STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of SCHOOL DISTRICT NO. 5, FRANKLIN Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and FRANKLIN EDUCATION ASSOCIATION	Case XXXIV No. 31652 DR(M)-308 Decision No. 21846

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, 815 East Mason Street, Milwaukee, Wisconsin, 53202, by Mr. Mark L. Olson, appearing on behalf of the District.

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 Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On June 3, 1983, School District No. 5, Franklin 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 Franklin Education Association over some twenty-one (21) sections of the parties' 1980-1983 collective bargaining agreement. On July 18, 1983, the District filed a supplemental petition for declaratory ruling which sought a ruling from the Commission as to whether certain revised proposals submitted to the District by the Association were mandatory subjects of bargaining. The Association responded to said supplemental petition by further revising certain of its proposals and the District thereafter specified which of said revised proposals remained in dispute and required a ruling from the Commission as to their mandatory or permissive status. A hearing on the disputed revised proposals was held on December 21, 1983, in Franklin, Wisconsin, before Examiner Peter G. Davis, a member of the Commission's staff. The parties thereafter submitted written argument and the briefing schedule was closed on May 30, 1984. Having considered the record and the positions of the parties, the Commission makes and issues the following

FINDINGS OF FACT

1. That School District No. 5, Franklin, herein the District, is a municipal employer having its offices at 7380 South North Cape Road, P.O. Box 307, Franklin, Wisconsin, 53132.

2. That Franklin Education Association, herein the Association, is a labor organization having its offices at 4620 West North Avenue, Milwaukee, Wisconsin, 53208.

3. That at all times material herein, the Association has been the exclusive collective bargaining representative of certain individuals employed by the District as "non-supervisory certificated personnel"; 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, 1980 through June 30, 1983.

4. That during collective bargaining between the parties over the terms of the agreement which would succeed their 1980-1983 contract, a dispute arose as to the District's duty to bargain with the Association over certain proposals; that

the parties were unable to resolve said dispute voluntarily; and that the District subsequently filed the instant petition for declaratory ruling to resolve the status of certain contract language and of certain contract proposals submitted to the District by the Association; and, that, aside from the language set forth in Finding of Fact 5 below, the Association does not propose to include certain contract language which is the subject of the District's petition herein in a successor collective bargaining agreement.

5. That there remains a dispute between the parties as to the status of the following Association proposals:

(1) Article VI, Seniority and Layoff Procedure, Section 8, Notification:

Section 8: Notification

When, in the judgment of the Board, a layoff of personnel (i.e., a reduction in the number of teaching positions or in the number of hours in any teaching position) is necessary in accordance with Section 7, above, the Board shall give preliminary written notice to the teacher(s) so affected by April 1. Thereafter, final written notice shall be provided no later than April 15. The Board shall simultaneously provide the Association with copies of all layoff notices which it sends to teachers pursuant to this Article.

The layoff of each teacher shall commence on the date that he or she completes the teaching contract for the current school year. (Footnote omitted)

(2) Article VI, Section 10, Contact Minutes:

Section 10: Contact Minutes

A. Contact minutes shall be defined as the time assigned for the instruction or supervision of one (1) or more students. In any school of the District where the schedule provides for passing time between classes, the time between any consecutive instructional and/or supervisory assignments shall be counted as contact time. The District shall determine the amount of contact time to which teachers shall be assigned. Teachers who are assigned to no more than 320 contact minutes per day averaged on a weekly basis shall be compensated in accordance with the salary schedule. Teachers to whom the District assigns more than 320 contact minutes per day averaged on a weekly basis, shall receive additional compensation according to the following formula:

(Teacher's per diem rate ÷ 450) x 1.5 = overload pay for each minute of contact time in excess of 320 per day.

B. Any additional compensation earned by a teacher under this section shall be paid on a separate check on the next regular payroll date following the performance of the overload assignment.

C. For teachers with less than a full-time contract, the contact minutes and overload pay shall be pro-rated according to the percentage of a full-time contract held by such teachers.

D. Teachers who are assigned to more than one building shall be provided with a reasonable amount of travel time between buildings. (Footnote omitted)

(3) Article VI, Section 11, Class size:

Section 11: Class size

A. The parties recognize that the size of a class is a matter of basic educational policy and that the District may assign any number of students it so desires to a class.

B. Teachers who are assigned to no more than the number of students listed in Appendix ___ shall be compensated in accordance with the salary schedule.

C. Should the District choose to assign class sizes in excess of the numbers contained in Appendix ___, the teacher so affected shall receive the overload pay indicated for each student per hour (per class period in grades 7-12) in excess of the numbers contained in Appendix ___.

D. During the first 15 student days each fall, class size overloads shall be allowed without additional compensation. In the event that a class size overload persists beyond the first 15 student days of the school year, the teacher shall receive overload pay retroactive to the first student day.

E. For purposes of computing the number of students in Section C., above, each mainstreamed exceptional educational student shall count as three students. (Footnote omitted)

(4) Article VI, Section 12, Instructional Preparation Time:

Section 12: Instructional Preparation Time

The District has the right, as a matter of educational policy, to determine the amount of preparation time which each teacher will be assigned to each work day. Teachers who are provided less than sixty (60) minutes (105 minutes for teachers engaged in team teaching) of duty free preparation time, in no less than 20 consecutive minute segments during the work day, shall receive overload pay in accordance with the following formula:

(Teacher per diem rate ÷ 450) X 1.5 = premium pay for each minute of duty free preparation time less than 60 minutes (105 for minutes for teachers engaged in team teaching) during the student work day.

As used herein, team teaching is defined as two or more teachers in the same building assigned together in work or activity in a common grade level, subject area, or other educational purpose. (Footnote omitted)

(5) Article VI, Section 14, Class Load:

Section 14: Class Load

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 work day. High school and middle school teachers who are assigned no more than one homeroom, one period of study hall supervision or tutorial duty and five classes per work day shall be compensated in accordance with the salary schedule. Teachers who are assigned to more than five classes per day shall receive overload pay based on the following formula:

(Teacher's per diem rate ÷ 5) x 1.5 (Footnote omitted)

(6) Article VI, Section 15, Assignment of Clerical Tasks:

Section 15: Assignment of Clerical Tasks

Teachers shall not be required to perform the clerical tasks of typing and/or duplicating/reproducing classroom or other instructional materials.

(7) Article VI, Section 18, Employes' Lounge:

Section 18: Employes' Lounge

The District shall provide and maintain the existing employe lounge in each school building in the District, for the exclusive use of District employes, parent volunteers and practice teachers.

(8) Article VI, Section 20, Assignment of Bargaining Unit Work:

Section 20: Assignment of Bargaining Unit Work

A. Except as may be provided for elsewhere in this Agreement, there shall be no subcontracting or other assignment of bargaining unit work to employes of the District who are not in the bargaining unit, to employes of any other employer, or to any other individuals. Bargaining unit work shall be performed only by employes who are members of the bargaining unit and entitled to the benefits of this Agreement; provided, however, that, in the absence of such an employe, the District may assign bargaining unit work to per diem substitute personnel for a period of time not to exceed fifteen (15) consecutive work days.

B. As used herein, "bargaining unit work" shall consist of all of those duties, assignments, tasks, or responsibilities which are fairly within the scope of responsibilities applicable to the kind of work performed by bargaining unit employes and/or which have been historically or customarily performed by employes in job classifications or positions included in the bargaining unit.

(9) Article VI, Section 21, Attendance at Professional Meetings:

Section 21: Attendance at Professional Meetings

Teachers and professional staff members may be permitted to attend professional conferences in their special field with expenses paid under the following conditions:

1. Approval of the principal and superintendent is required.

2. The school district budget for such conferences shall not be exceeded.

The cost of necessary substitute teachers shall be paid by the school district within the limits of the budget.

(10) Article VIII, Leaves, Section 4, Visitation Day:

Section 4: Visitation Day

Each teacher shall be granted one day each year for school visitation. Teachers shall make a written report to the principal of the work observed. Such days shall not be chosen which immediately precede or follow a holiday recess. The particular school to be visited and the time of the visitation shall be approved by the principal. The scheduling of

requested visitation days shall be reasonable, and shall not interfere with the District's educational programs and activities.

