacher with one or two preparation periods per week. The District further contends that there is no evidence that the compensation historically paid to teachers in Janesville has included five (or any) hours of preparation time per week, during the student day or otherwise. Secondly, the District contends that there is no showing that preparation time received at times other than "during the students school day" is different than preparation time received during the student school day. The fact that the Association's proposal makes this distinction does, in the District's judgment, illustrate that the true purpose of the proposal is to regulate the amount of student-teacher contact time. Thirdly, the District avers that the proposal utilizes a compensation formula which includes an eight hour work day. The District notes that the work day proposal actually calls for a six and three quarter hour work day. It again asserts that a proposal does not become "impact" proposal simply because the Association has devised a way to put a dollar value on something it thinks is bad policy.

The District asserts that preparation is work time the loss of which primarily means that the education provided the student may suffer. The District asserts that this is a basic educational policy matter which does not primarily affect wages, hours and conditions of employment of its employes. The District argues that Section 3 is also objectionable because it seeks to regulate the allocation of the teacher's time prior to the start of the student day by specifying that such time is "unassigned". It therefore contends that Section 3(b) of the proposal is also an attempt to bargain the allocation of the teacher's time and energy during the work day. In summary the District contends that the Association's proposal is permissive because it deals with an established permissive subject of bargaining without evidence of impact on the employes. The District argues that the proposal cannot be labeled an impact proposal on this record and that any assertions of impact are not proof and should not be considered. In any event, the District alleges that the primary effect of this aspect of the proposal is to negotiate the allocation of the time and energy of the employes.

As to Section 4, the District reasserts the arguments which it made as to the Association's elementary teacher preparation time proposal. In addition, the District argues that Section 4 seeks to require bargaining on the scope of the duties performed during the work day contending that under the proposal, teachers will perform five hours (at most) of the type of work specified during the work day with the remainder of the work day assigned to other duties or not assigned at all. As the length or number of class periods and the work day content are not mandatory subjects of bargaining, the District contends that this proposal is permissive.

The District also asserts that there is no evidence in the record that more than five hours of supervision assignments involves a greater work load than five hours of such assignments and argues that whatever impact is asserted by the Association should be balanced against the substantial evidence of impact the proposal would have upon District policy. The District contends that the absence of impact is further evidenced by the absence of logic in the proposed compensation. It notes that under the Association's proposal while the teacher work day is seven and one-half hours in length, a high school teacher working more than five hours of classroom instruction/student supervision a day receives more money. The District contends that this evidences the Association's intent to use the back door - a so called impact proposal - to bargain subjects it has no right to bargain through the front door. The District alleges that the Association cannot do so without establishing that the use of the back door is not a subterfuge to remove from the District's discretion decisions which belong with the District and are not mandatorily bargainable.

The District asserts that Section 4 of the Association's proposal relating to study hall is permissive because there is no evidence in the record as to whether and how a fifty-first student assigned to a study hall affects the supervising teacher's conditions of employment. Thus, the District argues that the impact on the District's resource utilization and educational policies is greater than any conceivable impact upon employe wages, hours and conditions of employment.

Turning to Section 5 of the proposal, the District contends that it suffers from the same infirmities applicable to Sections 3 and 4 plus the unwarranted assumption that even if impact as to a full-time teacher was demonstrated in areas like preparation period assignments, such impact would not necessarily affect part-time teachers.

In response to the arguments made by the Association, the District asserts that the Commission's decision in Oak Creek, supra, does not warrant a conclusion that the Association's proposals as to preparation time are mandatory. While admitting that both the Commission and the circuit court held that the impact upon the employe's wages, hours and conditions of employment of District decisions as to the amount of preparation time received by an employe was mandatorily bargainable, the District contends that the Commission cited no evidence in that case to support its presumption that the number of preparation periods has "direct affects on a teacher's working conditions". Thus, the District argues that where, as here, a proposal is intimately tied to matters of educational policy (e.g. the amount of instructional time), there should be something more than a presumption of impact. If, as the Commission and the courts have repeatedly held, the impact on working conditions is to be balanced against the impact on educational policy, Beloit, 73 Wis. 2d at 53; Racine County, 81 Wis. 2d at 95; Milwaukee Board of School Directors, 18995 (9/81) at 32, then there must be a factual basis on the record to support that analysis. Milwaukee Board of School Directors, 20093-A (2/83) at 54. As the Association made no attempt to create a factual record in this case, its failure to do so bars a finding that the proposal is mandatorily bargainable. The District also reminds the Commission that the proposal in this case does not merely assign a dollar value to preparation periods. The District contends that the proposal also restricts the time of day during which the District may assign a preparation period. The District contends that the proposal which regulates when preparation periods are to occur (or at least are to be given credit for) bears such an oblique relationship to working conditions that it must be found to be permissive, whether or not the proposal is ultimately phrased in dollar term figures. The District also submits that this aspect of the proposal identifies no impact on teacher's conditions of employment unless it is the Association's view that teachers are free to do nothing unless the students are at school. The District argues that if that is the purpose of the proposal, it is unlawful since it would require payment for services not performed.

In response to the District's arguments that the Association's preparation time impact proposals are permissive because they interfere with the District's decisions regarding the allocation of a teacher's time during the work day, the Association asserts that Section 1 of its proposal expressly recognizes the District's right to unilaterally establish the amount of student-contact time and preparation time to which a teacher is assigned and that Sections 3 and 4 of the proposal do not require the District to provide teachers with any specific amount of preparation time during the work day. The Association argues that the proposals require only that additional compensation be paid to elementary school teachers who are not provided with five hours of preparation time per week, and that secondary school teachers who are assigned more than average of five hours of classroom instruction or student supervision per work day, and who thereby receive less preparation time and are required to perform more student-contact/teaching work, shall receive additional compensation. The Association denies the District's contention that Section 3(b) requires that teacher's working time which is internal to the regular teacher work day but external to the student day remain "unassigned". It asserts that the language of Section 3(b) is purely definitional in nature and was included in the Association's proposal to simplify the calculation of the amount of preparation time provided by the District to elementary school teachers. The additional money provided for in the Association's proposal is intended to compensate teachers for the time outside of the regular work day which they will have to devote to preparation, in the event that the District does not provide such preparation time during the regular work day. As such, the Association argues that the proposal does not primarily relate

to matters of educational policy or to the allocation of teacher work assignments during the work day, but rather to the impact of particular District work assignments decisions on employe wages, hours and conditions of employment.

The Association asserts that under the principles established in the decisions of the Commission and the courts, there are two essential characteristics of a mandatory impact proposal: (1) the absence of undue restrictions on managerial decision-making and/or educational policy-making (as opposed to proposed consequences with respect to employe wages, hours and conditions of employment, which attach to particular management decisions and/or educational policies) and (2) the presence in the proposal of a relationship between the particular permissive managerial decision and the impact of that decision on employe wages, hours or conditions of employment. The Association contends that a union's decision to treat the impact of employer work assignment decisions in terms of additional compensation does not make such "impact pay" a "penalty", any more than overtime/premium pay or higher wages themselves are "penalties". It asserts that the fact that the District's policy decisions regarding teacher work assignments may be affected by the Association's proposal is fundamentally irrelevant to the issue of the bargainability of those proposals. The Association points out that to some extent, all collective bargaining agreement provisions "affect" a municipal employer's exercise of its functions and all contract proposals which limit a school district's unfettered right to make decisions affecting employes' working conditions "interfere with" the District's decision making. The Association argues that, however, whether the degree of "interference" represented by a contract proposal is considered acceptable or "undue" by the District or by the Commission is not dispositive of the bargainability issue, nor is it consistent with the Supreme Court's "primary relationship" standard. The Association notes that the Commission has heretofore acknowledged that the fact that a contract proposal affects the employer's budget and the means by which it delivers services to the public is not determiantive of the issue of bargainability. City of Wauwatosa, supra; City of Brookfield, supra. The Association also argues that since an employer is under no legal obligation to agree to any contract proposal, including a proposal which is a mandatory subject of bargaining, the merits of that proposal are irrelevant to the issue of the proposals' bargainability. It asserts that the question of whether a particular contract proposal is meritorous and should be either agreed to by an employer or adopted by a mediator-arbitrator under Sec. 111.70(4)(cm)6 Stats., is an entirely different question than whether the proposal must be negotiated. It argues that a contract proposal can be unworkable or unwise (e.g., a wage proposal proposal calling for a 100% increase in salary) and still be a mandatory subject subject of bargaining if it primarily relates to employe wages, hours and conditions of employment or to the impact on the bargaining unit of a permissive managerial decision.

The Association contends that its work assignment impact proposals neither dictate the number or type of work assignments which teachers can be required to perform during the regular teacher work day, nor preclude the District from establishing the amount of student-contact time and preparation time which the school board considers to be appropriate. The Association argues that the "decision-impact relationship" is embodied in the proposals' recognition of the indisputable fact, acknowledged by the Commission and the courts, that the number of student-contact hours and the number of daily preparation periods assigned to a teacher have a significant effect on a teacher's total work load. Oak Creek, supra. The Association alleges that the provisions of its proposal specify the economic impact, in terms of additional compensation to be paid to the teachers whose work load exceed or whose preparation time is less than the status-quo averages currently existing by District policy and/or practice (Tr. 250, Association Exhibit 27), of particular District unilateral decisions regarding teacher work assignments. Unlike the provision at issue in Blackhawk, supra, the Association's proposal does not dictate the amount of non-student-contact time required to be provided by the teachers during the work day. Unlike the clause in dispute in Oak Creek, supra, the Association's proposal does not mandate the number of preparation periods or amounts of preparation time which teachers must be provided by the District. The Association contends that the proposals do not require the District to provide teachers with any specific amount of preparation time during the regular teacher work day. The Association asserts that its

preparation time impact proposals are conceptually indistinguishable from the Oak Creek, class size impact proposal considered mandatory by the Commission. The Association therefore requests that the Commission find the preparation time impact proposals to be mandatory subjects of bargaining.

Discussion of Proposal 9

We commence our analysis of the Association's proposals by rejecting the District's contention that the proposals in question seek to allocate the teacher work day or to define the scope of the duties which will be performed by a teacher during that work day. As Section 1 of the proposal specifies, the District, under the Association's proposal, remains free to allocate the teacher work day in any way it sees fit. Section 3(b) does not, as the District argues, require that time prior to or after the student school day be unassigned. That portion of the proposal only specifies that if the District chooses to have such time periods free of any specific teacher assignments, that unassigned time does not fall within the definition of preparation time as used in this proposal.

We also do not share the District's view of the analysis which is appropriate for determining whether the instant proposal is a mandatory subject of bargaining. The District asserts that the proposal is permissive because (1) the Association has failed to demonstrate the requisite impact upon teacher hours and conditions of employment; (2) the Association is seeking to control educational policy through indirect cost implications; (3) the Association's definition of preparation time reveals its intent is simply to allocate the teacher day. In our view, the disputed language establishes compensation levels for weeks or days when the District chooses not to provide teachers with the specified amounts of preparation time. It is therefore a compensation proposal which is primarily related to the additional wages a teacher will receive when his or her day is allocated by the District in a certain manner. The Association bears no burden to demonstrate that a wage proposal which would apply to teachers who do not receive a specified level of preparation time or whose day is allocated in a specific manner is mandatory just as it bears no burden to establish the mandatory nature of the compensation which it proposes should be paid to teachers who receive levels of preparation time at or above those specified in the proposal. Both such proposals simply establish the compensation which the Association proposes is appropriate for different kinds of work weeks or work days. Thus, we reject the District's first contention as to why the proposal is permissive because we believe the analysis suggested therein is inapplicable. However, we are also persuaded that the impact which preparation time or the lack thereof has upon hours and conditions of employment is apparent.

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

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

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

> We conclude that the Association's proposal with regard to teacher-pupil contact hours, and the number of preparations that may be required of a teacher concern matters of educational policy, and therefore are permissive and not mandatory subjects of bargaining. Such decisions directly articulate the District's determination of how quality education may be attained and whether to pursue same. However, the impact

thereof, also as in the "class size" issue, have direct affects on a teacher's working conditions, and therefore, the impact thereof is subject to mandatory bargaining.

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

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

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

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

We find the impact of preparation time upon hours is clear. A teacher cannot teach, even poorly, without some knowledge of the subject to be taught. Knowledge of the subject to be taught requires preparation. Preparation requires the expenditure of time by the teacher. Time is either available as a part of the teacher's regular work day or outside the work day. If sufficient time is not available as a part of the work day, time must be spent outside the work day. While specific proof is not needed to establish the foregoing, we do note that supportive evidence is present in this record. During the February 24, 1984 supplemental hearing, the District presented evidence of duties which teachers on occasion perform before or after the school day. Preparation of lesson plans was a prominently mentioned duty which, a District witness testified was expected of teachers and required teacher work outside the school day.

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

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

We have reaffirmed the continuing validity of this conclusion in City of Brookfield, 17947 (7/80) and School District of Campbellsport 20936 (8/83).

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

Our analysis here comports with that utilized by the Commission in Racine Unified School District, 20652-A, 20653-A (1/84) when ruling upon a similar proposal.

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

As to the District's contention regarding the portion of the proposal (Section 5) which applies to part-time teachers, our analysis is equally applicable to such individuals and we thus also find this portion of the proposal to be mandatory. Turning to Section 4(c) we note that this portion of the proposal could more accurately be labeled a "class-size impact" proposal. We find this proposal to be mandatory for the reasons specified in our analysis of Association proposal 10.

The disputed language is as follows:

(10) Section 7. Class Size.

a. The parties recognize that the number of students assigned to a class 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 teaching and learning conditions are directly affected by class size and that the size of the class affects the conditions of employment and workload of teachers.

b. (1) Elementary school teachers who are assigned twenty-five (25) or fewer students per workday, averaged on a semester basis, shall receive wage compensation in accordance with the provisions of the Salary Schedule.

(2) Teachers at the secondary school levels who are assigned thirty (30) or fewer students per class, excluding band, orchestra and choir classes, shall receive wage compensation in accordance with the provisions of the Salary Schedule.

c. (1) In the event the District chooses to assign more than twenty-five (25) students per teacher per workday at the elementary school level, the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation at the rate of one percent (1%) of their base salary per student in excess of twenty-five (25), per semester.