(11) Article IX, Professional Improvement, Sections 1-4:

Section 1: Advance University Training and District In-Service Work.

To qualify for advancement on the index scale a teacher shall acquire credits through advanced professional training every three years.

1. A teacher having less than a masters degree plus sixteen credits shall acquire six credits, three of which may be acquired through in-service work within the school system. In-service work shall be approved by the administration with credits approved by the Superintendent. Additional university study shall not be required after the age of sixty for those teachers not holding a masters degree.

2. A teacher having more than a masters degree plus fifteen credits shall acquire three credits. The three credits may be acquired through in-service work within the school system. Additional university study shall not be required after the age of fifty-five for those teachers holding a masters degree in their teaching field.

3. A credit is defined as a semester hour credit which is earned by one hour of study per week for 18 weeks or its equivalent.

4. University credits shall be accepted from approved institutions of higher learning accredited by the North Central Association or similar accreditation agency. Teachers in the vocational training area will be credited with equivalency credits for approved classes and training required for them to maintain their vocational certification. These credits will be reimbursed as stipulated in section 5 of this article and shall apply toward advancement on the salary schedule.

5. A copy of the credits earned shall be filed in the Superintendent's office as a permanent record.

6. The course or courses taken shall be aproved by the Principal and the Superintendent.

7. Credit may be granted for travel. Such credit may be considered as meeting part of the requirements for professional training.

8. One (1) credit for the total required each three years may be travel credit.

9. The following factors shall enter the evaluation of travel credit:

   a. An application shall be submitted to the Superintendent, at least one month prior to the trip. It shall contain amount of time to be spent, itinerary, and educational objectives.

   b. A written report shall be submitted upon completion of travel to the Superintendent. This report shall evaluate the travel in terms of its relationship to the classroom, school and/or community activities, and shall be filed within one month after returning to school, or by October 1 of the current contract year, whichever is later.

c. In general, travel credit shall not be granted for a return to places or locations for which credit has already been granted within one cycle.

d. Within reasonable limits the teacher shall be expected to share learnings with school or community groups.

Section 2: Credit for Advanced University Professional Training.

1. Teachers that have earned their masters degree may select certain undergraduate courses offered by recognized colleges and/or universities for the purpose of maintaining their salary schedule increment eligibility. Per credit salary awards for approved credits may be made in accordance with the Professional Salary Plan. Permission to take certain undergraduate courses for local credit will be made only in the event that suitable graduate courses are not being offered at a given time.

2. Teachers that have earned their masters degree may select certain approved non-credit workshops, T.V. classes, etc. sponsored by a recognized college or university for the purpose of maintaining their salary plan increment eligibility. The amount of local credit equivalency shall be a separate consideration in each individual case. No per credit salary awards shall be allowed for approved equivalencies. Permission to participate in an approved equivalency program for local credit shall be made only in the event that suitable graduate courses are not being offered at a given time.

3. Teachers who have not earned their masters degree are permitted to take for local credit towards salary plan increments approved undergraduate courses. These credits will also entitle such a teacher to advance horizontally to B.A.+30 when he has reached the maximum in the B.A. column. These courses should be in the teacher's own closely related field.

4. All work taken for salary plan increment eligibility shall require prior approval.

Section 3: Credit for District In-Service Work.

1. Local Courses - Two credits for the purpose of salary plan increment eligibility shall be allowed to teachers successfully completing scheduled local courses meeting for a total of at least 18 hours during the semester. Teachers requesting credit in this category should be prepared to give evidence of related professional reading or preparation outside of class. If a teacher participates in a local course offered by a neighboring district, a letter certifying successful completion of the course should be filed with the Superintendent. No per credit salary awards shall be made for credits earned through locally scheduled in-service classes.

   One credit for the purpose of salary plan increment eligibility will be allowed to teachers successfully completing scheduled local courses meeting for a total of at least nine hours during the semester. Related professional study is expected, along with evidence of successful completion of the program.

   Also considered in this category are professional courses offered on television and non-credit universities.

2. Committee Work and Individual Projects - All teachers are expected to participate in at least one curriculum or school program study committee during each school year as a responsibility of professional employment. One local in-service credit for the purpose of salary plan increment eligibility shall be allowed for committee work involving at least nine (9) hours of formal committee work requiring a minimum of one hour of outside work for each hour of scheduled committee work. No per credit salary awards shall be allowed for committee work. In-service committee participation shall be ascertained through a committee log including meeting dates, times, and attendance.

The committee log shall be kept by the committee secretary and certified by the committee chairman. Persons working on the approved individual projects will keep and certify their own project log. Project logs are due at completion of the committee project.

Teachers wishing recognition for individual research of projects should consult with their principal or the director of instruction prior to starting their project. Policies relating to committee work will also apply to individuals.

Section 4: Credit Claim Procedure.

All credits must be claimed. This includes:

Credits for salary plan increment eligibility.
Credits for per credit salary awards.

Claims made by filing the proper request form with the Principal. The form titles are:

1. REQUEST FOR PRIOR APPROVAL (Blue).

If you plan to claim salary program benefits as a result of credits earned, approval must be obtained first in accord with School District Policy.

2. CLAIM FOR ALLOWANCE FOR LOCALLY EARNED CREDITS FOR SALARY PLAN INCREMENT ELIGIBILITY (Yellow).

All credits earned through the local in-service program must be claimed. Credit is not given automatically.

3. CLAIM FOR REIMBURSEMENT FOR CREDITS EARNED IN ACCORDANCE WITH THE SALARY SCHEDULE (Green).

Claim forms must be filed in duplicate. One copy will be returned.

6. That disputed proposals 2-4, 5 (in part), 6, 8 (in part) and 9-11, as set forth in Finding of Fact 5, primarily relate to wages, hours and conditions of employment.

7. That disputed proposals 1, 5 (in part), 7, and 8 (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.

3. That there is no dispute within the meaning of Sec. 111.70(4)(b), Stats., as to the duty to bargain over those portions of the parties' 1980-1983 collective bargaining agreement which were subject to the District's petition herein but as to which the Association does not seek inclusion in a successor agreement, and therefore the Commission will not rule upon the mandatory or permissive status of said language.

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., over the disputed proposals referenced in Conclusion of Law 1.

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

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

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

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

(Continued on Page 9)

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

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

I did not participate as to Proposal 1. 2/

_____
Danae Davis Gordon, Commissioner

1/ (Continued)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

2/ For the sake of expeditious issuance of this decision, Commissioner Davis Gordon has not participated with respect to proposal 1. Chairman Torosian and Commissioner Gratz previously joined in the Commission's dispositions of the status of somewhat similar proposals dealing with the same subject matter in School District of Janesville, Dec. No. 21466 (WERC, 3/84) and School District of Shullsburg, Dec. No. 20120-A (WERC, 4/84) and neither of them has altered his views with respect to language such as at issue herein. The status of a related proposal is also currently pending before the Wisconsin Supreme Court in West Bend Joint School District No. 1, Dec. No. 18512 (WERC, 5/81) aff'd in part and rev'd in part. West Bend Education Association v. WERC, No. 81-CV-294 (CirCt Washington Co., 7/82); (CtApp II 1983) unpublished decision, No. 82-1824.

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 conditons of employment of the employees . . .."(emphasis added)

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

It should be emphasized that a conclusion that a proposal is mandatory does not reflect approval of the merits of the proposal and that a conclusion that a proposal is permissive does not preclude a mutual agreement by the parties to bargain about the subject involved.

(1) The first disputed proposal reads as follows:

> Article VI, Seniority and Layoff Procedure, Section 8, Notification:
>
> Section 8: Notification
>
> When, in the judgment of the Board, a layoff of personnel (i.e., a reduction in the number of teaching positions or in the number of hours in any teaching position) is necessary in accordance with Section 7, above, the Board shall give preliminary written notice to the teacher(s) so affected by April 1. Thereafter, final written notice shall be provided no later than April 15. The Board shall simultaneously provide the Association with copies of all layoff notices which it sends to teachers pursuant to this Article.
>
> The layoff of each teacher shall commence on the date that he or she completes the teaching contract for the current school year. (Footnote omitted)

The District asserts that the Association's attempt to bargain over the timing by which layoffs may occur renders the proposal a permissive subject of bargaining. It contends that the Wisconsin Supreme Court in Brookfield, supra, concluded that the decision to layoff public employes is "a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government." The District argues that under the provision in dispute, it would be prohibited from rendering a management decision as to when layoffs might occur in the event that that decision were to be made after April 1 of the school year in question. The District notes that the Commission has already concluded that the timing of the layoff is an essential and integral part of the decision to layoff and quotes the Commission's decision in West Bend School District No. 1, Dec. No. 18512 (WERC, 5/81), "We conclude that proposals relating to the timing and frequency of layoffs interfere with the actual decision concerning same and thus effectively prevents

the municipal employer from implementing public policy which the Commission and the Supreme Court have already determined constitute non-mandatory subjects of bargaining." The District argues that the West Bend guidelines and reasoning mandate that the Commission consistently determine and hold that the timing of a layoff be deemed permissive and not subject to negotiation. The District argues that the Association's proposal holds the District captive as to when the layoffs may occur. Furthermore, the District alleges that this proposal unduly infringes upon the District's decision-making power as to the level of services to be provided on behalf of taxpayers. The District thus views the proposal as restricting its management right to determine the level and quality of services to be provided and runs afoul of clear Commission and Supreme Court precedent regarding the permissive nature of such decisions.

The Association asserts that its proposal deals with the timing and frequency of teacher layoffs. It argues that the proposal is intended to protect the job security embodied in the one-year employment contracts into which the District enters with its teaching staff and to provide teachers who are being laid off with advance notice of their impending layoff. The Association notes that in this proceeding the District challenges only those aspects of the Association's proposal which focus upon the timing and frequency of layoffs.

The Association asserts that its proposal establishes reasonable timelines for the implementation of teacher layoffs--particularly where those timelines are consistent with the requirements which the District must already follow with respect to the non-renewal of teacher contracts--and provides employes with a measure of job security which neither encumbers nor abridges the District's basic right to reduce personnel. The Association alleges that its proposal represents an attempt to bargain the impact of District layoff decisions on the conditions of employment of affected employes. The Association notes that in its West Bend decision, the Commission indicated that it considered advance notice of layoff to be a mandatory subject of bargaining. The Association contends that its proposal requires that teachers affected by the District layoff decisions receive preliminary written notice by April 1 and final written notice by April 15 and that such a requirement constitutes an "advance notice" proposal. The Association notes that the Commission's determination that a proposal such as that at issue herein is a permissive subject of bargaining has been overturned by two reviewing courts and that the matter is currently pending by the Wisconsin Supreme Court. The Association argues that the West Bend decisions of the Circuit Court and the Court of Appeals control all declaratory ruling proceedings now before the Commission which involved the same issue. The Association asserts that the Commission is bound by the rule of the West Bend case to find that teacher layoff implementation proposals such as that herein are mandatory subjects of bargaining. The Association asserts that compliance with the courts' decisions in West Bend requires that the Commission find this proposal to be a mandatory subject of bargaining.

Discussion of Proposal (1)

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 (sic) 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 (sic) 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.

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 Brookfield, supra, 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, supra, 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. (sic) 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.

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), (Continued on Page 16)

3/ (Continued)

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.

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 proposals which seek to bargain over the timing and frequency of layoff decisions. The Association's proposal herein is unlike that in West Bend in that it does not directly parallel the Sec. 118.22, Stats., timing and frequency for nonrenewals. Nevertheless, we are of the opinion that the Commission's basic rationale in West Bend is applicable to the instant proposal and warrants a determination that said proposal is a permissive subject of bargaining.

(2) The disputed proposal is as follows:

> Article VI, Section 10, Contact Minutes:
>
> Section 10: Contact Minutes
>
> A. Contact minutes shall be defined as the time assigned for the instruction or supervision of one (1) or more students. In any school of the District where the schedule provides for passing time between classes, the time between any consecutive instructional and/or supervisory assignments shall be counted as contact time. The District shall determine the amount of contact time to which teachers shall be assigned. Teachers who are assigned to no more than 320 contact minutes per day averaged on a weekly basis shall be compensated in accordance with the salary schedule. Teachers to whom the District assigns more than 320 contact minutes per day averaged on a weekly basis, shall receive additional compensation according to the following formula:
>
> (Teacher's per diem rate - 450) x 1.5 = overload pay for each minute of contact time in excess of 320 per day.

B. Any additional compensation earned by a teacher under this section shall be paid on a separate check on the next regular payroll date following the performance of the overload assignment.

C. For teachers with less than a full-time contract, the contact minutes and overload pay shall be pro-rated according to the percentage of a full-time contract held by such teachers.

D. Teachers who are assigned to more than one building shall be provided with a reasonable amount of travel time between buildings. (Footnote omitted)

The District submits that the disputed contact minutes provision would restrict the District's ability to allocate the teacher workday and thus is a permissive subject of bargaining. Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, (2/83). Moreover, the District argues that the proposal seeks to define the meaning of the term "contact time" within the District. Thus, the District asserts that this proposal would improperly interject the collective bargaining agreement into the policy determination of what will constitute "contact time" within the District. As the District believes that it should retain sole authority to determine the allocation of the teacher workday, it asserts that all portions of the Association's proposal are permissive, including that portion which focuses upon travel time. While recognizing that it is clearly necessary and reasonable that travel time be provided to teachers who are assigned to more than one building, the District contends that such a determination should be made as a matter of Board policy, rather than through collective bargaining. Since the District contends that it retains sole authority to determine quality of education which is to be pursued and retains the sole authority to determine what will constitute quality contact time between teacher and student, the District concludes that the Association's proposal primarily relates to matters of educational policy over which the District has no duty to bargain.

The Association asserts that the District has challenged three aspects of the contact minutes proposal:

(1) The proposal's definition of contact minutes, as set forth in the first two sentences of subsection A;

(2) The proposal's express disclaimer that "The District shall determine the amount of contact time to which teachers shall be assigned", set forth in a third sentence of subsection A;

(3) The proposal's requirement that teachers who are assigned to more than one building shall be provided with a reasonable amount of travel time between buildings.

The Association submits that the sole basis for the District's objections to these three portions of the Association's proposal is the allegation that the provisions "would restrict the District's ability to allocate the teacher workday".

The Association contends that its proposal, in its entirety, is analogous to the student-contact time and preparation time impact proposals found to be mandatory subjects of bargaining by the Commission in School District of Janesville, Dec. No. 21466 (WERC, 3/84), pp. 74, 75-76, 82-88; School District of Shullsburg, Dec. No. 20120-A (WERC, 4/84), pp. 25-28; and Racine Unified School District, Dec. Nos. 20652-A and 20653-A (WERC, 1/84), pp. 39-45. The Association contends that in those decisions the Commission rejected the arguments made by the District herein. Just as in Janesville, Shullsburg and Racine, the Association contends that the introductory disclaimer and definitional components of the proposal are mandatory subjects of bargaining because the underlying subject and intent of the proposal, as the District acknowledges and the Commission upheld in the above-cited cases, is a mandatory subject of bargaining. The Association asserts that the same arguments apply to the "travel time" aspect of the proposal. Moreover, the Association notes that even the District concedes that "It is clearly necessary and reasonable that such travel time be provided to teachers who are assigned to more than one building." The Association contends

that the proposal is definitionally integrated with the unchallenged and mandatory compensation aspects of the proposal and is a necessary component thereto. As such, the Association asserts that its proposal is a mandatory subject of bargaining.

Discussion of Proposal (2):

We reject the District's contention that the first two sentences of the disputed proposal constitute an effort by the Association to bargain over the allocation of the teacher workday. The proposal explicitly states that it is the District which determines the amount of contact time to which any teacher shall be assigned. As we have previously held in Racine and Janesville, such disclaimers serve as interpretative aids which are deemed mandatory if the remainder of the proposal is primarily related to wages, hours and conditions of employment. As the unchallenged compensation formula which follows this introductory language is mandatory, the disputed disclaimer is found mandatory as well. As to the disputed "contact time" definition, it is clear that it is necessary, within the context of the remainder of the proposal, to define the term "contact" so that the compensation formula set forth in the proposal can be meaningfully applied. As the District remains free under this portion of the Association's proposal to make any choices it sees fit as to the amount of contact time which will be assigned to any teacher, subject only to the compensation ramifications which such choices may have, we find this portion of the proposal to be a mandatory subject of bargaining. Our conclusion in this regard is consistent with that reached in Racine, supra; Janesville, supra; and Shullsburg, supra.