(2) In the event the District chooses to assign more than thirty (30) students per teacher per class at the secondary school level (excluding band, orchestra and choir classes), the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries,

additional compensation in accordance with the following formula:

$$\frac{\text{Number of students in excess of 30}}{30} \times \text{Teacher's Regular Hourly Rate of Pay} \times \text{Number of Periods (Classes) of Class Overloads}$$

d. For elementarty school teachers with less than full-time contracts with the Distrit, the class size workload described above in paragraph b.(1), and the additional compensation provided for in paragraph c.(1), shall be prorated according to the percentage of a full-time contract held by such teachers.

e. Where class size overloads occur as the result of exceptional circumstances (e.g., flexible scheduling, team teaching, experimental programs, etc.), the work overload compensation provisions of subsection c., above, shall not apply; provided, that the Association has been advised of the situation by the District and agrees to waive the work overload compensation provisions.

f. During the first ten (10) school days of each school year/semester, class size overloads will be allowed without additional compensation to the teacher, while administrative schedule changes are being attempted. If class size overloads persist beyond the first ten (10) days of the school year/semester, the teacher shall receive additional compensation from the first day of the overload, including those days occurring within the first ten (10) days of the school year/semester, in accordance with the provisions of subsection c., above.

Section 8. Any additional compensation earned by a teacher under this Article shall be separately itemized and paid monthly by the District.

In Section 7(a) of the proposal, the District asserts that the Association seeks to bargain about the number of students can be assigned to a class and to bargain about a statement that class size is a matter of basic educational policy. The District asserts that these are clearly matters of basic educational policy. Beloit, supra.

As to Section 7(b) and (c), the District asserts that said proposals are an attempt to emasculate the distinctions between mandatory and permissive subjects of bargaining. The District contends that the Association's proposals here effectively bar the District from exercising its judgment and discretion in matters of class size. It asserts that determinations of appropriate class size reflect consideration of a number of factors which relate to educational policy determinations. By allowing the Association to bargain over class size "norms" beyond which the District must pay additional compensation to teachers, the District asserts that it will be inhibited by these cost implications and will not be free to consider the various educationally related factors which should be considered when setting the size of a specific class. The District also notes that because of the various factors that lead to class size determinations, some teachers would never be eligible despite working as hard as possible (and perhaps more adequately than other teachers who stand to make extra money). Thus, because of the nature of a teacher's class, or physical facility limitations, or other student-dictated reasons, some teachers could gain notwithstanding a minimal effort while other teachers could not, notwithstanding an outstanding effort. The District asserts that this could have a major adverse impact on morale, educational policy and the total educational program. The District also argues that this proposal could potentially have a significant impact on the unit structure utilized by the District at the elementary school level. In short, the District argues that the Association seeks to boot-strap its "impact" proposal by requiring bargaining on a class size "norm" that is in itself non-mandatory.

In any event, the District alleges that no impact on employes has been shown by class sizes in excess of the proposed standards. The District contends that the Association asks the Commission to accept on faith its premise that each

student in excess of an established norm affects the teacher's working conditions. The District argues that such an assumption is unwarranted. While admitting that Beloit may establish that in certain circumstances the evidence may show that additional students in a classroom generate additional work, the District contends that such an impact cannot be assumed and notes that classes below the norms specified may generate impact upon teacher hours and conditions of employment while classes above the norm established may have no impact upon these employe interests.

The District also contends that the Association's proposal is not demonstrably or rationally related to any potential workload "impact". It points out that the Association wants extra money for students above the negotiated norm, but from that norm downward, there would be no correlation of number of students and work load. The District also contends that the compensation formula utilized by the Association has no relationship to the number of students in a classroom. The District also argues that the exceptions specified in Section 7(e) demonstrate that the Association is actually seeking to bargain educational policy.

As to the Commission's decision in School District of Campbellsport, 20936 (8/83), the District contends that case was wrongly decided or, in the alternative, that the present factual record compels a contrary result in this case. The District asserts that in this case, as in Campbellsport, the Association concedes that the class size proposal containing economic restrictions is still subject to a balancing test. The District submits that in applying that balancing test in Campbellsport, the Commission understated or underestimated the impact on educational policy making of a class size-compensation proposal and overstated or over-estimated the impact on working conditions which a change in class size generates. The District notes that in Campbellsport, the employer conceded that the class size/compensation proposal was mandatory, but argued that you have to wait until a new class size was set during the contract term to bargain over the effects demonstrated by such a change. The District asserts that in Campbellsport the employer had the right idea but the wrong explanation; i.e., it isn't the point at which class size is set that is determinative, rather what is determinative is the actual impact on working conditions as measured against the degree of intrusion on decision-making. The District also reminds the Commission that it does not concede the bargainability of the class size proposal herein.

While an increase in class size may have an impact on workload in a given case, the District argues that there is no basis for finding such an impact in all cases. The District asserts that this very presumption is being advanced by the Association in this case and asserts that while such a presumption maybe tolerable in areas only marginally related to educational policy, that presumptions should not be a substitute for proof in the area of class size. Absent such proof of impact and a proposal more tightly tied to a proven impact, the District reiterates its position that the Association's proposal is nothing more than a mechanism for regulating class size. The District notes that there is no educational policy which is not susceptible to imposition of dollar disincentives. If the Commission accepts the Association's arguments, the District asserts that teacher unions can establish a text to be used, the caliber of students to be taught, or the physical facilities involved, all of which would be subject to regulation and bargaining by simply making a dollar proposal. The District asserts that under this approach the distinction between mandatory and permissive subjects of bargaining would be completely emasculated. The District also reiterates its general argument that the external imposition of agreements through binding arbitration requires a more restrictive definition of what is mandatorily bargainable. The District contends that it is one thing to require a school district to negotiate over a proposal, ultimate agreement over which is a function of, first, the acceptablity of the proposal (i.e., to what extent does it intrude on or interfere with the duty to set policy) and, second, the parties' mutual interest in labor peace. The District argues that it is quite a different proposition to let an arbitrator decide how much interference is acceptable. If the integrity of the political process is to be preserved, the District contends that the Commission must require a clear and convincing showing on the record that the proposal's relationship to working conditions predominates over the impact on educational policy. Thus, the District contends that the Association's class size proposal should be found to be permissive.

The Association asserts that the District bases its challenge to the Association's class size work load proposal on essentially one factor: that the Association's proposal constitutes bargaining over the adoption of class size policies. The Association contends that the remainder of the District's argument in its brief consists entirely of exceptions to specific clauses in the Association's proposal-in short, the District is bargaining over the merits of the proposal. The Association contends that its proposal expressly recognizes the District's unilateral right to determine class size. It argues that nothing in the proposal restricts or prevents the District from adopting or implementing any class size policy or practice it considers appropriate.

The Association sees the District as arguing that because the Association's proposal "relates" to District class size decisions, the proposal represents bargaining over those decisions and is thus permissive. The Association contends that the scope of mandatory "impact bargaining" implicit in the District's legal position in this case is so narrow as to effectively eliminate the Association's right to negotiate concerning the impact on employe working conditions of District class size policy or practice. The Association contends that the appropriate analysis to be utilized when determining whether the proposal is mandatory or permissive is as follows: proposals which do not mandate class size limits or restrict the District with respect to class size options that it may select to implement do not primarily relate to the formulation of educational policy and are mandatory subjects of bargaining. Such a proposal's primary relationship is to the impact of District class size decisions as they affect employe's wages and working conditions. The Association asserts that its proposal properly fits in this latter, mandatorily bargainable category. The Association contends that its proposal simply embodies the fact, acknowledged in Beloit, supra, and Oak Creek, supra, that the number of students assigned to a teacher directly affects the work load of that teacher. The Association asserts that its proposal specifies the economic impact, in terms of additional compensation to be paid to teachers whose class size work loads exceed the status quo averages currently existing by District policy and/or practice, of particular District unilateral decisions regarding class size policy or practice.

The Association asserts that its proposal embodies a specific relationship between the annual salaries received by teachers in the bargaining unit and the class size work loads to be undertaken in exchange for those salaries and, as such, is primarily related to teacher's compensation (wages) and to their class size work loads (conditions of employment). If the District wishes to assign additional work to teachers, by increasing their class size work loads, the Association's proposal simply provides that additional work will entitle teachers affected by the larger class size work load to additional compensation at the rates specified in the proposal. The additional money is intended to compensate for the additional work inherent in larger class sizes, since "the larger the class, the greater the teacher's work load". Beloit, supra.

As to the District's contentions that the relationship in the Association's proposal between the number of students assigned to a class and that teacher's work load is unpersuasive or irrational, the Association asserts that such issues go to the merits of the proposal and not to its bargainability. The Association notes that the District can set forth its own position on the proper relationship during the parties' negotiations or in its case to a mediator-arbitrator. However, in either case, the relationship between the number of students assigned to a teacher and that teacher's work load is a matter of mandatory impact bargaining and the Association argues that the District is neither required to accept the Association's impact proposal, nor restricted by that proposal with respect to the number of students it can unilaterally choose to assign to teachers. As to the District's professed concerns regarding the impact upon morale which implementation of the Assocication's proposal could present, the Association initially notes that there is no support in the record for this assertion and that even if those are legitimate concerns, the proper forum for addressing such problems is the bargaining table. Other District objections which the Association asserts go to the merits of the proposal and not its bargainability include the District assertions that while a class of forty students may not give rise to any of the "effects" enumerated in Beloit, a class of twenty or ten make give rise to several. The Association argues that this argument simply acknowledges the underlying fact that class size is one of the factors which has an impact on a teacher's work load. However, as to the specific numbers utilized by the District in its argument, the Association contends that those objections constitute bargaining over the merits of the proposal. District

arguments as to the lack of relationship of the level of additional compensation to the class size "norms" or the lack of a reduction in compensation when class sizes go below those "norms" also constitute attempts by the District to bargain over the merits of the class size impact proposal. The Association asserts that the Commission should reject these arguments as irrelevant.

The Association alleges that its class size impact proposal is conceptually parallel to the class size impact proposal considered mandatory by the Commission in Oak Creek, supra. Given the Commission's decision in Oak Creek, and the Commission and the Court's decisions in Beloit, which recognized the impact of class size upon teacher workloads, the Association contends that a finding that its proposal is mandatory must be made by the Commission.

Discussion of Proposal 10

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

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

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

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

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

> WERC, by Finding of Fact No. 7, found that this proposal as to class size related to basic educational policy but that the implementation thereof also had an impact on wages, hours and working conditions. Its declaratory ruling was that class size is not a mandatory subject of collective bargaining, but a duty existed to bargain collectively with respect to the impact thereof on wages, hours and conditions of employment.
>
> While the evidence conflicts as to the extent to which class size effects (sic) the quality of education received by students, there is a respectable body of opinion that it is a determinant of such quality. See Exhibits 9 (especially pp. 1, 3), 10 (especially pp. 1-2), and 11 (especially p. 1). It should be noted that Exhibit 11 is a pamphlet entitled "Class Size -- Does it Make a Difference?" published and distributed by the Division for Planning Services, Wisconsin Department of Public Instruction, and gives the results of the Olson and Vincent studies on the subject where data from many thousands of classrooms were studied.
>
> WERC is not required to resolve conflicts among educators on educational policy. It could rationally conclude that a school board's prerogatives in making educational policy

include the power to decide that class size does affect the quality of education and to set class sizes accordingly.

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

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

> THE PROBLEM. The difficulty encountered in interpreting and applying sec. 111.70(1)(d), Stats., is that many subject areas relate to "wages, hours and conditions of employment," but not only to such area of concern. Many such subjects also have a relatedness to matters of educational policy and school management and operation. What then is the result if a matter involving "wages, hours and conditions of employment" also relates to educational policy or school administration? An illustration is the matter of classroom size, subsequently discussed. The number of pupils in a classroom has an obvious relatedness to a "condition of employment" for the teacher in such classroom. But the question of optimum classroom size can also be a matter of educational policy.
>
> . . .
>
> (H) CLASSROOM SIZE. The teachers' association submitted to the commission as a subject matter requiring mandated bargaining a proposal concerning class size. 35/ The commission, on the evidence before it, concluded that the size of a class is not primarily a matter of "wages, hours and conditions of employment" but is primarily a matter of basic educational policy. 36/ Therefore, it concluded, "decisions on class size are permissive and not mandatory subjects of bargaining." The trial court affirmed this holding, stating that, on the basis of the evidence before it, the commission could conclude that a school board's prerogatives in making educational policy include the power to decide that class size does affect the quality of education and to set class size accordingly. The commission also held that the size of a class has an impact upon conditions of employment of teachers. 37/ So it concluded that: "While the School Board has the right to unilaterally establish class size, it nevertheless has the duty to bargain the impact of the class size, as it affects hours, conditions of employment and salaries." The reviewing court also affirmed this commission holding that, while class size was not bargainable, the impact of class size upon "wages, hours and conditions of employment" was mandatorily bargainable. We affirm the trial court holding, agreeing that the commission was warranted in reaching the conclusions it did.

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

36/ The WERC memorandum stated: "The size of a class is a matter of basic educational policy because there is very strong evidence that the student-teacher ratio is a

determinant of educational quality. Therefore, decisions on class size are permissive and not mandatory subjects of bargaining.

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

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

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

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

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

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

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

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

3. Grades 7-12: Additional compensation at the rate of one-quarter percent (0.25%) of the teacher's yearly base salary for each student in excess of one hundred sixty (160) per school day, averaged on a semester basis.