As to the proposal's requirement that teachers assigned to more than one building be provided with a "reasonable amount" of travel time, the District is correct that this proposal does allocate a portion of those teachers' workday. However, it is also clear, as the District itself points out, that travel time is a physical necessity which as a practical matter must be provided to teachers. Thus, we are not persuaded that any work day allocation educational policy judgments are actually implicated by a general travel time proposal because if the District chooses to assign teachers to different buildings, it has no choice but to bow to the necessity of providing the minimum travel time which the assignment dictates. However, this proposal would do something more than require that teachers receive the bare minimum of travel time needed to physically transport an individual from one location to another. The use of the term "reasonable" arguably entitles teachers to something more than the bare minimum and suggests that sufficient time be allocated so that teachers can travel the distance in a safe manner consistent with applicable driving conditions and traffic laws. As we conclude that the availability of "reasonable" travel time relates directly and substantially to employe working conditions due to the above-noted factors, and as we conclude, on balance, that said relationship predominates over the minimal infringement on District work allocation prerogatives which "reasonable" travel time might generate, we conclude that this portion of the proposal is also a mandatory subject of bargaining.

(3) The disputed proposal is as follows:

Article VI, Section 11, Class size:

Section 11: Class size

A. The parties recognize that the size of a class is a matter of basic educational policy and that the District may assign any number of students it so desires to a

D. During the first 15 student days each fall, class size overloads shall be allowed without additional compensation. In the event that a class size overload persists beyond the first 15 student days of the school year, the teacher shall receive overload pay retroactive to the first student day.

E. For purposes of computing the number of students in Section C., above, each mainstreamed exceptional educational student shall count as three students. (Footnote omitted)

The District contends that the Wisconsin Supreme Court has long held that class size is a permissive subject of bargaining. Beloit, supra. The District argues that the portion of the instant proposal, Section 11(A), which contains a philosophical statement which parallels the status of the law as to class size has virtually no impact on any bargaining unit members' conditions of employment and as such is not a mandatory subject of bargaining.

Turning to Section 11(E) of the proposal, the District asserts that the Association's attempt to give greater weight to mainstreamed exceptional education students is a matter of educational policy which is a permissive subject of bargaining. The District argues that the determination of class size is a matter of basic educational policy over which the District need not bargain and that the Association's proposal would inextricably tie wages to class size thus precluding the District from making educational policy choices as to the appropriate class size levels in the various classrooms. The District contends that the Association, through its proposal, seeks to dictate to the District what the class size of a classroom which includes mainstreamed exceptional education students should be. Perhaps more significantly, in the District's judgment, is the fact that the Association's proposal, which purports to establish an absolute and inflexible weighting system regarding the mainstreaming of exceptional education students, directly interjects itself into matters of educational policy. The District asserts that the language of Section 11(E) would substitute the judgment of the Association for that of both the District and the Wisconsin Department of Public Instruction in such matters. The District argues that nothing could be more closely related to the formulation of educational policy than the decision as to the weight to be given to such exceptional education students in the mainstreaming in classrooms, especially so where the proposal gives virtually no variance or differentiation as to the type or degree of handicap which is suffered by the students in question. The District therefore asserts that the proposal is a permissive subject of bargaining.

The Association asserts that prior Commission decisions have generally determined that the impact of District class size decisions or practices on the work load of its teaching employes is a mandatory subject of bargaining and have specifically held class size impact proposals such as the Association's to be mandatory subjects of bargaining. School District of Campbellsport, Dec. No. 20936 (WERC, 8/83); Racine, supra; and Janesville, supra. In its decisions, the Association asserts that the Commission has rejected the same arguments advanced by the District in support of its positions in this case. As to Section (A) of its proposal, the Association notes that its language constitutes an express disclaimer recognizing the District's unilateral right to determine class size. The Association notes that in the Janesville decision, the Commission found almost identical language to be "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."

Turning to Section (E), the Association contends that this language is purely definitional in nature and a necessary component of the proposal's unchallenged and mandatory "impact-compensation" formula. Contrary to the District's assertions, the Association asserts the proposal cannot constitute a restriction or limitation on the District's class size decision-making, since the District can choose to assign any number of students to any teacher's class. Thus the Association contends that the proposal cannot be read or interpreted as substituting the judgment of the Association for the District or the Wisconsin Department of Public Instruction. The Association argues that its proposal merely recognizes the undisputed fact that mainstreamed exceptional educational students require more work and involve more responsibilities than students without

exceptional educational needs. Although the Association notes that the Commission has held that the Association "bears no burden" to prove by specific evidence the mathematical relationship between this definitional proposal and the impact of particular District class size decisions upon teacher hours and working conditions, Janesville, supra, at pp. 86, 96-97, the Association points out that District Exhibit 4 demonstrates the validity of the relationship embodied in the Association's class size impact proposal. Based upon the analysis contained in the Commission's Campbellsport, Racine and Janesville decisions, the Association asserts that the challenged portions of its proposal are mandatory subjects of bargaining.

Discussion of Proposal (3)

We reject the District's assertion that the Association's proposal dictates any specific decision as to the class sizes which the District may choose to maintain. The first sentence of the proposal explicitly disclaims any such intention and, as we concluded in Janesville at p. 96, such introductory preparatory language will be found to be a mandatory subject of bargaining if the subject to which that statement is linked is also mandatory. Here, as in Janesville, the proposal is linked to a mandatorily bargainable compensation proposal and thus we find the introductory language to be a mandatory subject of bargaining. Turning to Section (E) of the proposal, we reject the District's contention that the proposal mandates any specific decisions as to the manner in which the District or the Department of Public Instruction may choose to require the mainstreaming of exceptional educational students. Instead, this portion of the proposal establishes that, if the District makes a choice to mainstream, such students will be weighted more heavily than other students for the purposes of the compensation formula set forth in the remainder of the proposal. Sections 115.76-115.85, Stats., provide a legislative validation of the Association's assertion that exceptional education students have additional needs above and beyond those of other students which necessarily yield additional work for a teacher. Having rejected the District's contentions and having concluded that the language in question constitutes a portion of a mandatorily bargainable compensation formula, we find this portion of the proposal to be a mandatory subject of bargaining.

(4) The disputed proposal is as follows:

> Article VI, Section 12, Instructional Preparation Time:
>
> Section 12: Instructional Preparation Time
>
> The District has the right, as a matter of educational policy, to determine the amount of preparation time which each teacher will be assigned to each work day. Teachers who are provided less than sixty (60) minutes (105 minutes for teachers engaged in team teaching) of duty free preparation time, in no less than 20 consecutive minute segments during the work day, shall receive overload pay in accordance with the following formula:
>
> > (Teacher per diem rate ÷ 450) X 1.5 = premium pay for each minute of duty free preparation time less than 60 minutes (105 for minutes for teachers engaged in team teaching) during the student work day.
>
> As used herein, team teaching is defined as two or more teachers in the same building assigned together in work or activity in a common grade level, subject area, or other educational purpose. (Footnote omitted)

The District contends that the first sentence of Section 12 of the disputed proposal, while factual, relates directly to the matter of allocating teacher duties within the teacher workday, and as such is a permissive subject of bargaining. The District contends that such statements are more appropriately placed in Board policy, which Commission and Supreme Court precedent have determined to be the proper location for such omnibus statements of District educational policy. The District notes that such a statement is, in fact, found within the policy of the Franklin School Board. As this sentence is a policy statement which has virtually no impact on mandatorily bargainable issues and does not address the impact of District allocation of teacher time on wages, hours and conditions of employment, the District contends that the sentence is permissive.