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

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

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

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

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

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

> . . . The proposal at issue here, however, specifically recognizes that class size is a basic educational policy and provides for the District to assign "any number of students it desires to a teacher's classes." It does not establish guidelines as to student-teacher ratios. Contrary to the District's contentions, we note that the Commission's discussion of Section 21.3 in Oak Creek 9/ suggests that a proposal as provided herein, which does not restrict the District's right to determine class size, but provides for a method to compensate a teacher based on class size, would be considered impact and therefore mandatory.
>
> The District also contends that to be a legitimate class size "impact" proposal the provision must be based on increases in actual class size practices in the District and not on numerical guidelines unrelated to existing class sizes. The District's argument, however, again ignores the impact of its existing class size practices and the concomitant right of the Association to bargain over that impact. Contrary to the District's claim, rather than being an attempt to bargain the Association's version of what it feels is appropriate class size policy, the Association's proposal only provides a means for determining when a teacher will be entitled to additional compensation and how much the teacher is to receive. Unlike the proposal in Oak Creek, the Association's proposal here does not limit in any way the District's authority to set whatever class size limits it feels are proper. The fact that under the Association's proposal the District would have to start paying teachers additional compensation at class size levels below what the District considers appropriate and that the proposal distinguishes between certain grade levels and type of classes goes to the merits of the proposal and not to its status as a mandatory or permissive subject of bargaining.
>
> The District also errs in its argument that the Association's proposal is permissive since it requires the District to have a written class size policy, distinguishes or does not distinguish between certain grade levels and classes, requires additional pay for teachers with classes exceeding specified numbers and provides a means of calculating the number of students assigned to a teacher. The proposal does not require the District to have a written class size policy or even to have any established class size policy. As noted above, the proposal only provides a method for computing impact pay. The District is free to do as it deems proper as far as setting class sizes. While it is true that under the proposal the District would incur additional expense by having to pay

teachers extra if it set class sizes above certain levels, that is not a sufficient limitation on the District's ability to set class size policy to make the Association's proposal permissive. 10/

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

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

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

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

11/ City of Wauwatosa, Supra.

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As to Section 7 (a), the first sentence of the proposal is a disclaimer which seeks to ensure that the language it precedes cannot be reasonably interpreted at dictating any class size choice. Language such as that in this sentence is often essential to a proponent's desire to clearly set forth the intent of its proposal. If the subject of that intent is a mandatory subject of bargaining, we will conclude that the introductory preface to such a proposal is mandatory as well. We turn to that determination below. However, as the second sentence of this first paragraph is of no interpretive assistance, and as it cannot reasonably be interpreted as establishing any contractual right related to wages, hours and conditions of employment, we find same to be permissive.

The District herein has argued that the impact of class size upon wages, hours and conditions of employment cannot be presumed and must be established by the record. It argues that the Association has failed to establish such an impact and thus asserts that the proposal should be found to be a permissive subject of bargaining. We do not agree. As we have previously indicated herein, the primary relationship of the proposal to wages is sufficient to render the proposal mandatory. However, we further conclude that the Court's decision in Beloit also establishes the apparent relationship which the number of students has upon the amount of work which a teacher must of necessity perform. Indeed, the Court itself noted "The number of pupils in a classroom has an obvious relatedness to a 'condition of employment' for the teacher in such classroom". The Court further agreed that the "commission was warranted" when concluding "the larger the class, the greater the teacher's workload, e.g., more preparation, more papers to correct, more work projects to supervise, the probability of more disciplinary problems, etc." Absent evidence of a radical change in the manner in which classes are taught in the public schools in Wisconsin, we believe the issue of whether class size impacts upon teacher's wages, hours and conditions of employment to have been resolved in Beloit. We further note that we find no support in Beloit or elsewhere for the District's contention that it is appro-

priate to balance dollar implications on employes against dollar implications for educational policy when determining mandatory/permissive issues.

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

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

In summary, we have concluded that the proposal primarily relates to wages, and also to the impact upon hours and conditions of employment of District class size policy choices. We do not find that specific evidence must be provided to establish these apparent relationships. We, therefore, find the majority of the proposal to be mandatory subject of bargaining.

Our analysis here parallels that utilized by the Commission in Racine Unified School District, 20652-A, 20653-A (1/84) when considering a similar proposal.

(11) The disputed contractual language is as follows:

> Reimbursement for Credits Earned
>
> Section 1. Graduate and undergraduate credits, earned by a teacher at a college or university empowered to grant baccalaureate degrees as a result of a course or courses which satisfy the approval requirement(s) set forth below, shall be reimbursed by the Board at the rate of seventy-five percent (75%) of the UW-Whitewater first-semester tuition fee, upon satisfactory completion of the course or courses and filing of the proper transcript(s) with the District.
>
> Section 1. For purpoes of reimbursement and placement on the salary schedule, automatic approval will be given to a course which satisfies one or more of the following criteria:
>
> a. The course is within a teacher's current subject area or curricular responsibility.
>
> b. The course is an education course at the current level of the teacher's assignment.
>
> c. The course is related to a teacher's co-curricular assignment.
>
> d. The course is taken at the request of an administrator, with a copy of the request on file in the Personnel Office. Any course which falls within the school day or conflicts with inservice must have prior principal approval.
>
> e. The course is with a graduate degree program in the field of education.

For purposes of reimbursement and placement on the salary schedule, a course approval form must be submitted (Appendix B).

Section 3. Reimbursement for credits earned pursuant to this Article shall be paid once-a-year, in November. This November payment shall cover reimbursement for all credits earned before September 1 of that year, provided the official transcript of the credits earned is on file in the Personnel Office by October 31 of that year.

Section 4. Reimbursement shall be paid pursuant to this Article for all approved courses begun or completed by the teacher prior to the teacher's receipt of any layoff notice.

The District challenges Sections 1, 3 and 4 of this proposal, as well as the words "reimbursement" and in the first and last sentences of Section 2. The District's objection is limited to that portion of the proposal which seeks to bargain "reimbursement" for credits attained by the teacher but not required by the District. The District asserts that in such circumstances, since the attainment of credits is not a condition of employment imposed by the District, neither is reimbursement for the costs of obtaining such credits. The District also asserts that the proposal is too ambiguous to be found mandatory. The District alleges that if it required credit attainment in order for teachers to keep their jobs, a proposal to define qualifying credits and/or reimbursment for the cost of securing same might relate primarily to the teachers' wages, hours and conditions of employment. However, where the District, as a matter of educational policy or job qualification, does not have such requirement, attainment of those credits does not relate to wages, hours or conditions of employment. City of Milwaukee Sewerage Commission, 17302 (9/78). The District also notes that the proposal does not provide any benefit to the District as a result of the credits. Nor would it require a teacher whose credit attainment is thus financed by the District to remain in the Janesville District.

If the Commission were to generally conclude that the subject addressed by the proposal is a mandatory subject of bargaining, the District contends that the proposal should not be found mandatory because of certain ambiguities therein which could constitute substantial interference with the District's educational policy and management prerogatives. In this regard the District asserts that the reimbursement requirement may extend to credits earned prior to employment in Janesville and that this could interfere with the District's initial hiring decisions. The District also notes that the required reimbursement rate could exceed the teachers actual tuition costs and that the unclear "satisfactory completion" requirement could discourage teachers from taking challenging courses.

The Association contends that the fact that the District does not require teachers to attain the credits referenced in its proposal is irrelevant to the issue of whether the proposal is primarily related to wages, hours or conditions of employment. It notes that the District does not require teachers to take a vacation or sick leave but that nonetheless such economic benefits are indisputably mandatory subjects of bargaining. City of Madison, 16590, (10/78). In addition, the Association argues that the statutory phrase "conditions of employment" is not equivalent to or co-extensive with "requirements of employment". It argues that the economic benefit provided by the credit reimbursement proposal, however, is encompassed by the term "wages" and argues that the Association's proposal is primarily related to teacher wages and nothing else. The Association asserts that academic credit reimbursement is not only an economic benefit in and of itself but also relates primarily and directly to the determination of teacher salaries under the salary grid which is common not only to the Janesville District but also to virtually every district in the State of Wisconsin. The Association asserts that the structure of the teacher's salary schedule reflects the extra value received by the District from a teacher who has acquired additional educational training. Thus, the Association rejects the District's assertion that the District obtains no benefit as a result of the credits for which reimbursement is provided. As it asserts that the credit reimbursement proposal is exclusively related to teacher wages and totally unrelated to the formulation of educational policy, the Association contends that the Commission should find its proposal to be mandatory.

Discussion of Proposal 11

We concur with the Association's argument that this proposal is primarily related to wages. The Association's proposal reflects an attempt to obtain additional monetary compensation for teachers. As we view this proposal to be in essence a wage proposal and as we have not been presented with any persuasive basis for concluding that this proposal has any significant relationship to the formulation or determination of public or educational policy, we conclude that it is a mandatory subject of bargaining. In so concluding, we reject the District's assertions as to the ambiguities presented by the terms of the proposal in itself. Issues as to whether the reimbursement rate could exceed the actual cost incurred by the teacher or what will be compliance with the satisfactory completion standard all go to the merits of whether such a proposal should appear in a collective bargaining agreement and not to its mandatory/ permissive status. As to the District's argument as to potential interference with this initial hiring decision, we note that this proposal does not establish any minimum qualifications for the teaching jobs made available by the District and thus, we find the District's citation of City of Milwaukee Sewerage Commission, supra, to be unpersuasive.

(12) The disputed provision is as follows:

Extra-Duty Assignments

Section 1. All extra-duty work assignments 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-duty activity, other than the involuntary assignment of the activity to an employe in the bargaining unit. The District shall make every reasonable effort to obtain qualified braining unit volunteers for all extra-duty work assignments before subcontracting or making involuntary assignments.

As used in this Article, "extra-duty work" shall mean the duties of curriculum leaders, unit leaders, instructional managers, chairperson of the Professional Growth Committee, elementary/-secondary school building assistants, and ahtletic coaching and/or co-curricular assignments.

Section 2.

a. In the event that the District, after reasonable efforts, is unable to secure a qualified bargaining unit volunteer for an extra-duty work assignment, the District may subcontract such assignment to non-bargaining unit personnel; provided, however, that such subcontracting may not result in the layoff, reduction in hours, or nonrenewal of any bargaining unit employe.

b. If the District chooses not to subcontract the assignment, and is unable to secure volunteers, the District then may make an involuntary assignment of the extra-duty work to a qualified bargaining unit member. All such involuntary assignments shall be to the least senior, qualified employe on the roster of emoyes (sic) for the extra-duty work involved (see Section 3., below); provided, that employes once involuntarily assigned to a duty shall not be involuntarily assigned a second time until all qualified employes have been assigned.

c. No employe shall be involuntarily assigned more than one extra-duty work assignment per year, unless the District can demonstrate that there are no reasonable alternatives available in the bargaining unit in order to provide the extra-duty activity.

Section 3. Roster. For each extra-duty work assignment, the District shall prepare and maintain a roster of all bargaining unit employes 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. Any grievances regarding the placement of employes on rosters shall be filed no later than thirty (30) workdays after the posting of the roster. Grievances regarding the roster shall enter the grievance procedure at the District Administrator level.

Section 4.

a. Within a reasonable time after the District has knowledge that a vacancy in a extra-duty work assignment will occur, it shall post a notice announcing that vacancy in a conspicuous place in each school building and furnish a copy of the notice to the Association.

b. No extra-duty 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) workdays. This requirement shall not be interpreted to prevent the District from immediately filling a vacant extra-duty work assignment on a temporary emergency basis.

The District contends that the Association's extra-curricular proposal is a non-mandatory subject of bargaining. It initially notes that extra duty assignments covered by this proposal are an integral and important part of the District's educational program. Thus, the District argues that decisions relating to the manner in which such activities are assigned constitute significant educational policy choices. The District contends that the significant role of extra-curricular activities in the overall educational program is further evidenced by the fact that personnel needs for extra-curricular positions may be taken into account when teachers are initially hired.

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

1. All such assignments must be on a "voluntary basis" unless the District is willing to attempt to demonstrate "no reasonable alternative" to an involuntary assignment.

2. A volunteer has to be accepted unless the District is willing to attempt to demonstrate the volunteer is "not qualified".

3. Involuntary assignments may only be made to "qualified" unit members.

4. The qualification standards must be reasonable and uniformly applied.

5. The District must make every reasonable effort to obtain a volunteer from the unit before subcontracting or making an involuntary assignment.

6. Involuntary assignments must go to the least senior employe who is "qualified".

7. Unless the District is willing to attempt to demonstrate "no reasonable alternatives" no employe can have more than one extra-duty assignment per year.

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

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

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

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

The Association contends that its proposal is mandatory under the rationale expressed by the Commission in School District of Rhinelander, 19761 (7/82). It asserts that under the Rhinelander decision, the District can require that teachers, as opposed to non-teachers or non-unit volunteers, direct all educationally related extra-curricular activities offered to students by the District. Thus the Association asserts that a contract proposal which would require the District to subcontract extra-curricular assignments for which there are no unit volunteers is probably a permissive subject of bargaining. Thus, the Association's proposal permits the subcontracting of extra-curricular duties to non-unit volunteers, as an option available to the District to be utilized or not utilized at its discretion. However, as the duties in question are "fairly within the scope of a teachers job" which can be involuntarily assigned to teachers by the District, the Association maintains that it must be able to bargain contractual protections for that unit work, such as the qualified right of qualified bargaining unit volunteers to receive such assignments before the District can subcontract same.

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

The Association contends that its proposal does not affect the District's decision as to which extra-curricular activities its students will have available to them nor does it prevent the District from staffing all of the extra-curricular programs which it chooses to offer to students with qualified teachers. It notes that the District's obligation to give preference to qualified bargaining unit

volunteers is limited to the utilization of "reasonable efforts" and notes that the restriction of one involuntary extra-duty work assignment per year is specifically conditioned on the existence of available reasonable alternatives.

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

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

In conclusion, the Association contends that its proposal primarily relates to the procedure for selecting employes for bargaining unit work assignments, where the selection pool consists of qualified unit teachers who represent essentially identical employes for the purposes of the District's educational mission. While the proposal has, at best, an indirect impact on the District's managerial prerogatives, the Association argues that its proposal has, as the Commission recognized in its decision in City of Brookfield, supra, a very direct impact on the hours which the District's employes are required to work. A reasonable balancing of the impact of the proposal on the District's legitimate interests and managerial functions, and on the employe's hours and conditions of employment, requires the conclusion that the proposal is primarily related to employe hours and conditions of employment and is, accordingly, a mandatory subject of bargaining.

Discussion of Proposal 12

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

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

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

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

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7/ Beloit, supra.

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

9/ As the parties chose not to litigate the issue of whether certain extra-curricular assignments may be so far removed from an educational policy determination that a staffing decision would constitute a mandatory subject of bargaining, it is inappropriate and the record does not allow any comment as to whether any such assignments are found in Appendix C. Suffice it to say that as the proposal in question applied to all such assignments and as the substantial majority of the listed activities unquestionably relate to educational policy determinations, such an activity by activity analysis is also unnecessary.