Turning to that portion of the proposal which attempts to define "team teaching" the District submits that said definition is so vague and indefinite as to negate the complexity of the team teaching models utilized by the District. The District asserts that the implementation of the proposed language would greatly alter its ability to identify and administer teaching teams in a manner outlined in applicable District publications and that the proposal is therefore a permissive subject of bargaining.

As with its contact minutes and class size impact proposals, the Association argues that its introductory disclaimer is clearly a mandatory subject of bargaining. It asserts that the introductory sentence, like the remainder of its Section 12 proposal, does not dictate any specific educational policy choice and forms a basis for ascertaining the Association's intent which underlies its preparation time impact proposal. As noted by the Commission in Janesville, supra, "if the subject of that intent is a mandatory subject of bargaining, introductory prefaces . . . are also mandatory."

The Association further argues that the disputed language as to "team teaching" is simply a definitional component of the Association's impact proposal. The Association argues that the definition of team teaching utilized in its proposal has existed in the parties' collective bargaining agreement for over a decade. It contends that the reference to team teaching is a necessary component of the compensation formula and that the proposal, by the use of the phrase "as used herein," is expressly limited in its application to said compensation formula. The Assocation contends that it is clear that the definition of team teaching proposed for the limited purpose of the compensation formula does not interfere with the District's right to adopt whatever team teaching educational delivery systems it wishes, and does not preclude the District from employing whatever team teaching approaches it considers educationally useful. The Association submits that the proposal neither requires the District to utilize a team teaching delivery system nor dictates or restricts the particular team teaching approaches which the District may choose to implement. Instead, the Association asserts that its proposal is primarily related to the requirement that teachers who are assigned to work in conjunction with each other in a common grade level, subject area or other educational purpose in the same building will receive additional compensation if they are provided with less than 105 minutes of preparation time each day. The Association asserts that such a proposal is a mandatory subject of bargaining under the rationale and analysis applied by the Commission in Janesville, supra; Shullsburg, supra; and Racine, supra.

Discussion of Proposal (4)

As we have previously discussed, the introductory language in dispute constitutes a disclaimer which, by virtue of its relationship to an otherwise mandatory proposal, is a mandatory subject of bargaining. Turning to the issue as to the definition of team teaching utilized in the proposal, we reject the District's assertions that this definition in any way precludes the District from utilizing any team teaching model that it may desire or that it requires that team teaching models be utilized. Instead, the proposal only specifies that if the District utilizes a team teaching model which falls within the scope of the proposed definition, then certain compensation formulas will apply to such involved teachers if they do not receive the specified amount of preparation time. Thus, while we are cognizant of the complexity of team teaching methodology pointed out by the District in this proceeding, we see no impact upon the District's freedoms in this regard when making such educational determinations. Therefore, we conclude that the Association's proposal primarily relates to wages and conditions of employment and thus is a mandatory subject of bargaining.

(5) The disputed proposal is as follows:

Article VI, Section 14, Class Load:

Section 14: Class Load

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 work day. High school and middle school teachers who are assigned

> no more than one homeroom, one period of study hall supervision or tutorial duty and five classes per work day shall be compensated in accordance with the salary schedule. Teachers who are assigned to more than five classes per day shall receive overload pay based on the following formula:
>
> (Teacher's per diem rate ÷ 5) x 1.5 (Footnote omitted)

The District contends that the Association's proposal with respect to class load is clearly a permissive subject of bargaining as it relates to the District's ability to assign classes to teachers. Further, the District argues that the proposal does not address the issue of the impact of work assignments on a teacher's wages, hours or conditions of employment. Since the language proposed by the Association purports to address the District's allocation of the teacher workday, the District contends that the proposal primarily relates to educational policy. Moreover, the District argues that current Board policy does contain such a statement and is the appropriate location for such statements.

The Association contends that in Janesville, supra, the Commission ruled on a proposal identical to that which the District has challenged herein and that the Commission held the introductory interpretive sentence to be a mandatory subject of bargaining. The Association does note however that the Commission found the reference to "a teacher's area(s) of certification" to be permissive as an over-broad attempt to protect teacher job security.— As the instant case was litigated prior to the Commission's issuance of the Janesville decision, the Association respectfully suggests that the Commission furthers no useful purpose related to the parties' current negotiations or to the evolutionary development of the law by disposing of the District's objections to this aspect of the Association's proposal by simply citing or quoting the Janesville decision. Accordingly, the Association requests the Commission rule upon the bargainability of the following proposal which the Association contends would be a mandatory subject of bargaining under the Commission's rationale as expressed in Janesville:

> "No teacher may be assigned to a work assignment or responsibility which requires a license or certification which the teacher does not hold."

Discussion of Proposal (5)

As we have previously discussed herein, this proposal is found to be a mandatory subject of bargaining to the extent that it clarifies the Association's intent that its otherwise mandatory impact proposal does not seek to determine the number and type of work assignments which teachers shall perform during the regular teacher workday. As our rationale for that determination has already been discussed several times herein, we need not repeat same here.

Turning to the portion of the proposal which limits work assignments to those within a teacher's area of certification, the Association correctly points out that in Janesville the Commission found such a specification to be permissive and expressed the following rationale for said conclusion:

> 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

(6) The disputed proposal is as follows:

> Article VI, Section 15, Assignment of Clerical Tasks:
>
> Section 15: Assignment of Clerical Tasks
>
> Teachers shall not be required to perform the clerical tasks of typing and/or duplicating/reproducing classroom or other instructional materials.

The District contends that the language as proposed by the Association would require it to hire additional non-teaching personnel to perform typing and photocopying duties. The District cites testimony in the record which demonstrates both that clerical tasks are inherent in almost every assignment given to any employe in the District and that additional staff would be needed if teachers were to be unavailable for the occasional performance of such tasks. The District argues that the decision to hire and assign clerical aides is primarily a management function and thus a permissive subject of bargaining. Blackhawk VTAE, Dec. No. 16640-A (WERC, 9/80); aff'd Blackhawk Teachers' Federation v. WERC, No. 80-CVA-2009, (CirCt Rock, 8/81); aff'd (CtApp IV) 109 Wis.2d 415 (1982). Moreover, the District argues that the proposal flies in the face of the Commission precedent that determinations as to the assignment of duties within the employes' scope of responsibilities are management rights which need not be bargained. The District asserts that the record establishes that the performance of "clerical related work" within the overall context of teaching and/or administrative work is an accepted part of a teacher's professional duties within the Franklin School District. The District therefore requests that the Commission find this proposal to be a permissive subject of bargaining.

The Association denies that its proposal would require the District to hire or employ teacher aides, clerical staff or any other employes. The Association asserts that the proposal makes no reference to the employment of such employes. The Association argues that the fact that the District must employ non-teaching employes to perform clerical tasks which it wishes to have done, or that it is currently not employing an adequate clerical staff to perform all the necessary typing and duplicating duties, cannot form a basis, consistent with the Commission's "primary relationship" test, for holding the Association's proposal to be a permissive subject of bargaining. If such an argument were accepted by the Commission, the Association posits that the District could, by employing no custodial personnel and assigning janitorial duties to its teachers, successfully preclude the Association from attempting to prevent the assignment of such clearly non-teaching duties to teachers.

The Association asserts that, as the Commission's decision in Milwaukee Board of School Directors, Dec. No. 20398-A (WERC, 12/83), sets forth, the proper analysis must focus on whether the clerical activities prohibited by the proposal fall fairly within the scope of a teacher's employment. The Association contends that in this case the record and the parties' practice demonstrate that the Association's proposal applies to tasks which are not within the scope of duties and responsibilities of the teaching position. The Association contends that the record establishes 1) that the clerical tasks addressed by the Association's proposal are not generally or regularly performed by teachers and, most importantly, 2) that the typing and duplicating duties are not assigned to teachers. Moreover, the Association contends that the parties' 1980-1983 collective bargaining agreement and school board policy establish that the clerical tasks of typing and duplicating classroom materials have been neither assigned nor regularly performed by bargaining unit teaching staff.

The Association notes that in Oak Creek - Franklin Joint City School District No. 1, Dec. No. 11827-D (WERC, 9/74), the Commission held that a proposal that "all teachers shall not be required to type and duplicate classroom materials" was a mandatory subject of bargaining and stated:

> Typing and duplicating duties performed by teachers in carrying out their classroom responsibilities constitute a portion of their work load. We conclude that the nature of such work load has a minimal effect on educational policy, and, therefore, the matter of whether teachers should perform typing and duplicating duties is subject to mandatory bargaining.

The Association also notes that in City of Wauwatosa, Dec. No. 13109-A (WERC, 6/75), the Commission upheld an analogous proposal based upon its Oak Creek analysis. The Association concedes that some "clerical" tasks have been and are performed by teachers, where those tasks are necessarily incidental to their ongoing teaching duties (i.e., they "constitute a portion of their work load", Oak Creek, supra). The Association asserts that its proposal would not preclude the occasional performance of incidental clerical functions which are "supplemental to and supportive of" a teacher's teaching duties. However, the Association asserts that as the Commission held in its Oak Creek, City of Wauwatosa, and Milwaukee Schools decisions, the fact that teachers perform such "supplemental" and "supportive" duties does not make the performance of clerical tasks by teachers a matter which relates primarily to the management or basic policy direction of the District. The Association submits that the clerical duties addressed by this proposal are not fairly within the job responsibilities and duties of professional educators. The Association requests that the Commission find its proposal to be a mandatory subject of bargaining.

Discussion of Proposal (6)

In City of Wauwatosa, supra, the Commission ruled that it was a mandatory subject of bargaining for a labor organization representing firefighters to propose that firefighters be relieved of switchboard duties which they performed on an occasional basis. When reaching that conclusion the Commission reasoned as follows:

> In resolving this issue, the Commission notes that it has recently ruled on an analogous issue in Oak Creek - Franklin Jt. City School District No. 1. 1/ There, the labor organization presented a proposal in collective bargaining negotiations which provided that:
>
> > "In order to achieve maximum utilization of teacher's planning time, all teachers shall not be required to type and duplicate classroom materials, clerical aides shall be provided for each school. One clerical aide shall be provided for each unit in a multi-unit school."
>
> Commenting on this and other related issues, the Commission ruled, inter alia, that matters relating to the management of the school system and/or basic educational policy are subjects reserved to the management and direction of the municipal employer and that, therefore, a municipal employer is not required to bargain with respect to such matters, except insofar as the establishment and implemention (sic) of such matters affects the wages, hours and conditions of employment of municipal employes. The Commission also concluded that matters "primarily relating to wages, hours and conditions of employment" are not reserved to the municipal employer and that such matters constitute a mandatory subject of bargaining. Under this reasoning, the Commission in Oak Creek declared that:
>
> > "Typing and duplicating duties performed by teachers in carrying out their classroom responsibilities constitute a portion of their work load. We conclude that the nature of such work load has a minimal effect on educational policy, and, therefore, the matter of whether teachers should perform typing and duplicating duties is subject to mandatory bargaining. However, the District has no mandatory duty to bargain on that portion of the proposal relating to the demand that the District employ and provide Clerical Aides in schools, since such a demand relates to the District's management function." (Footnote omitted) (Emphasis added).
>
> Applying the foregoing analysis to the instant facts, the Commission finds that there is no meaningful distinction between the desire of teachers to be free of clerical duties, and the desire of firefighters to be free of switchboard duties. As noted in the Findings of Fact, each firefighter

performs switchboard duties on an occasional basis (about four hours every three months), and then only to relieve the full-time civilian, non-bargaining unit employes, who normally perform such duties on a full-time basis. Thus, the firefighters here perform duties which are supplemental to and supportive of their firefighting duties, just as the teachers in Oak Creek performed occasional clerical functions which were supplemental to and supportive of their teaching duties. Further, in both instances, the performance of the particular duty in issue is a matter which does not relate to either the management or the basic policy direction of the particular municipal employer. Accordingly, in such circumstances, and pursuant to our decision in Oak Creek, the Commission concludes, based upon the facts here presented, that Petitioner's request to remove the switchboard duties from bargaining unit personnel constitutes a mandatory subject of bargaining. 2/

1/ Decision No. 11827-D (9/74), see also City of Beloit, Decision No. 11831-C (9/74).

2/ In so finding, the Commission, of course, is not holding that the Employer must necessarily accede to Petitioner's bargaining demand. For, it is well established under Section 111.70(1)(d) of MERA, that the duty to bargain does not "compel either party to agree to a proposal or require the making of a concession."

Applying the holdings of Oak Creek, supra, and City of Wauwatosa, supra, to the instant case, we conclude that the Association's proposal is a mandatory subject of bargaining. The record establishes that while teachers do on occasion perform the duties referenced in the Association's proposal, such duties are at most, "supplemental to and supportive of" their teaching duties and responsibilities. However, it should be noted that the proposal, as written applies only to "classroom or other instructional materials". Hence, we do not view this case as presenting an issue as to mandatory nature of proposal which focused upon other potential typing responsibilities. We further conclude that the performance of the clerical duties covered by this proposal is not an issue which relates in any significant way to either the management or the basic policy direction of the School District. The fact that the Association's proposal, if agreed to by the District or if awarded by a mediator-arbitrator, might necessitate the expenditure of additional District resources to have the duties referenced in the proposal performed by other employes, is irrelevant to our determination herein and goes to the merits of the proposal. Obviously, a contrary conclusion would render permissive all proposals which have an economic impact, including proposals specifying wage rates, salary schedules, etc.

Unlike Oak Creek, supra, the Association's proposal herein does not attempt to dictate the identity of the individuals who the District may choose to have perform the duties described therein. Thus, Oak Creek, as indicated earlier herein, is supportive of our conclusion and not contrary thereto. Our conclusion also is not contrary to that expressed in Milwaukee Sewerage Commission, supra, where we concluded that an employer need not bargain as to whether employes will perform duties which were "fairly within the scope of the duties applicable to the kind of work performed". That holding is not applicable to duties which, although performed by employes on an occasional basis, remain "supplemental to and supportive of", rather than an integral part of, the employe's primary responsibilities and duties. Our conclusion herein is also consistent with that reached in Milwaukee Board of School Directors, supra, wherein we found mandatory a proposal which placed a limitation upon the clerical tasks which accountants could be required to perform where said clerical duties were not directly related to the accountants' primary job responsibilities. We therefore conclude that the Association's proposal is a mandatory subject of bargaining.

(7) The disputed proposal is as follows:

> Article VI, Section 18, Employes' Lounge:
>
> Section 18: Employes' Lounge
>
> The District shall provide and maintain the existing employe lounge in each school building in the District, for the exclusive use of District employes, parent volunteers and practice teachers.

The District asserts that the Association's proposal requires that the District provide and maintain employe lounges in each building and that said proposal primarily relates to the District's ability to manage and control its physical facilities and thus is a permissive subject of bargaining. The District contends that the Association's proposal does not address any employe concerns "about work place conditions such as freedom from actual dangers to health and safety" and thus Sheboygan County Handicapped Children's Education Board, Dec. No. 16843 (WERC, 2/79), does not provide a basis for finding this proposal to be a mandatory subject of bargaining. Indeed, the District asserts that Blackhawk VTAE, supra, renders this proposal permissive. The District asserts that the record demonstrates that the management and control of the lounge areas has been retained by the District and that a determination as to the use to which District facilities will be put is clearly a matter which is primarily related to the management and direction of the District.

The Association counters by asserting that the Commission's decision in Sheboygan, supra, is neither dispositive of the issue in this case nor supportive of the District's position. Unlike the proposal at issue in Sheboygan, the Association contends that its proposal does not concern floor space, furnishings, cleanliness, lighting and heating of work places; does not apply to work places outside the District's direct control; and does not impermissibly involve the Association in the planning or construction of District physical facilities. The Association asserts that the bargainability of its proposal is controlled by the Commission's decision in Blackhawk VTAE, supra, wherein the Commission quite clearly stated that "providing of lounges and restroom facilities pertain (sic) primarily to working conditions, and therefore it is a mandatory subject of bargaining." The Association asserts that the existence of, and a teacher's access to, an employe lounge, in which a teacher may take a break, prepare for class, etc., without the need to supervise students, is clearly a matter which primarily relates to the teachers' working conditions. The Association asserts that maintaining existing lounge rooms in school buildings entails no additional capital or maintenance expenditures by the District (over what is already being spent to maintain the building itself) and is marginally, at best, related to the District's ability to manage and control its physical facilities. The Association notes that whether the physical space addressed in the Association's proposal is maintained as an employe lounge or devoted to some other purpose, the District's capital, heat, electricity and maintenance expenses are, of course, the same. As the Association's proposal only requires the District to continue to provide physical space for a lounge within its existing buildings and that it physically maintain said lounges, the Association asserts this proposal is a mandatory subject of bargaining within the meaning of the Commission's Blackhawk decision.