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

As footnote 8 in the Rhinelander decision indicates, the Commission has consistently held that an employer need not bargain over the minimum qualifications for a job but must bargain over the selection criteria to be applied when choosing among qualified applicants. The right to establish such qualifications, as recognized by the Court in Beloit, flows from the need to insure that qualified individuals be available to direct any activity which is sufficiently related to the educational mission. We find that the District retains the right to set unilaterally certain minimum qualifications vis-a-vis the coaching positions in question, notwithstanding

the existence of the WIAA. We note that the WIAA is a voluntary organization to which the District need not belong and that the WIAA does not purport to and does not in fact make educational policy judgments that foreclose the District from pursuing further educational objectives where extra-curricular athletics programmings is concerned.

We find the proposal as written to be permissive because, as in Rhinelander, it may prevent the District from providing qualified direction of an extra-curricular activity (athletics) which activity bears a significant and sufficient relationship to fulfillment of the District's educational mission. (See our note 9 in Rhinelander, above). We so conclude because the language at issue here may require the District to hire a bargaining unit member who has no familiarity with the sport in question and who thus could lack minimum qualifications to perform the assignment.

It is our view however, that the District's right to set minimum qualifications is not without its limits. The educational policy dimensions predominate as regards such job performance related minimum qualifications as the professional certification, educational attainment, experience with and knowledge of a sport, knowledge of safety practices regarding the sport, knowledge of first aid and/or sports injury training practices that will be required of applicants for each of its coaching work opportunities. However, minimum qualifications that do not primarily relate to educational policy or management of the district could not be imposed without fulfillment of the statutory bargaining requirements; examples might include a requirement that the applicants must be District residents, unmarried, etc.

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

We also think it appropriate to clarify the application of the Rhinelander holding to the instant dispute. Where, as here, the District has historically utilized unit teachers to fill the vast majority of coaching positions, the positions become unit work which the MTEA can seek to protect from assignments thereof to non-unit personnel. As the Supreme Court indicated in Racine, absent evidence that the decision represents a choice among alternative social or political goals or values, the decision to substitute non-unit for unit personnel is a mandatory subject of bargaining. While, as stated in Rhinelander, it is theoretically possible that a district could show that use of non-unit personnel represented a choice among goals or values, such a showing remains a burden which must be met by the record before the Commission. Here, the District has not shown that any value choice is at stake, other than its expressed desire to have the "best qualified" person in the job. Especially in view of the court's holdings in Beloit and Glendale, 4/ we do not believe that the foregoing District desire is sufficient to overcome the MTEA's legitimate interest in protecting what has historically been essentially unit work if qualified unit

employes are interested in filling the position. If no qualified unit applicant timely applies for a given assignment, as the parties have interpreted the language, the District would be free to use non-unit personnel.

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

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

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

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

With regard to the District's contention that this proposal interferes with initial hiring decisions, we disagree. We find that the question of whether an applicant will accept an extra-curricular assignment if hired involves the initial

hiring decision, which is a non-mandatory subject of bargaining. 4/ Furthermore, acceptance of such an assignment by a newly hired teacher would be viewed as a voluntary acceptance of said assignment.

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

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

Our analysis parallels that utilized by the Commission in Racine Unified School District, 20652-A, 20653-A (1/84) when discussing a similar proposal.

(13) The disputed contractual language is as follows:

> This Agreement shall have a term of the school years commencing July 1, 1983, and ending June 30, 1985 (the 1983-84 and 1984-85 school years).
>
> In the event that the parties do not reach a written successor agreement to this Agreement by the expiration date of this Agreement, the provisions of the Agreement shall remain in full force and effect during the pendency of negotiations and until a successor agreement is executed; provided, however, that this Agreement shall not have a duration of more than three years.

The District contends that this proposal is permissive because it seeks to require bargaining over the continuation of all contractual provisions including those which are permissive subjects of bargaining. The District asserts that such a clause could interfere with the District's right to utilaterally implement upon a bargaining impasse or to evaporate permissive subjects of bargaining upon the expiration of a collective bargaining agreement. The District also argues that the delay in the evaporation of the permissive provisions in a collective bargaining agreement which would be caused by this provision provides the Association with a motive for not reaching an agreement on a subsequent contract. The District further avers that this proposal would also make parties less inclined to agree to include permissive subjects in a contract, a result at odds with the Commission's

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

determination to not deter bargaining settlements. City of Wauwatosa, 15917 (1977). The District alleges that the Commission's decision in Milwaukee Board of School Directors, 20093-A (2/83) supports its position as to this proposal. While admitting that the Commission's decisions in City of Wauwatosa, supra, and City of Sheboygan, 19421 (3/82) would on their face support the Association's position in this matter, the District alleges that a close reading of those decisions indicates that the issues and arguments raised by the District herein were not considered by the Commission. Thus, the District contends that a second look at such clauses is appropriate.

As to the Association's contention that the District arguments regarding evaporation and implementation after impasse are irrelevant because the contract never expires under this clause, the District contends that such contentions are an ingenious but meritless attempt by the Association to "have its cake and eat it to". The District argues that if that argument is credited, then the District would be free not to bargain over any subject covered by the contract at least until the end of the third year of said agreement. The District asserts that the Commission should reject the Association's argument and find the proposal to be permissive.

The Association asserts that the District's challenge to its proposal represents yet another example of the District's frivolous relitigation of settled issues. The Association asserts that in the City of Wauwatosa, supra, and City of Sheboygan, supra, the Commission held that a duration clause which provides that the terms of a collective bargaining agreement will remain in full force and effect during the pendency of negotiations and until a successor agreement is executed constitutes a mandatory subject of bargaining, provided that the clause specifies that the agreement cannot exceed the statutory three year duration. Thus, the Association asserts that the proposal has already been determined to be a mandatory subject of bargaining by the Commission. The Association alleges that all of the arguments advanced by the District in this case were considered by the Commission in its prior rulings and that said arguments have acquired no more validity since the above cited decisions were decided by the Commission. The Association notes that under the contingency portion of its proposal, the contract does not expire until a successor agreement becomes effective (subject to the three year limit). Thus, the Association avers that all of the District's arguments concerning the proposals adverse restrictions on the District's right to implement changes with respect to permissive subjects upon expiration of a contract are fundamentally irrelevant. The Association alleges that the District is not obligated to negotiate permissive subjects of bargaining or to include such matters in its contract with the Association, regardless of the duration of that contract, and that the Association's proposal herein does not provide otherwise. As duration clauses specifying the effective dates of a collective bargaining agreement are mandatory subjects of bargaining, Department of Administration 13807-A (4/76) aff'd, 90 Wis. 2d 426 (1979), and as the Commission has previously found proposals such as that herein to be mandatory, the Association requests that the Commission reaffirm that the proposal at issue herein is a mandatory subject of bargaining.

Discussion of Proposal 13

In City of Wauwatosa, supra, the Commission was confronted with a contractual provision which read as follows:

> This Agreement shall . . . remain in full force and effect to and including, December 31, 1976 and thereafter shall be considered automatically renewed for successive twelve month periods unless procedures are instituted in accordance with Sec. 111.77 of the Wis. Statutes . . . In the event that the parties do not reach written agreement by the expiration date, the existing Agreement shall be extended until a new agreement is executed.

In that case, the employer asserted that the proposal was permissive because it required that permissive subjects from an expired agreement be continued, even into the arbitration process, and thereby allowed permissive subjects of bargaining to be submitted to an interest arbitrator who would determine the terms of a new collective bargaining agreement. The Commission commented as follows:

> "We do not so read this proposal. This proposal merely continues the effective date of the agreement until a new agreement is reached. . . . Essentially this proposal seeks to preserve contractual benefits and duties until a new agreement is reached. Accordingly, it primarily relates to wages, hours and conditions of employment and is a mandatory subject of bargaining."

In City of Sheboygan, supra, the Commission reaffirmed the viability of its Wauwatosa decision specifying, however, that such a duration clause should reflect the three year statutory limitation upon the length of collective bargaining agreements under the Municipal Employment Relations Act.

While the District accurately states that the Commission has not explicitly dealt with the arguments raised herein when considering such a clause, we do not find any of those arguments raised by the District to be a basis for overturning our prior conclusions. When determining whether a provision is a mandatory or permissive subject of bargaining, we are obligated to apply the test established by the Court in Beloit, supra, and Racine, supra. The proposal at issue herein provides the Association with protection from the potential for "evaporation" or implementation upon impasse through its contingent extension of the term of the contract if no new agreement is reached during the first two years of the contract's duration. When an employer choses to bargain to agreement over permissive subjects of bargaining, thereby placing them in a collective bargaining agreement, the duration of that agreement does not thereby become a permissive subject of bargaining as the District would have us conclude. The Association's proposal herein simply establishes an alternate duration for the contract if a certain contingency occurs. By including permissive provisions in a collective bargaining agreement, the employer effectively waives its ability to evaporate those items for the term of that contract. The Association's proposal herein does, as the District argues, prevent evaporation during the term of the contract. However, given the District's prior assent to the inclusion of such matters in a contract, this protection from evaporation does not provide a basis for concluding that this clause primarily relates to educational or public policy. This conclusion is consistent with Court's holding in State of Wisconsin, Department of Administration, v. WERC, supra, wherein the Court held that "a contract effective date does not involve matters primarily of Employer policy or management rights such that it would not be a subject suitable for collective bargaining. Beloit, supra, at 54, 67; Unified S. D. No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 95, 96, 259 N.W. 2d 724 (1977)." The District's arguments as to this proposal's interference with the ability to implement changes upon impasse in bargaining also fails to establish any significant relationship between the proposal and educational or public policy. Where, as here, a contract provision specifies circumstances in which the contract's duration will be extended, and where, as here, the parties are obligated to honor the terms of their contract during its duration, the ability or right to implement changes, which may exist upon the expiration of the contract is simply irrelevant to the mandatory/permissive determination before this Commission. Finally, we reject the District's argument that our recent decision in Milwaukee Board of School Directors, supra, is supportive of the District's position. The clause at issue in that decision was found to be permissive because it allowed for the inclusion in the contract of permissive subjects of bargaining to which the employer objected. The instant proposal only specifies the length of time which the District will be obligated to honor any contractual provisions which are permissive subjects of bargaining which the District has elected not to object to and which are included in the contract. In summary, we conclude that a duration clause which contains the contingent extension of the contract specified herein is primarily related to wages, hours and conditions of employment and therefore is a mandatory subject of bargaining.

(14) SCHOOL CALENDAR

The District contends that the Association's 1984-1985 calendar proposal is permissive because its primary relationship is not to wages, hours and conditions of employment of teachers but to educational and public policy matters inappropriate for resolution in the negotiation forum. The District contends that the entire proposal is permissive because it seeks to bargain about: (1) how many days students will attend school for the school year; (2) when the students' school year will start, and end; (3) when in-service programs can be offered without forfeiting any student attendance day; (4) when parent-teacher conferences

can be scheduled; (5) when students will receive "breaks" in the school year; (6) whether absence due to teacher convention is sufficently advantageous to the school district to pay for attendance at it, and to close the schools for it; and (7) when and whether inclement weather days should be rescheduled.

The District asserts that in Joint School District No. 8 v WERB, 36 Wis. 2d 483 (1967) the Wisconsin Supreme Court expressly reserved ruling on whether "the determination of a school calendar is a major educational-policy determination", emphasizing that under Sec. 111.70 Stats., as it existed at that time, the ultimate responsibility for determining the school calendar remained with the school district. The District quotes the following portion from the Court's decision in that case:

> "... If the School calendar was subject to collective bargaining in the conventional sense in which that term is used in industrial labor relations under sec. 111.02(5), there would be merit to the argument of the school board that its legislative function is being delegated or surrendered and thus the calendar could not constitutionally be a subject of negotiation although it fell within the broad terms of the statute. However, under sec. 111.70 the school board need neither surrender its discretion in determining calendar policy nor come to an agreement in the collective bargaining sense. The board must, however, confer and negotiate and this includes a consideration of the suggestions and reasons of the teachers. But there is no duty upon the school board to agree against its judgment with the suggestions and it is not a forbidden practice for the school board to determine in its own judgment what the school calendar should be even though such course of action rejects the teachers' wishes. The refusal to come to a "settlement" may, of course, place the school board in a position where the teachers can invoke the fact-finding procedure, but the findings of the fact finder if adverse to the board are not binding upon it. The force of the fact-finding procedure is public opinion, and the legislative process thrives on such enlightment in a democracy. (emphasis added)

The District notes that four years later, when the Court repeated that the school calendar and in-service days are subject to negotiation under Sec. 111.70, Stats., the Court cited Joint School District No. 8. The District points out that the Supreme Court in Beloit, supra, concluded that there is a duty to bargain as to "any calendering proposal that is primarily related to 'wages, hours and conditions of employment.' "The District also draws the Commission's attention to Sec. 120.10(13) and (15) Stats., which state:

> (15) SCHOOL HOURS. Establish rules scheduling the hours of a normal school day. The school board may differentiate between the various elementary and high school grades in scheduling the school day. The equivalent of 180 such days, as defined in s. 115.01(10), shall be held during the school term. Thus subsection shall not be construed to eliminate a school district's duty to bargain with the employe's collective bargaining representative over any calendaring proposal which is primarily related to wags, hours and conditions of employment.

Citing the foregoing the District submits that the issue of the bargainability of calendar is far from settled. It asserts that the Supreme Court has been deliberate in its handling of the matter, first in Joint School District No. 8, supra, and more recently in its 1976 Beloit decision. It argues that the Court in its affirmance of the Circuit Court's decision in Beloit went out of its way to quote the lower Court's explanation that the employer retained ultimate control of calendar items under the law as it stood then. The District contends that the language of the Court's decision in Beloit and the content of Sec. 120.12(15), Stats., both clearly recognize that calendaring proposals can be other than primarily related to wages, hours and conditions of employment. As the med-arb law undermines the premise of the Courts' prior decisions, the District believes

that a close review of the bargainability of school calendar issues is appropriate.

The District alleges that the school calendar for a public school district represents the quantity of education that children receive during the course of the year. The District asserts that the calendar also determines the sequence in which and the pace at which such education will be delivered. The District argues that the quantity of education is one of the two dimensions to a District's curriculum choices, the other being quality. Thus, the District argues that the school calendar is the major determinant as to the amount or quanity of education to be offered to the community during a given time period. While admitting that the District has utilized a "traditional" calendar in prior years, the District asserts that there is substantial concern among educators in the United States about the adequacy of the traditional school year calendar. The District cites the recently released report of the National Commission on Excellence in Education as support for this assertion. The District also contends that the growth of knowledge, the measurable decline in student achievement which has occurred in recent years, the learning loss phenomenon which occurs during long summer vacations, the differing calendaring proposals used by other modern societies, and the need to better utilize skilled specialists all demonstrate that the determination of the school calendar is a major educational and public policy determination. Therefore, on the record before the Commission, the District asserts that the issue left unanswered in Joint School District No. 8 as to whether the school calendar is a major educational policy determination must be answered in the affirmative.

While the Association may argue that its proposal does not preclude the District from conducting "school" any time it wants, the District asserts that this argument must be rejected. First, the District notes that the Association acknowledges that its argument that the calendar proposal only states when this group of employes will be present and working is at direct odds with "a natural relationship" between teacher's and student's presence in the building. Second, the District asserts that there is no historical support for the position that a second staff of professionals could "fill-in" on such a basis. It contends that as the exclusive bargaining representative for all full time teachers, such a second staff of professionals would presumably be included in the bargaining unit represented by the Association. Third, and most significant in the opinion of the District, is the undisputed record evidence of the adverse effect such a scheme would have on the educational program. The District asserts that a solid educational program requires a single regular teacher to pace delivery, individualize instruction, and fairly measure student achievement.

The District argues that the school year calendar affects the employes wages, hours and conditions of employment only indirectly. It contends that the primary relationship is to educational and public policy. Thus, the District argues that the length of the school year and the times of the year when school will be in session are matters of basic educational policy which should be unilaterally established by the Board and that negotiations should then proceed regarding the wages, hours and conditions of employment applicable to that established calendar.

Aside from the basic calendar issue discussed above, the District contends that the portion of the calendar proposal which establishes the scheduling of in-service work days is also permissive. While admitting that in Beloit the Court affirmed the Commission's holding that "the number of in-service days during the school year, and the day of the week such days will fall" was mandatorily bargainable, the District notes that the Court's very brief discussion of this issue relied upon the Court's prior decisions in Board of Education v. WERC, supra, and Joint School District No. 8, supra, which explicitly reserved ruling on whether determination of a school calendar was an educational policy determination and strongly indicated a contrary result if the bargaining statute required a delegation or surrendering of the School Board's legislative function. The District also notes that in Beloit the Court stated that "on the record before it the commission was entitled to hold the 'in-service days' proposal mandatorily bargainable." The District argues that as the Commission's decision does not describe the record before it in that case, the relevant facts in this record can legitimately be seen as providing a basis for a different result. In this regard the District contends that the record demonstrates the following:

1. The number of in-service/work days to have during a school year requires an assessment of the needs of the children, the needs of the educational program, and what is necessary to maintain that program at the level of quality established by the Board.

2. On in-service/work days, students are not in attendance.

3. In Janesville, in-service days are used to orient professional staff to changes, communicate with staff, and present whatever planned program or curriculum orientation the District determines is appropriate. When nothing structured is appropriate, these are "workdays" used for preparation or year end wrapup such as recordbooks, grades, etc.

4. The content of these days is a product of student and program assessments. Content of inservice days is a permissive subject of bargaining. Beloit, supra.

5. The Association's proposal specifies when any inservice days in the District will be held.

6. The inservice/work days are part of the Association's proposed 190 "work days". The Association contends that the District could not schedule student days on these days proposed by the Association as inservice/work days without negotiating wages. In other words, the District argues that the Association's proposed calendar would preclude scheduling anything but inservice/work days without students on these dates.

Given the foregoing, the District argues that the Association is doing more than proposing that its members will work a certain number of days between this date and that date. The District asserts that the Association is instead proposing what work they will do and when they will do it. The District asserts that these issues relate directly to educational policy as they require a determination that a particular day's work or a particular day's program is sufficiently valuable to the District to justify student non-attendance. The District argues that what activity a teacher will be performing on a work day does not directly or substantially affect the teacher and therefore, does not relate in any significant way to wages, hours or conditions of employment. As the question of when teachers will work with students, as opposed to performing other work, is not a mandatory subject of bargaining because it pertains directly and primarily to educational policy, the District contends that the Association's inservice/work day calendar proposal must be held permissive because it attempts to determine the content of a least four work days and there is no evidence of how, if at all, such a proposal affects the employes. Milwaukee Sewerage Commission 17025 (1979); City of Wauwatosa, 15917 (1977); City of Madison, 17300 (1983); Oak Creek-Franklin Joint School District, 11827-D (1974).

As to the Association's effort to bargain when parent-teacher conferences, if any, will be held, the District cites the Commission's recent decision in Milwaukee Board of School Directors, 20093-B (8/83) as clear precedent for the validity of the District's position. The District also notes that the facts in this record support such a conclusion in the following manner:

1. Parent-teacher conferences are meetings with parents by individual teachers to discuss the progress of individual students and to give both parties an opportunity to communicate with each other about the child.

2. Determinations as to when parent-teacher conferences should be held involve assessments of an appropriate time to intervene in the students education and communicate with the parent, and of an appropriate time secure maximum parental involvement.

3. The number of parent-teacher conferences involves an educational assessment of how often parents should be brought

in to accomplish the District's educational goals. There is also a public policy assessment of how often parents expect such conferences, and to what extent the District's accountability obligation is satisfied by such a conference.

4. In Janesville, parent-teacher conference days are non-attendance days for students.

5. The Association's calendar proposal specifies three parent-teacher conference days and thus, if the District wanted to have students in school on those days instead of at parent-teacher conferences, it would require the Association's agreement. As parent-teacher conferences are within the normal scope of responsibilities traditionally assigned to teachers, the District contends that there is no evidence or assertion as to whether or how the scheduling of parent-teacher conference days affects the teachers wages, hours and conditions of employment.

Therefore, based upon the Commission's prior holding and the record facts herein, the District asserts that the Association's calendaring proposal as to parent-teacher conferences must be held to be a permissive subject of bargaining as it attempts to determine the work content of at least three of the work days of the employes.

Turning to that portion of the Association's calendar proposal which specifies when breaks in the school year calendar will occur, the District contends that the scheduling of break periods is a matter of curriculum and educational policy. The District asserts that, for instance, breaks should be scheduled at convenient curriculum junctures, at a logical ending period which considers the mental health students and teachers. The District alleges that breaks perhaps should fall at times when refreshing and reinvigorating the student's mind is the most appropriate. By seeking to require bargaining of the issue of breaks in the schedule, the District argues that the Association attempts to shut-out all other relevant considerations such as private school calendars, private and public economic interests, other employe interests, students learning pace and attendant pressures etc. The District contends that if an alteration in the length or number of break periods during a school year as to which wages had already been negotiated occurred, bargaining would be appropriate as to the issue of whether additional wages should be paid to the employes. However, because of the impact on the curriculum, the program and the students, the District asserts that the Association's proposal at issue herein is not primarily related to wages, hours and conditions of employment. The District therefore requests the Commission to find this portion of the calendar proposal to be permissive.

As to the Association's proposal relating to make-up days, the District contends that this portion of the calendar proposal is permissive because (1) it seeks to negotiate whether and under what circumstances lost student school days will be rescheduled and (2) it purports to establish when. The District contends that neither issue is primarily related to wages, hours and conditions of employment. As previously discussed, the District notes that the length of the school year in large part establishes the quantity of education received by students. The District asserts that the Association proposal as to makeup days could mean up to five days of instruction would be lost without being rescheduled at other times during the school year. The District notes that Secs. 121.006 (2), 120.13(13), 115.01(10), Stats., require at least 175 days of instruction to secure state aids. The District contends that the Association seeks about 177 days of scheduled student teacher contact via the proposed calendar, less inclement weather days which do not have to be rescheduled for state aid purposes. The District urges that, even if it must bargain the number of days in the work year (i.e. the 190 proposed by the Association) it should not have to bargain about whether to reschedule student contact days included originally as part of that 190 days. The District asserts, as it has previously, that each day of student-teacher contact is of great significance and in an educational sense is "priceless". Thus, it asserts that whether to reschedule a day depends upon the quantity and ultimately the quality of education that is to be provided and that the public has a crucial interest in questions of this nature. Therefore, the District contends that the decision of whether to reschedule student-teacher

contact days primarily relates to educational policy and does not relate in any significant sense to wages, hours and conditions of employment.

As to the issue of when to schedule makeup days, the District contends that this decision also involves essential educational policy judgments. It asserts that two primary considerations as to how that decision should be made are when such days would attract the greatest number of students and when student attitudes will be most conducive to the greatest learning. The District contends that these considerations are particularly imperative because of the normal, predictable resistance anticipated from the students who often view scheduled makeup days as some sort of punishment. The District therefore asserts that it is especially important that makeup days be scheduled so as to minimize the interference which these student attitudes could bring to the student's task. The District contends that there is no specific prior Commission decision as to this issue and thus, even if the Commission concludes that Beloit, should be followed, it requests that this portion of the calendar proposal be found to be permissive.

Looking at the portion of the Association calendar proposal which designates three days during the student school year as paid "convention days", the District contends that the loss of three student-teacher contact days goes to the quantity and hence quality of the educational program. The District also argues that whether to take two days from students in October and one day in February, as proposed by the Association, impacts upon educational judgments as to the student's learning environment and attitude at those particular junctures in the curriculum. The District recognizes that in the Board of Education v. WERC, supra, the Court opined that "educational conventions, and whether they are to be considered inservice or school days, and questions of compensation for such days are, we believe, within the statutorily defined area" of wages, hours and conditions of employment." However, the District asserts that under the current med/arb statute, serious questions can be raised as to the continuing validity of the Court's conclusion. In that regard it cites the following quotation from the Court's decision.

> Sec. 118.21(4), Stats., provides in part:
>
> "School boards may give to any teacher, without deduction from his wages, the whole or part of any time spent by him in attending a teachers' educational convention, ..." (Citation to predecessor statute omitted)
>
> We believe under this section that the school board or the board of education is given discretion as to whether teachers individually or collectively will be given time off to attend any educational convention, including a state or regional convention, how much time off will be given, how many conventions can be attended, and whether it is to be with or without pay in whole or in part. The discretion exercised must not be unreasonable, illegally motivated, nor arbitratory and, although the final determination must rest with the board of education, it is a subject upon which the board of education must negotiate with the representative of the majority labor organization representing the teachers. (citing Joint School District No. 8 v. WERB (1967), 37 Wis. 2d 483, 494, 155 N.W.2d 78.

The District contends that the Court's citation to its decision in Joint School District No. 8 underscores again the Court's statement that it was not ruling on whether "the determination of the school calendar is a major educational-policy determination". The District argues that the loss of three days with teachers means that the students get nothing at least on those days. The District contends that whether this loss of curriculum exposure is balanced by long term gains is an educational policy issue which is not appropriate for the bargaining table. The District contends that the proposal to release teachers from their professional duties on dates preestablished by private labor organizations has only an indirect impact on teachers. The District asserts that the primary relationship of the proposal is to the fact that students will not be in school and their learning process thus interrupted and shortened. As the Association's proposal in

essence requires a choice between the alternative of a teacher's presence in the classroom teaching students or a teacher's attendance at a state-wide union meeting, the District asserts that this portion of the calendar proposal must be found to be permissive.

In conclusion the District urges that the Commission find the entire calendar proposal to be a permissive subject of bargaining. If, however the Commission determines that one or more aspects of the calendar proposal does or do relate primarily to wages, hours and conditions of employment, the District asserts that that is not enough to make the entire proposal mandatory. Thus, it requests that if there are mandatory aspects to the proposal, they should be singled out and the remainder of the proposal be declared permissive.

Contrary to the assertions of the District, the Association contends that its calendar proposal seeks to bargain about the following subjects:

> 1. The number of days that teachers will provide student teaching services to the District in return for the wage and benefit package proposed by the Association, and when during the 1984-1985 school year, in relation to vacations, holidays and breaks, those workdays will occur.
>
> 2. The additional number and dates of in-service and parent-teacher conference days which the teachers will agree to work for that same economic package.
>
> 3. The number of holidays and vacation/break days when teachers will be excused from working, without loss of pay, and when such paid "time off" may be taken.
>
> 4. That teachers shall be entitled to attend the state and regional teachers' conferences without loss of pay.
>
> 5. An agreement that teachers will work additional days, without additional compensation from that contained in the wage and benefit package proposed by the Association for the work year specified in items 1 and 2 above, in the event that school days cancelled due to inclement weather need to be rescheduled in order for the District to comply with the State's legal requirements for the receipt of state aids. Two additional concepts are inherent in this proposal: (a) That whether or not the District actually utilizes the services of its teachers on all of the work days scheduled in the calendar proposal, or cancels work on some of those days as a result of factors outside the control of the teachers, the teachers are entitled to be paid for those days since the teachers have "given" those days to the District and have foregone the opportunity to schedule and use those days for other personal or employment activities; and (b) the quid pro quo for the teachers' agreement to work the additional make-up days without additional compensation is the District's agreement with respect to when such make-up days will be scheduled.

The Association argues that not a single challenged aspect of its calendar proposal contravenes state law with respect to the scheduling or provision of public education to the District's students, nor does any part of the proposal conflict with the District's proper and legal exercise of its educational duties and responsibilities under state statutes relating to school districts. It alleges that all of the subjects included in the Association's calendar proposal are primarily related to teacher hours and conditions of employment and have been previously determined to be mandatory subjects of bargaining by the Commission and the Wisconsin courts. The Association asserts that it will resist the compelling temptation to express its feelings with respect to the District's attempt to relitigate an issue that has been bargainable and bargained for a decade as well as the less compelling temptation to repeat all of the arguments that previously formed the basis for ruling that "school calendar" is primarily related to teacher hours and working conditions and is therefore a mandatory subject of bargaining. The Association contends that the bargainability of the school calendar was

clearly settled in Beloit, supra, and that the Court's holding in Beloit with respect to the school calendar has since been cited by the Court with approval in Racine, supra.