Discussion of Proposal (7)

In Blackhawk VTAE, supra, the Commission found the following proposal to be permissive:

> Existing teachers' lounges and restroom facilities shall be maintained, and furnished, subject to the physical limitations of the existing District buildings, and the lease agreements under which such buildings are held by the District.

While it is true, as the Association notes, that the Commission stated, ". . . that the providing of lounges and restroom facilities pertain (sic) primarily to to working conditions", the Commission found that by seeking "to maintain existing facilities, not necessarily the number of same," the proposal primarily related to the management and control of the District's physical

facilities and was therefore a permissive subject of bargaining. The Association's proposal herein suffers from the same flaw found determinative in Blackhawk VTAE. While we reaffirm that the Association could mandatorily propose that employe lounges be provided in each school building, the requirement that the existing lounges be maintained, without any showing that the existing lounges, as opposed to a lounge provided in an alternate location in each building, has any impact upon employe conditions of employment, renders the proposal permissive because of its interference with the District's management and control of its physical facilities.

(8) The disputed proposal is as follows:

> Article VI, Section 20, Assignment of Bargaining Unit Work:
>
> Section 20: Assignment of Bargaining Unit Work
>
> A. Except as may be provided for elsewhere in this Agreement, there shall be no subcontracting or other assignment of bargaining unit work to employes of the District who are not in the bargaining unit, to employes of any other employer, or to any other individuals. Bargaining unit work shall be performed only by employes who are members of the bargaining unit and entitled to the benefits of this Agreement; provided, however, that, in the absence of such an employe, the District may assign bargaining unit work to per diem substitute personnel for a period of time not to exceed fifteen (15) consecutive work days.
>
> B. As used herein, "bargaining unit work" shall consist of all of those duties, assignments, tasks, or responsibilities which are fairly within the scope of responsibilities applicable to the kind of work performed by bargaining unit employes and/or which have been historically or customarily performed by employes in job classifications or positions included in the bargaining unit.

The District contends that the Association's absolute prohibition against the assignment of "bargaining unit work" to anyone other than members of the bargaining unit directly interferes with the District's absolute right to assign duties within the respective scope of responsibilities of employes within the District. The District contends that the record demonstrates the futility of any attempt to clearly delimit the extent of "bargaining unit work" in an effort to prohibit the performance of such work by certain groups of employes or individuals. The District contends that it has historically utilized teachers to assist administrators plan curriculum, decide which textbooks to purchase, etc. The District argues that the sharing of administrative and teaching responsibilities that has occurred in the District in the past would be substantially interefered with by this proposal and that the goals and values of the District would suffer. The District contends that it needs the interaction of all professionals in the District to reach the educational objectives which the District has established. The District asserts that the implementation of the Association's proposal would directly interfere with not only the District's ability to assign teaching duties and responsibilities to members of the bargaining unit, but would also negatively impact upon the District's right to utilize the services of administrators and parent volunteers for purposes which are directly related to the provision of educational services within the District. Thus, the District contends that the proposal concerns a matter which is directly related to the management and control of the District and to the formulation of educational policy and should be deemed permissive on that basis.

In addition, where, as in the subject case, there has been no clear delineation between the duties which have historically been shared between teachers, administrators, and parent volunteers, the District contends that the potentially pernicious effect of a proposal such as that promulgated by the Association can neither be overstated nor overestimated in terms of impact upon educational processes in the District. The District contends that the impossibility of crafting a definition of the term "bargaining unit work" which will accommodate this historical perspective clearly and irrevocably mandates a finding that the proposal is permissive.

The Association contends that the Commission has consistently held that a union may protect the jobs of its members by bargaining restrictions on, or prohibitions against, the subcontracting or other displacement of bargaining unit work. Racine Unified School District No. 1, Dec. No. 12055-B (WERC, 10/74); City of Oconomowoc, Dec. No. 18724 (WERC, 6/81); Northland Pines School District, Dec. No. 20140 (WERC, 12/82); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) and Dec. No. 20093-B (WERC, 8/83); Racine Unified School District, Dec. Nos. 20652-A and 20653-A (WERC, 1/84); School District of Janesville, Dec. No. 21466, (WERC, 3/84). The Association contends that the protection of unit work, and thus unit jobs, from erosion through the subcontracting of an assignment to non-unit personnel is one of the most basic, if not the most basic, bargaining goal of any labor union. In this case, the Association argues that the District seeks to re-litigate this well-established principle, by disguising its objections to the Association's assignment of bargaining unit work proposal behind semantical quibbles and overly broad assertions regarding the proposal and its reasonable meaning and effects.

The Association notes that the work assignments covered by the proposal are "fairly within the scope of responsibilities applicable to the kind of work performed by" bargaining unit employes, and thus is bargaining unit work which the Association is entitled to protect through collective bargaining. The Association asserts that the District does not dispute, nor could it, that the work assignments covered by the Association's proposal represent bargaining unit work. The District cannot contend, in the Association's view, that these duties are fairly within the scope of a teacher's job, and thus subject to involuntary assignment, without recognizing the Association's well-established legal right to bargain contractual protections for that unit work. Thus, the Association can mandatorily propose that qualified bargaining unit members receive such work assignments before the District is entitled to subcontract, or assign then to non-unit personnel, with the resultant reduction or loss of employment by bargaining unit employes. The Association notes that the subcontracting of extra-curricular assignments and the temporary use of non-unit per diem substitute teachers is permitted by the proposal. The Association contends that nothing in the proposal prevents the District from exercising its managerial right to secure the availability of a qualified teacher perform the educational duties and responsibilities required in carrying out its educational mission and programs, or its right to reasonably decide what qualifications the persons performing "bargaining unit work" should possess to fill such assignments. Moreover, the Association asserts that it is clear that nothing in the proposal prevents or restricts the District's ability to require the performance of the bargaining work covered by the proposal or "to assign teaching duties and responsibilities to members of the bargaining unit."

The Association notes that in City of Oconomowoc, supra, the Commission held a union proposal prohibiting the subcontracting "of jobs historically performed by members of the bargaining unit" to relate primarily to the wages, hours and conditions of employment of the employes represented by the Union and, thus, to be a mandatory subject of bargaining. In a related context, the Association points to the Commission's decision in Milwaukee Board of School Directors, Dec. No. 20093-B supra, wherein the Commission noted that there is a theoretical possibility that a district could show that use of non-unit personnel represents a choice among political goals or values. However, the Association notes that the Commission held that such a showing remains a burden which must be met based upon the record before the Commission. In this case, the District, in the Association's view, has cited the "goal or value" of the desire to utilize the free labor of parent volunteers. The Association asserts the District has no non-bargainable right to replace bargain unit employes with "the services of administrators and parent volunteers". It argues that the District has failed to demonstrate any compelling educational policy justification for not applying the holdings of the above-cited Commission decisions to the Association's proposal in this case. In response to the District's argument that the proposal would prevent the District from assigning certain duties to administrators and parent volunteers which have historically been shared, the Association asserts that its proposal does not preclude such continued performance of educationally-related duties by non-unit personnel, since those duties are not reasonably encompassed within the proposal's definition of bargaining unit work.

The Association asserts that its proposal is clearly worded and intended to prevent substitution of non-unit personnel for unit personnel. Contrary to the District's assertions, the Association alleges that its proposal cannot reasonably

be interpreted to prevent the performance, by non-unit employes, of work which those employes have always performed and which does not result in the displacement or replacement of unit employes. Thus, the Association contends that its proposal is a mandatory subject of bargaining.