The Association contends that there is no support for the District's argument that the adoption of the med-arb statute serves as a basis for altering the bargainability of school calendar. It notes that both Beloit, supra, and Racine, supra, have been cited numerous times since the enactment of Sec. 111.70(4)(cm) Stats., by both the Commission and the courts. The Association points out that the Wisconsin Court of Appeals affirmed the Commission in Blackhawk Teachers Federation v. WERC, supra, concluding that "the amendments to Sec. 111.70 do not warrant adoption of a different task to determine the scope of collective bargaining under Sec. 111.70(1)(d). When our supreme court approved the 'primary relation' task, it was construing the language in Sec. 111.70(1)(d). The 1977 amendments to Sec. 111.70 did not alter that provision". The Association asserts that the Commission and Supreme Court have unambiguously ruled that all aspects of the school calendar are mandatorily bargainable. It contends that there is nothing in the instant case which distinguishes it from the established case law. The Association asserts that it remains true that "while the School Board cannot be required to agree or concede to an Association demand as to calendar days, it is required to meet, confer and bargain" as to the calendaring proposals involved in this case. Beloit, supra. Hence, the Association argues that the Commission must rule that the Association's 1984-1985 calendar proposal is a mandatory subject of bargaining. By way of clarification, the Association asserts that its proposal does not mandate that the District have any specific number of inservice days or any specific number of parent-teacher conference days. The Association contends that the District is free to conclude that it does not wish to have any inservice days or work days and that, if it made such a choice, the District could schedule regular classes for those days. Similarly, if the District chose not to have any parent-teacher conference days or to have fewer than the three specified in the Association's proposal, the District could utilize the remaining available days as student-teacher classroom instructional days. Thus, the Association contends that inservice/work days and parent-teacher conference days are only designated in the calendar for the purposes of identifying when those days will occur if the District choses to schedule those functions.

Discussion of Issue 14

Following the 1971 adoption of Secs. 111.70(1)(d) and (3)(a)4, Stats., the Commission in Beloit, supra, was confronted with the issue of the scope of the municipal employer's duty to bargain over a school calendar which established the length of the school year, teaching days, inservice days, vacation periods, holidays and convention dates. The Commission held:

> "We conclude that the school calendar is a mandatory subject of bargaining, since it establishes the number of teaching days, inservice days, vacation periods, convention dates, and the length of the school year directly affecting 'hours and conditions of employment'.
>
> With respect to the Associations's proposal pertaining to In-Service Days, we determine that the number of such days and the day of the week on which such days will fall are mandatory subjects of bargaining because, with the teaching days, they comprise the teachers' work days. However, we conclude that the type of programs to be held on such days, and the participants therein are not subjects of mandatory bargaining, since we are satisfied that such programs and the participants therein have only a minor impact on working conditions, as compared to the impact on educational policy."

The Supreme Court in Beloit, supra, affirmed the Commission's ruling in its entirety. However, the Court framed its holdings in terms more narrowly drawn than the "all aspects of the school calendar" designation that appeared at one point in the statement of the issue for the Commission. Specifically, the Court expressed its hold as follows: The Board ... is required to ... bargain as to any calendaring proposal that is primarily related to wages, hours and conditions of employment.

As the Court did not overturn any of the Commission's conclusions as to the calendar provision before it in Beloit, supra, we view the Court as having determined that there is a duty to bargain as to school calendar proposals which establish the length of the school year, the number of teaching days, vacation periods, holidays, convention days, and inservice days. We believe that Beloit reflects a determination by the Commission and the Courts that when the relationship of the educational policy determinations involved in the various elements of the school calendar provision referred to by the Commission in its decision are balanced against their relationship to employe concerns as to hours and conditions of employment, the latter relationship predominates in each instance. Thus, the calendaring provision before the Commission was found by the Commission and the Courts to be mandatory in all respects. 5/ We see no basis in this record for overturning those prior determinations.

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5/ As the foregoing makes clear, we do not agree with our dissenting colleague's assertions to the effect that "both the Commission and the Court have left open the question of whether and which components constituting the broad subject of calendar are mandatory in nature." In our view, both the Commission and the Courts came to grips with the mandatory/permissive status of the elements of the school calendar provision that was before the Commission in the Beloit case.

The Commission decision in Beloit emphasized at the outset of its discussion that "our determination of each of the proposals involved herein is based on the specific proposal presented for inclusion in the collective bargaining agreement which was being negotiated by the parties." The Commission physically included the school calendar provision under consideration therein as a part of its decision, along with the language of the various proposals in dispute. The Commission commented specifically on the various elements it found in that provision, to wit, "number of teaching days, inservice days, vacation periods, convention dates, and length of the school year", finding each of those elements, and hence the provision in its entirety, subject to mandatory bargaining based on the balancing test articulated and applied by the Commission in that case.

In that context, we cannot agree with our colleague that the Commission did not determine the mandatory/persmissive status of the calendaring issues involved in the provision it had before it in that case.

Circuit Judge Currie's decision in Beloit also addressed the elements of the provision that had been enumerated by the Commission. The Judge concluded that the Commission's holding that the school calendar provision involved was mandatory in all respects was a rational interpretation and Judge Currie affirmed the Commission's determination regarding the school calendar provision in all respects. Thereupon, the Supreme Court stated, ". . . we affirm the trial court holding that . . . (the District) is required to meet, confer and bargain as to any calendaring proposal that is primarily related to 'wages, hours and conditions of employment'."

In view of the Commission's and Circuit Court's references to the various elements of the calendar provision involved in Beloit, we think the most reasonable interpretation of the Supreme Court's affirmance is that the school calendar provision involved, and each of the elements comprising it, primarily related to wages, hours and conditions of employment so as to appropriately be held to be within the scope of mandatory bargaining. Indeed, the present Commission unanimously noted in Milwaukee Board of School Directors, 20093 (8/83) that "The Supreme Court affirmed the Commission's ( Beloit )calendar ruling) in each of the foregoing respects . . . . (such that) . . . we conclude that school calendaring issues beyond those involved in the specific proposal held mandatory by the Commission and Court in Beloit must be analyzed case-by-case to determine whether they are primarily related to wages, hours and conditions of employment or, instead, primarily related to the formulation or management of educational policy." Id. at 6.

The District properly notes that the Court's holding reflects that a duty to bargain exists as to "any calendaring proposal that is primarily related to wages, hours and conditions of employment". Thus, as we recently concluded in Milwaukee Board of School Directors, supra, school calendaring issues beyond those involved in the specific proposal held mandatory by the Commission and the Court in Beloit must be analyzed on a case by case basis to determine whether they are primarily related to wages, hours and conditions of employment or, instead, primarily related to the formulation or management of educational policy. The Association's calendar proposal as to parent-teacher conferences and makeup days present two such issues which will be analyzed on such a basis by the Commission herein.

Before turning to that task, we think it is appropriate to comment upon the District's assertion that the passage of the mediation-arbitration law presents a valid basis for concluding that the status of the calendar proposal ruled upon in Beloit is something less than settled. As we have discussed earlier in this decision, we do not find any support for that assertion by the District in the Supreme Court's decisions which have been issued in cases involving the duty to bargain where access to binding arbitration was available. We further note that, as pointed out by the Association, the Court in Blackhawk, supra, explicitly rejected the argument proferred here by the District. As to calendar, we believe that reference to Sec. 120.12(15), Stats., provides ample evidence that the Legislature supports the Courts' rejection of any modification of the scope of the duty to bargain due to the presence of binding arbitration. We note that the portion of that statutory provision which specifies "this subsection shall not be construed to eliminate a school district's duty to bargain with the employes collective bargaining representative over any calendaring proposal which is primarily related to wages, hours and conditions of employment" was added to the statutes by Chapter 206, Laws of 1977, and became effective on July 1, 1978. Section 111.70(4)(cm) Stats., the mediation-arbitration statute referred to by the District, became effective on January 1, 1978, prior to the statutory addition noted above. Had it been the legislative intent to alter the duty to bargain in this area because of the presence of mediation-arbitration, one would presume that the Legislature would have chosen something other than a quotation of the holding in Beloit, supra., to reflect such an intended change. By choosing to amend the abovequoted statute with language which reflects the Court's holding in Beloit, we think it clear that the Legislature has affirmed the continuing validity of the "primary relationship" test in the area of calendar as well as the specific calendar items found mandatory therein. Therefore, we again reject the District's contention in this regard.

We turn now to the calendaring issues not specifically dealt with in Beloit.

In Milwaukee Board of School Directors, supra, we were confronted with the calendar issue of the scheduling of parent-teacher conferences. The Commission therein ruled as follows:

> It appears from the foregoing and from the record as a whole, that, apart from their concerns as professional educators about the most effective timing of student evaluations and teacher-parent conferences, the MTEA's wage, hour and conditions of employment concrns in the matter include the following: having sufficient notice of the date report cards will be distributed (and of the date in advance thereof on which grades must be turned in for processing) to permit the teacher to fulfill that duty without undue haste or stress; having sufficient time after the end of the period during which the student is being evaluated to reflect on the student's performance during that period and to formulate the grading information by the submission deadline without undue haste or stress; setting the day of the week on which the grades be required to be submitted, e.g., will there be a weekend after the close of the evaluation period and before the date for submission of grades to the administration; having sufficient notice of the date of parent-teacher conferences to eprmit the teacher to gather materials, prepare comments and ready the classroom, etc., to effectively communicate with the parents; and having sufficient separation

in time between the date for submission of grades and the date of the following parent-teacher conference to permit preparation for the conference without undue haste or stress.

The District contends that the dates in question reflect educational policy choices as to when students and parents should receive information as to the student's progress during the school year. More specifically, the District's educational policy concerns would appear to include: when best to evaluate and motivate students; how to do so in a manner that permits effective and timely procesing and distribution of grade reports; when and how best to communicate with parents both in the form of report cards and in the form of parent-teacher conferences; and how best to coordinate the grade-reporting and parent-teacher conferencing to maximize the value of each to the educational process. The District contends that when parent-teacher conferences are held may depend on the policy choices regarding the purpose of the conference. For instance, if conferences are used as a vehicle to distribute report cards and to discuss student progress, the conferences may be best scheduled around the end of the grading period. However, if the conferences are utilized to acquaint the parents with the teches and the school, then the conferences would be scheduled early in the semester. The District also argues that the day of the week on which conferences are held has an impact on the participation level of the parents. Conference days scheduled for Monday and Friday tend to have less participation. The District further notes that the scheduling of parent-teacher conferences on the same day report cards are distributed has led to increased parental participation.

We reject MTEA's contention that the interest of teachers in having sufficient time to prepare for conferences and for the submission of grade information requires a conclusion that the dates of conferences and card distribution are mandatory subjects. As the District argues, MTEA's legitimate interest in teachers having sufficient notie for preparation can be met by mandatory "impact" bargaining concerning the amount of advance notice required as to such dates. In our view, then, periods of required advance notice of the dates of parent-teacher conferences, report card distribution (and grade information submission) are mandatory subjects of bargaining.

We are also persuaded that--as regards the proposals we have before us herein--the educational policy dimensions of decisions as to dates for parent-teacher conferences and report cards outweigh the wage, hour and condition of employment dimensions including the legitimate teacher concerns that those dates could be scheduled in combinations that would present teachers with severe time pressures as regards their preparations for parent conferences and their submission of grades information. However, by so concluding, we are not deciding whether some future proposal for a minimum spacing between such dates could be developed as to which the wage, hour and condition of employment dimensions rather than the educational policy dimensions would predominate.

For the foregoing reasons, we have ruled that the specific proposals at issue herein constitute permissive subjects of bargaining.

We note that the MTEA is free to bargain over the impact of the dates selected by the District for the events in question upon the wages, hours and conditions of employment of teachers. It should also be emphasized again that our conclusions flow from a context in which the MTEA seeks to

bargain dates from among a group of dates already identified generally as those for teaching and parent-teacher conferences.

We do not believe that the record herein warrants different conclusion since the Association has neither asserted nor demonstrated employe interests which are any stronger than those presented by the MTEA and found non-predominant by the Commission. We therefore find that the Association's parent-teacher conference calendar proposal is a permissive subject of bargaining.

Turning to the issue of make-up days, the Association has proposed that if sufficient days of class are cancelled due to inclement weather, etc., only those days which are necessary for the District to qualify for state aids will be made up. The Association has further specified that the makeup days, if any, will commence on March 25, 1985. As we have previously discussed, the Association can, under Beloit, supra., insist on bargaining the number of teaching days and when they will occur. If the Association can insist on bargaining the number and timing of teaching days which will initially be scheduled, we believe it follows that the Association can also bargain as to whether and when any days will be made-up if some of those days are cancelled. While we again note our awareness of the educational policy dimensions of such decisions, we see no persuasive basis for concluding that, on balance, the relationship to employes' hours and conditions of employment does not predominate. While it is true, as the District argues, that the Association's calendar proposal only specifies five make-up days, we do not find the absence of a specified schedule for additional days which might be needed to qualify for state aids to be a basis for finding a proposal to be permissive. We initially note that eight days would have to be cancelled before this District concern would generate an actual problem. More importantly, we view the Association's proposal as reflecting a clear intent that whatever number of days are needed to be rescheduled to qualify for state aids, those days will in fact be worked by the teachers represented by the Association. Thus, we view the specification of only five scheduled make-up days as only a reflection of the likelihood that no more than seven school days will be cancelled due to inclement weather etc. We therefore conclude that this aspect of the calendar proposal is a mandatory subject of bargaining.

## DISSENT AND CONCURRING OPINION OF COMMISSIONER COVELLI ON CALENDARING ISSUES

I disagree with that my colleagues in their apparent conclusion that we are precluded from examining the elements of the school calendar at issue herein by the decision of the Supreme Court in Beloit. Both the Commission and the Court have left open the question of whether and which components constituting the broad subject of calendar are mandatory in nature. The record in the case before us invites a detailed review as it amply supports a conclusion that, while many portions of the Association's calendar proposal are subject to a duty to bargain, others relate primarily to the determination of public policy. Further, I conclude that it is possible to harmonize the mandatory and permissive items related to calendar in such a way as to allow meaningful negotiations over the former without unduly restricting the municipal employer's right to determine the latter. I therefore dissent and separately concur.

### I. PRIOR COURT CONSIDERATION OF CALENDAR

My colleagues in the majority assert that the holding of the Court in Beloit affirming the Commission's decision in that case forecloses any argument that the items enumerated by the Commission therein are more closely related to the determination of public policy than to hours and conditions of employment. A closer examination of Beloit and its predecessors suggest that the Court's holding was not so broad as the majority asserts, and the the Court has not yet directly considered which portions of the school calendar are mandatory subjects of bargaining and which portions of the calendar are reserved to the political process.

#### A. JOINT SCHOOL DISTRICT NO. 8

In Joint School District No. 8 v. Wis. E.R. Board, 37 Wis. 2d 493 (1967), the Supreme Court considered the question of whether a school board might be compelled to submit to fact-finding over the overall issue of school calendar. The school board argued that calendar was "a major educational policy determination" and as

such not a negotiable subject. The Court held that the general subject of calendar had a significant relationship to hours and conditions of employment, and thus was appropriately included in the process of fact-finding. The Court expressly declined to decide "whether the determination of a school calendar is a major educational policy determination" Id, at 492, because the nature of the process made such a determination unnecessary. At that time, the provisions of Section 111.70 did not require collective bargaining between the parties as to any subjects. The municipal law as then constituted authorized the parties to confer and negotiate on questions of wages, hours and conditions of employment, but did not provide that refusal to do so was a prohibited practice. The sole result of a refusal to confer was the creation of the right in the other party to invoke fact-finding. Terming this a "vital distinction", the Court went on to say:

> "If the school calendar was subject to collective bargaining in the conventional sense in which tht term is used in industrial labor relations under sec. 111.02(5), there would be merit to the argument of the school board that its legislative function is being delegated or surrendered and thus the calendar could not constitutionally be a subject of negotiation although it fell within the broad terms of the statute. However, under sec. 111.70 the school board need neither surrender its discretion in determining calendar policy nor come to an agreement in the collective bargaining sense. The board must, however, confer and negotiate and this includes a consideration of the suggestions and reasons of the teachers. But there is no duty upon the school board to agree against its judgment with the suggestions and it is not a forbidden practice for the school board to determine in its own judgment what the school calendar should be even though such course of action rejects the teachers' wishes. The refusal to come to a "settlement" may, of course, place the school board in a position where the teachers can invoke the fact-finding procedure, but the findings of the fact finder if adverse to the board are not binding upon it."
>
> Id, at pages 494-495

The Court's determination that negotiations over the calendar did not impermissibly interfere with the functioning of the political process in this area was plainly premised upon the board's right to ultimately decide calendar policy in accordance with its own judgment. Indeed, the Court stressed the contributions that fact-finding might make to the policy-making process, concluding that:

> "(t)he force of . . fact-finding . . is public opinion, and the legislative process thrives on such enlightment in a democracy."
>
> Id, at 495

B. BOARD OF EDUCATION

The next statement by the Court on the subject of calendar following Joint School District No. 8 was a comment in Board of Education v. WERC, 52 Wis. 2d 625 (1971). The case involved not the duty to bargain, but the issue of whether an agreement requiring pay to members of a majority union for attendance at the union's convention illegally discriminated against members of a minority union who were not guaranteed pay for attending their union's convention. In a preliminary discussion of the duties of the exclusive bargaining representative, the Court stated that "the school calendar and in-service days are subject to negotiations with the bargaining agent. . . ." Board of Education, at 633, and cited Joint School District No. 8, supra, for this general proposition. The Court again cited Joint School District No. 8 later in the same opinion for the proposition that final determination of calendar issues "must rest with the board of education. . . ." Board of Education, at 639. These two comments, unrelated to the primary issues before the Court, were the sole discussion of the nature of calendaring proposals by the Court in that case.

C. BELOIT

Subsequent to the adoption of MERA and the imposition of an enforceable duty to bargain, the general issue of school calendar was presented to the Court in Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), an appeal from Commission Decision No. 11831-C. The Commission had ruled on the nature of

eleven specific proposals, as well as the general subject of school calendar, with regard to which the Commission held "all aspects" to be mandatory subjects for bargaining. 6/ Both the Employer and the Association appealed the decision to the Dane County Circuit Court. The circuit court affirmed the Commission's decision, with some modifications. 7/ The Supreme Court affirmed the trial court, but narrowed the Commission's holding on calendaring, and found that "while the school board cannot be required to agree or concede to an association demand as to calendar days, it is required to meet, confer and bargain as to any calendaring proposal that is primarily related to 'wages, hours and conditions of employment.'" 73 Wis. 2d 43, at page 62 (emphasis added). In making this ruling, the Court cited to both Joint School District No. 8 and Board of Education.

D. DISCUSSION

The majority asserts that Beloit settled the question of whether "number of teaching days, in-service days, vacation days, convention dates, and the length of the school year" are mandatory subjects. From the foregoing review of the Court's decision regarding calendar, however, it should be apparent that the Court has not so held. The decision in Joint School District No. 8 expressly reserved ruling on the policy dimensions of the calendar. The Court instead emphasized the fact that the school board retained ultimate decision making authority regarding calendar and that the consequence of bargaining the issue - fact-finding - would serve to enhance rather than usurp the policy making role of the Board by better informing the public and promoting debate on the issue. Compare this analysis with the language used by the Court in Racine, supra, to explain why certain items were not mandatory subjects for bargaining under an enforceable duty to bargain:

> "In municipal employment relations the bargaining table is not the appropriate forum for the formulation or management of public policy. Where a decision is essentially concerned with public policy choices, no group should act as an exclusive representative; discussions should be open; and public policy should be shaped through the political process. . . ." 81 Wis. 2d 89, at page 100.

Given the differing contexts of the cases, there is no inherent conflict between the Court's determination in Joint School District No. 8 that negotiating calendar is allowable where the Board retains complete discretion in the matter and the process flowing from negotiations merely serves to enhance the Board's policy making ability, and the proposition in this case that some aspects of the school calendar are permissive under the tests adopted in Beloit and Racine, decided some nine years after Joint School District No. 8.

Again, in Board of Education, the Court stated that the general subject of school calendar was a subject of bargaining, citing to Joint School District No. 8. As previously noted, however, the issue of the calendar's policy implications was not before the Court in that case. The discussion was purely preliminary to a review of an existing contract clause and its discriminatory effects on certain

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6/ The Commission's total discussion of the general issue of school calendar was as follows:

> "School Calendar:
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> We conclude that the school calendar is a mandatory subject of bargaining, since it establisehs the number of teaching days, in-service days, vacation periods, convention dates, and the length of the school year directly affecting "hours and conditions of employment." Beloit, No. 11831-C, at page. 22

7/ Dane County Circuit Court, Case Nos. 144-272, 144-406, 144-472, Decision No. 11831-D, 3/31/75.

bargaining unit members. It can hardly be said that the Court's comment on the negotiability of calendar represented a broad holding that each and every component part of the calendar was primarily related to wages, hours and working conditions.

Beloit represents the centerpiece of the majority's argument that the issue of calendar is no longer open to examination. The treatment of calendar in that case was different in two respects from that given the other eleven issues decided therein. First, there was no contested proposal on calendar presented to either the Commission or the Courts in Beloit, and the issue was therefore decided in the abstract. Second, calendar was the only issue decided on the basis of precedential cases in Beloit. As discussed in greater detail below, these are critical distinctions which suggest that the Court has not yet had the opportunity to apply the 'primarily related' test to the component parts of the school calendar.

1. The Proposal Before the Court

The parties in Beloit had reached agreement regarding the calendar prior to submission of their petition for declaratory ruling, and no Association proposal was presented to the Commission or the Courts. 8/ As noted, the Commission held that "all aspects of the school calendar" were mandatory subjects of bargaining. The Court substantially narrowed this holding, deciding that the "school board . . . is required to meet, confer and bargain as to any calendaring proposal that is primarily related to wages, hours and conditions of employment' " 73 Wis. 2d 43, at page 62. The majority asserts that the Court intended thereby to ratify the mandatory nature of each item in the laundry list of illustrative items contained in the Commission's brief discussion. 9/ In each of the other subject areas considered by the Court, the holding addressed the specific proposal before it, and the Court found that proposal (or parts of it) to be mandatory or permissive. Only in the area of calendar did the Court limit its holding to a determination that a proposal in that general subject area would be mandatory if it met the 'primarily so' test, without a specification that the proposal before it met that test. The obvious reason for this 'contingent' holding was that there was no contested proposal before the Court, merely an assertion by the Employer, litigated by the parties and addressed by the Commission, that calendar proposals generally were permissive subjects. The Court's rejection of this broad argument is consistent with its statement earlier in the same case that the 'primarily so' test should be applied "on a case by case approach to specific situations." 73 Wis. 2d 43, at page 55.

2. The Court's Reliance on Precedents

In addition to the fact that no specific contested proposal was presented to the Court in Beloit, it is worth noting that the calendar was the sole issue decided in that case on the basis of a precedential decision, rather than an explicit determination that the proposal was primarily related to wages, hours and working conditions. The Court cited to Board of Education, which in turn relied on Joint School District No. 8. As previously discussed, Joint School District No. 8 was premised upon the district's right to finally determine calendar irrespective of its negotiability, 10/ and the harmony between fact-finding and

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8/ The agreed upon calendar was submitted as an exhibit. See Beloit, 11831-C, at pages 8 and 12; 73 Wis. 2d 43, Footnote 29 at page 61.

9/ ". . . teaching days, in-service days, vacation days, conventions dates, and length of school year. . . " Beloit, 11831-C, at page 22.

10/ Significantly, both the Circuit Court and the Supreme Court stressed the importance of the fact that the District could not be compelled to agree to any proposal on calendar. This language was not employed in the discussion of any other proposal, and points to the Court's reliance on the continuing vitality of its prior ruling.

the democratic determination of public policy issues. When Beloit was decided, that underlying premise was still valid. The creation of an enforceable duty to bargain, and the attendant prohibition on unilateral action, contained in MERA still did not seriously constrain the municipal employer's ability to ultimately determine the calendar if agreement could not be reached. All that was required was good faith bargaining to the point of impasse. The institution of the Mediation/Arbitration provisions of MERA subsequent to the decision in Beloit, however, does destroy the premise of Joint School District No. 8 and, with it, Board of Education.

Under Mediation/Arbitration, both the Board and the Association have an equal chance of determining the calendar once impasse is reached, through proposals submitted to a neutral third party. Arbitration does not rely on "public opinion" 11/ or "enlightenment in a democracy" 12/ to "persuade or dissuade a school board in its determination of a school calendar. 13/ Rather it involves the binding decision of a third party based upon statutory criteria. 14/ This represents a dramatically different consequence to determining that a subject is mandatory than that relied on by the Court in Board of Education and Joint School District No. 8. As the adoption of MERA and its MED/ARB provisions completely eliminate the rationale underlying the precedents relied on by the Court in Beloit, I do not believe that we are precluded by reason of that decision from examining the elements of the school calendar. 15/

In summary, neither the Commission 16/ nor the Court has squarely addressed the question of which specific portions of the school calendar are mandatory subjects for bargaining under a statute providing both an enforceable duty to bargain and a mechanism for the compulsory resolution of impasse. The issue is before us in this case and on this record. As the following discussion

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11/ Board of Education, supra, at page 495.

12/ Id, at page 495.

13/ Id, at page 495.

14/ Section 111.70(4)(cm), Wis. Stats.

15/ I would stress that my conclusion that the MED/ARB provisions of MERA warrant review of the component parts of the school calendar is based upon the unique history of the calendar issue in the courts. It is the effect that MED/ARB has upon the Court's express premise in the precedential cases on calendar, rather than merely the introduction of the process into public sector collective bargaining, that makes it relevant. Had these issues been separately submitted to the Commission and the Courts and measured on their merits against the Beloit-Racine standard, I would agree with my colleagues that the passage of MED/ARB would have no bearing on whether they were mandatory or permissive.

16/ My colleagues suggest that this Commission has ruled on the applicability of Beloit to the specific components of the calendar set forth therein. In Milwaukee Board of School Directors, supra, we did state that "school calendaring issues beyond those in the specific proposal held mandatory by the Commission and the Court in Beloit must be analyzed case-by-case to determine whether they are . . (mandatory)." Id, at p. 6. Contrary to the interpretation given my position by my colleagues, I do not disagree with the above-cited dicta. The point I would make is simply that the Commission and the Court held the general subject of calendaring to be mandatory in Beloit since the general subject was the only thing before them. Here we are concerned with the specific component parts of the calendar. Taken as a whole, as was done in Beloit, the mandatory apsects of the calendar outweigh the permissive aspects, and the proposal therein was mandatory. The majority ignores the preceding paragraph in Milwaukee Board of School Directors where also noted that the Court narrowed our Beloit holding to "any calendaring proposal that is primarily related to wages, hours and conditions of employment" thus recognizing that certain components may be permissive.

illustrates, there are substantial issues of public policy involved in the determination of the number of student-teacher contact days, parent-teacher conferences and in-service days. There are also important ways in which these determinations impact upon wages, hours and working conditions. The accomodation of these competing interests should be arrived at through a careful analysis, utilizing the 'primarily so' test.

## II. THE COMPONENT PARTS OF THE SCHOOL CALENDAR

### A. Teaching Days

The school calendar establishes, among other things, the number of days each year that students will be taught. With the exception of curriculum, what more basic educational policy decision can be posed to a school board? The number of teaching days determines the quantity of education that a district will make available to its students and thus, all other things being equal, how well educated the students of the district will be upon completion of their school careers. The process of educating children does not lend itself to neat distinctions between the act of teaching, the content of the curriculum and the amount of time spent in presenting that curriculum. The amount of time available for teaching largely determines the scope of the curriculum and thus the content of the student's school day. Our Supreme Court, in City of Brookfield v. WERC, 87 Wis. 2d 819 (1979), held that the determination of the "quality and level of municipal services" is not a mandatory subject of bargaining. Id, at 833. The Commission also has consistently held that the level of service provided by a municipal employer is a permissive subject of bargaining, 17/ and that the duration of pupil-teacher contact during the school day is a matter of basic educational policy, because it "directly articulate(s) the District's determination of how quality education may be attained and whether to pursue same". 18/ To suggest that the number of contact minutes in a day goes directly to the quality of education, while the number of contact days in a year does not, is to draw a distinction with no apparent basis. 19/ In education, teaching is the service and learning is the product. 20/ The relationship between the level of this service and the quality of this 'product', as well as the other public policy implications of teacher-pupil contact days, is made clear by the following excerpts from the recently released study by the National Commission on Excellence in Education, A Nation At Risk: The Imperative For Education Reform: 21/

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17/ City of Wauwatosa 15917 (11/77); Milwaukee Board of School Directors, 17504, (12/79); City of Brookfield, 19944 (9/82).

18/ Oak Creek Franklin Joint School District 11827-D (9/74), at p. 15.

19/ In this regard, I would point out that the State Legislature has left it to local school boards to determine contact minutes, and the Commission has nonetheless determined them to be primarily related to educational policy. The Legislature has, however, deemed teaching days to be of significant enough public concern to establish an absolute minimum number in order to qualify for state aids. See Section 120.12(15) Wis. Stats.

20/ If a teacher may demand that there be no more than 180 teaching days in a school year, and as a matter of right place that issue before an arbitrator, do my colleagues believe that a Sanitation Worker may demand that garbage be collected only 180 days per year, or that a Baliff may insist upon only 180 days of court per year? Why may not the food service workers, bus drivers and teacher's aides, all of whom are affected by the number of days of pupil attendance, present conflicting demands for a certain school calendar? Picture a school district with four different bargaining units arriving at an early settlement with its bus drivers and then informing the teachers that the matter of calendar is settled by virtue of its signed contract with the drivers. In the alternative, picture a district forced to arbitrate with four separate units and losing three of the four arbitrations. Which of the four possible calendars will dictate the amount of instruction received by that District's students?

21/ U.S. Government Printing Office Stock No. 065-000-00177-2 (April 1983)

"Indicators of the Risk:

The educational dimensions of the risk before us have been amply documented in testimony received by the Commission. For example:

International comparisons of student achievement, completed a decade ago, reveal that on 19 academic tests American students were never first or second and, in comparision with other industrialized nations, were last seven times.

. . .

About 13 percent of all 17 year olds in the United States can be considered functionally illiterate. Functional illiteracy among minority youth may run as high as 40 percent.

Average Achievement of high school students on most standardized tests is now lower than 26 years ago when Sputnik was launched.

. . .

The College Board's Scholastic Aptitude Tests (SAT) demonstrate a virtually unbroken decline from 1963 to 1980. Average verbal scores fell over 50 points and average mathematics scores dropped nearly 40 points.

College Board achievement tests also reveal consistent declines in recent years in such subjects as physics and English.

. . .

Between 1975 and 1980, remedial mathematics courses in public 4-year college increased by 72 percent and now constitute one-quarter of all mathematics courses taught in those institutions.

. . .

A Nation at Risk, at pp. 8 and 9

Each generation of Americans has outstripped its parents in education, in literacy, and in economic attainment. For the first time in the history of our country, the educational skills of one generation will not surpass, will not equal, will not even approach, those of their parents.

A Nation at Risk, at page 11

"FINDINGS

Findings Regarding Time

Evidence presented to the Commission demonstrates three disturbing facts about the use that American schools and students make of time; (1) compared to other nations, American students spend much less time on school work; . . . .

In England and other industrialized countries, it is not unusual for academic high school students to spend 8 hours a day at school, 220 days per year. In the United

States, by contrast, the typical school day lasts 6 hours and the school year is 180 days.

A Nation at Risk, at page 21

"RECOMMENDATION C: TIME

We recommend that significantly more time be devoted to learning the New Basics. This will require a more effective use of the existing school day, a longer school day, or a lengthened school year.

. . .

3. School Districts and State Legislatures should strongly consider 7-hour school days, as well as a 200-to 220 day school year."

A Nation At Risk, at page 29

In addition to the compelling findings of the National Commission, the record in this case reflects the concerns of other educational policy makers over the implications of the number of teacher-pupil contact days to the quality of education. 22/ The Commission received direct testimony from District witnesses about the inter-relationship between teacher-pupil contact days and such issues as curriculum content, student retention and pupil performance. 23/ The record before the Commission and any objective view of the educational process inevitably lead to the conclusion that number of teacher-pupil contact days in a school year is intimately related to the level of services provided by the Employer and the quality of education offered to District pupils. As such, it represents so fundamental a policy issue that it must be deemed an inappropriate subject for removal from the arena of political debate and decision making. 24/

Having concluded that a proposal placing an absolute limitation on the number of teacher-pupil contact days is a permissive subject of bargaining, I would note that I am not unmindful of the significant impact that the subject has on 'wages, hours and working conditions' for all District employes, including teachers. The number of teacher-pupil days also constitutes the major portion of the work year for school-year employes. These employes have a legitimate concern in having advance knowledge of the number of teacher-pupil contact days so that they plan their schedules, as well as formulate their wage proposals if they are salaried employes. As discussed, infra, there are many elements of the overall calendar which are mandatory as to timing, and advance knowledge of the number of teacher-pupil contact days would be essential to the formulation of bargaining proposals over those matters. In addition, it may be that a school district's decision to increase the number of teacher-pupil contact days would so increase the demands on the teaching staff that its bargaining agent would wish to propose premium pay or per diem pay provisions for contact days in excess of a set number. Such notice and extra pay provisions would consitute valid impact demands by the bargaining agent, and the employer would be under a duty to bargain over them. Through such proposals the employes' right to engage in meaningful bargaining over mandatory calendar issues could be harmonized with the District's right to make policy determinations relating to teacher-pupil contact days. This is very similar to the issue of class size, where the District retains the ultimate authority to determine class size, but the Association is free to propose extra compensation for teachers whose classes exceed specified levels. 25/

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22/ See District Exhibit 18 for the comments on Lloyd C. Nielsen, President of the American Association of School Administrators; District Exhibit 16, Evaluations of Year-Round School Programs, illustrating some options available to educators.

23/ Tr. pp. 194-205.

24/ Racine, supra, at pp. 99-100.

25/ "See discussion on WORKING CONDITIONS, Subsection 7, CLASS SIZE, Infra, at pps. 130.

B. The Starting Date For the School Year

As with teacher-pupil contact days, neither the Commission nor the Courts has directly addressed the issue of whether the starting date for the school year is a mandatory subject of bargaining. Although there are certain policy dimensions to this decision, I believe that the interests of the employes predominate.

The date on which school is commenced each year is a significant benchmark for the local community. Certain industries, such as agriculture and tourism, depend heavily upon a student work force. Furthermore, the activities of community members are often planned around the starting date. Feelings on the subject can be quite intense, as is witnessed by the recent efforts to petition the Legislature for a prohibition against starting school before Labor Day. Balanced against these generalized community concerns is the fact that school year employes have a direct concern with knowing when their work year will begin. Many of these employes have other jobs over the summer break, or continue their professional educations. As these school employes have a reasonable expectation of a prolonged break over the summer months owing to the nature of their employment, the dimensions of that break more directly impact their conditions of employment than they do any educational policy considerations. Thus a calendaring proposal relating to the starting date of the school year is a mandatory subject of bargaining.

C. Parent-Teacher Conferences

I agree with my colleagues that the record in this case will not support a conclusion that the issue of parent-teacher conferences is a mandatory subject of bargaining. Whether such conferences will be held at all represents a basic educational policy judgment that it is desirable to inform parents of their children's progress and involve them in a structured way in the educational process. Further, the timing of these conferences directly relates to the character and effectiveness of the parent's involvement. A conference scheduled at the beginning of the school term would useful for discussing educational goals, but useless for evaluating progress towards those goals. Thus the educational policy dimensions of the issue predominate. The Association is, of course, free to make proposals relating to the impact that the decision to hold parent-teacher conferences on a particular set of dates might have on wages, hours and working conditions (for example, provisions for advance notice).

D. Make-up Days

For the same reasons stated in my discussion of teacher contact days, Section II, A, supra, I conclude that make-up days are permissive subjects of bargaining and therefore dissent from the decision of my colleagues. Make-up days are nothing more than teacher contact days which have been rescheduled due to school closings. The decision to have make-up days and the number of these days to be scheduled is derived from the initial decision to have a certain number of contact days in the school year, and a proposal to limit make-up days to those necessary to qualify for state aids unduly restricts the right of the district to determine the quantity of service that it will provide.

While the decision to make-up school days lost to inclement weather and the like is a permissive subject, the Association is entitled to bargain over the dates for holding the make-up days. Once the school district's interest in establishing the overall number of contact days is met, the balance shifts to the employes' interest in being able to plan for the summer break and knowing the likely end of the work year. Whether make-up days will be scheduled on Saturdays or will extend the work year certainly carries within it some implications for the quality of educational services provided on those days, i.e., a judgment as to the value of attempting to conduct classes on a weekend. On balance, however, the effect of this scheduling decision more directly relates to hours and working conditions than to any public policy concerns. Accordingly, I concur with the majority that when make-up days will occur is a mandatory subject of bargaining.

E. Teacher In-Service Days

The District asserts that in-service days represent policy choices as to whether students will be taught on a particular day or teachers will spend the day in training programs, and whether such training is necessary to achieve the level

of services sought by the District. The Association contends, and my colleagues agree, that the entire issue of In-Service days was settled in the Beloit decision and need not be reviewed in this case. While I concur with the majority 's position as to scheduling of in-service days, if they are to be held, I believe that the decision to conduct in-service programs in the first place is clearly permissive.

The District's contention that the decision to hold in-service programs requires a choice between training teachers or teaching students presupposes that the District does not have the ability to do both during the course of the school year. This supposition is at odds with the District's argument that the number of teacher-pupil contact days is a public policy decision within the discretion of the elected school board. As noted in Section II, A, supra, the record in this case does establish the validity of that argument. Given that the District has the right to determine the number of contact days, the insertion of an in-service day in the schedule does not force a choice between training and pupil contact, except on that particular day. While there may be particular days within the school year on which there are legitimate educational policy reasons for insisting that there be no break in the flow of teacher-pupil exchanges, the District has not provided us with any concrete examples and, even if they had, such examples would not lead to the conclusion that the scheduling of in-service days was permissive in its entirety - merely that a proposal to schedule an in-service on that given day would be permissive. I see no compelling educational policy choices which would be constrained by a proposal to schedule teacher in-service days on specific dates during the school year. The scheduling of such dates does affect the working conditions of teachers, who must prepare lesson plans around that particular date and make allowances for the date in their work schedules. Furthermore, the number of dates set aside for in-service training relates to the length of the work year when considered in conjuction with the number of teacher-pupil contact days, and is intimtely connected with overall compensation and hours. Premised upon my conclusion that overall teacher-pupil contact days need not be limited by the scheduling of in-service days. I would conclude that the number and timing of dates set aside for in-service training during the work year is a mandatory subject of bargaining.

The foregoing discussion is limited to the scheduling of in-service days. The decision whether to actually conduct in-service programs, and the content of those programs, does, as the District asserts, relate to the educational policy choices. As the Commission held in Milwaukee Teacher's Education Association 17504-17508 (12/79), it is generally the Employer's prerogative to assign work which falls fairly within the scope of the employe's responsibilities, and thus the decision to provide or require in-service training is not a mandatory subject of bargaining. Further, the decision to assign in-service involves a decision that the training is necessary for improving or maintaining the quality of instructional services in the District, and an evaluation of the qualifications of the professional staff. The fact that the Association may bargain over the number and timing of in-service dates, does not therefore suggest that the District is required to conduct in-service programs on these dates. This may, of course lead to a situation in which dates are reserved for in-service programs and no programs are being offered. Presumably these days could be reallocated to teaching time or other tasks within the scope of the teachers' employment through the exercise of the Employer's right to assign work.

F. Breaks in the School Year

The District asserts that the timing and length of breaks in the school year, such as the traditional Christmas and Spring breaks, primarily relate to educational policy decisions, in that such breaks dictate a suspension of the teaching process, reflect a determination that a particular time is most beneficial to the mental health of students and staff, and are of great practical importance to members of the community. The record does not reflect any significant policy implications to the scheduling of traditional breaks in the school year, and these breaks are closely akin to vacation and holiday proposals found in virtually every other field of employment. 26/ As such they are plainly related to hours and working conditions and are mandatory subjects of bargaining.

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26/ This assumes that the proposals of the parties on breaks concern themselves with traditional break periods and do not attempt some radical restructuring of the school year.

G. Convention Day

The Association characterizes its proposal to designate dates for teachers' convention as seeking an entitlement for a day off without loss of pay for the purpose of attending the state convention. The District asserts that the issue requires a balancing of the possible loss to students through three less contact days with the possible gain to the District from offering its teachers the option of attending a professional convention. Again, I would premise my decision on this issue on my conviction that the District would lose no overall contact days because of the Board's right to determine the number of such days, and therefore find that the employes' interest in negotiating a day off without loss of pay for convention attendance outweighs the District's interest in insuring pupil attendance on those particular days. Just as with the issue of scheduling in-service days, there is nothing in this record that points to a particular significance about the days in question, and the Association's proposal is therefore a mandatory subject of bargaining.

III. SUMMARY ON CALENDARING ISSUES

While there are certainly some complications to negotiating an overall calendar where certain aspects are not amenable to collective bargaining, this same dilemma has been presented before with regard to other issues, and negotiators for labor and management have proven equal to the task. The Commission noted in an early decision regarding class size that:

> "We recognize that the non-mandatory aspect vis-a-vis the mandatory aspect of the matter of class size may result in somewhat of a dilemma at the bargaining table. However, the possibility thereof does not constitute a basis for concluding otherwise." Oak Creek-Franklin Joint City School District 11827-D, Footnote 8, at page 15. See also Beloit, 11831-C, footnote 10, at page 22.

Here, the dilemma is not so pronounced as it may appear. The District has responsibility to make the public policy determination of how many contact days will be included in the school year as well as the number and timing of parent-teacher conferences. The Association is entitled to reasonable notice of the District's decision so that it may bargain the impact of those decisions on compensation, as well as formulate its proposals relating to the mandatory aspects of calendaring, e.g., starting date, number and placement of days reserved for in-service training, placement of make-up days, convention days and the duration and placement of breaks. Given adequate advance notice of the number of contact days, the parties should have no more problem negotiating this overall schedule than do employers and union in year 'round operations when they consider such issues as holidays, vacations and work schedules.

Dated at Madison, Wisconsin this 9th day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

I dissent in part and concur in part as to Proposal 14 and fully concur as to the remaining proposals.

_____
Gary L. Covelli, Commissioner

I separately concur as to proposal 5 and fully concur as to the remaining proposals.

_____
Marshall L. Gratz, Commissioner