Discussion of Proposal (8)

In Unified School District No. 1 of Racine County, supra, the Court concluded that where a decision to subcontract does not represent a choice among alternative social or political goals or values, it is a mandatory subject of bargaining because of the substantial impact upon wages and conditions of employment. Thus, absent evidence in this record that use of non-unit personnel represents a choice among goals or values, the Commission will conclude that the portion of the Association's proposal which would preclude use of non-unit personnel (i.e., subcontracting) to perform bargaining unit work is a mandatory subject of bargaining. There is no evidence in this record that the District has ever utilized non-unit personnel to perform the teaching function nor of any social or political goals or values which would warrant such a choice. Thus, to the extent that the proposal in question focuses upon the core of a teacher's responsibilities (i.e., classroom teaching, etc.) we find it to be a mandatory subject of bargaining.

It would appear that the District's primary argument as to this disputed proposal focuses upon duties and responsibilities which teachers have historically shared with administrators and, in some instances, parents and which the District asserts would be covered by this proposal. The record does indicate that teachers have been utilized by the District to assist in tasks such as curriculum planning, textbook selection, library acquisitions, etc. The record also demonstrates that these responsibilities have been shared with administrators and parents. The Association contends that its proposal can reasonably be interpreted as not precluding the continued performance of these educationally-related duties by non-unit personnel, since those duties are not reasonably encompassed within the proposal's definition of bargaining unit work. However, this disclaimer is not, in our judgment, sufficient to overcome the plain meaning of the Association's proposal which specifies that bargaining unit work, which is defined in part as "duties, assignments, tasks, or responsibilities . . . which have been historically or customarily performed by employes . . . in the bargaining unit", " shall be performed only by employes who are members of the bargaining unit . . ." (Emphasis added). As the record demonstrates that the shared responsibilities have "historically or customarily been performed" by teachers, we conclude that such work is within the coverage of the proposal.

We are cognizant of the fact that use of teachers on curriculum and textbook committees is commonplace in many districts across the state of Wisconsin, including the District herein. It is also true however that issues such as the type of curriculum to be utilized and the materials which will be purchased to implement that curriculum are permissive subjects of bargaining. Beloit, supra. Our interpretation of the Association's proposal herein creates a clash of the substantial importance to employes of retaining work which has been historically performed by unit members, and the freedom of a district to make educational policy choices without mandated involvement by teachers. We conclude herein that the balance between these two substantial competing interests tips in favor of a conclusion that the educational policy dimensions outweigh the unit work protection aspects of such a proposal. This determination is consistent with our prior findings that a union cannot mandatorily propose that it be involved in curriculum or other educational policy determinations even when it has historically performed that function. Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83). Thus, to the extent that it covers work which although historically performed, is part of the process by which educational policy choices are made by the District, we must find the Association's proposal herein to be a permissive subject of bargaining.

(9) The disputed proposal is as follows:

> Article VI, Section 21, Attendance at Professional Meetings:
>
> Section 21: Attendance at Professional Meetings
>
> Teachers and professional staff members may be permitted to attend professional conferences in their special field with expenses paid under the following conditions:

1. Approval of the principal and superintendent is required.

2. The school district budget for such conferences shall not be exceeded.

The cost of necessary substitute teachers shall be paid by the school district within the limits of the budget.

The District asserts that its decision to allow members of professional staff to attend conferences is an educational policy determination and a permissive subject of bargaining. The District alleges that the record reveals no impact of this proposal upon wages, hours or conditions of employment. The District asserts that it utilizes the prerogative to have employes attend professional conferences to ensure that certain teachers maintain a level of excellence by exposing such teachers to new techniques and procedures in their respective fields. The District contends that its objection to this language focuses upon the expressly voluntary nature of the proposal. The District alleges that it does not require teachers to attend professional meetings under this section and that teachers who utilize the opportunity to attend professional conferences are not compensated differently in any manner from other teachers. As attendance at professional conferences is purely voluntary, the District contends that the provision is clearly not a "condition of employment" but instead a variable which relates directly to the quality and level of educational services provided by the District.

The Association contends that its proposal is economic in nature and analogous to paid leave provisions and teacher convention calendar proposals. Although the proposal may have a secondary effect of encouraging teachers to improve their educational skills and academic training, the Association rejects the District's contention that the proposal does not relate to a "condition of employment" simply because the District does not require teachers to attend. The Association asserts that the lack of any such requirement is irrelevant to the issue of whether a paid professional leave/reimbursement proposal is primarily related to teacher wages, hours or conditions of employment. The Association notes that the District does not "require" teachers to take vacations, sick leave or personal business leave but that such economic benefits are nevertheless mandatory subjects of bargaining City of Madison, Dec. No. 16590 (WERC, 10/78). In addition, the Association asserts that the statutory phrase "conditions of employment" is not equivalent to or coextensive with "requirements of employment". The economic benefit provided by this proposal is encompassed by the term "wages" and the Association's proposal is, it asserts, primarily related to the economic and professional benefits received by District teachers under the collective bargaining agreement. The Association argues that the proposal in question is indistinguishable from "educational release time" proposal in Madison Metropolitan School District, Dec. No. 16598, (WERC, 10/78). The Association contends that its proposal is primarily economic on three levels. First, the provision permits a teacher to be released from work without loss of pay. Second, the District's obligation to pay is restricted to "the limits of the budget". Finally, the proposal requires the District to pay teachers' expenses, again within "the limits of the budget". The Association contends that this aspect of the provision is analogous to the "reimbursement for credits earned" proposal upheld as a mandatory subject of bargaining by the Commission in Janesville.

In addition the Association notes that the proposal contains express limitations and qualifications which prevent the provision from unduly interfering with legitimate District managerial or policy determinations - including, in fact, District budgetary decisions. The proposal requires prior District approval and notice to the District and the potential costs of the leave and reimbursement aspects of the provision are controlled by the District. Thus the Association contends that its proposal is primarily related to teacher wages and is totally unrelated to the formulation of educational policy. The Association therefore requests that the Commission find its proposal to be a mandatory subject of bargaining.

Discussion of Proposal (9)

We concur with the Association's contention that this proposal primarily relates to wages. It reflects an attempt to obtain additional monetary compensation for teachers who the District chooses to allow to attend the

conferences covered by the proposal. The record does not demonstrate any significant impact of this proposal upon the formulation or determination of educational policy and, given the direct and substantial relationship to employe wages and conditions of employment we find, as to similar proposals in in Madison Metropolitan School District, supra, and Janesville, supra, that the proposal is a mandatory subject of bargaining.

(10) The disputed proposal is as follows:

> Article VIII, Leaves, Section 4, Visitation Day:
>
> Section 4: Visitation Day
>
> Each teacher shall be granted one day each year for school visitation. Teachers shall make a written report to the principal of the work observed. Such days shall not be chosen which immediately precede or follow a holiday recess. The particular school to be visited and the time of the visitation shall be approved by the principal. The scheduling of requested visitation days shall be reasonable, and shall not interfere with the District's educational programs and activities.

The District contends that this provision is permissive because it addresses the allocation of the teacher work day as well as the determination and implementation of public policy in education within the District. The District asserts that visitation days, as outlined in the Association's proposal, are recognized as an integral part of the overall educational program provided by the District. The District asserts that the record clearly demonstrates that the purpose of a visitation day, as well as its impact upon a teacher, is entirely related to the enhancement of the teaching staff's knowledge as to educational programs available in other school districts as well as the related ability to recommend improvements to the District based upon such observations. The District argues that as this proposal has no discernible impact upon wages, hours and conditions of employment, its primary relationship to educational policy determinations renders it permissive.

The Association asserts that its proposal is primarily a "paid leave" provision which, for the same reasons set forth earlier in relationship to the "professional conference" proposal, is a mandatory subject of bargaining. The Association notes that the proposal is expressly and properly qualified to avoid any undue interference with the normal, reasonable operations or management of the District's educational program and activities. As the visitation day proposal is an economic and professional benefit proposal primarily related to teacher wages and conditions of employment and as the proposal has only a minor and indirect impact upon the management and operation of the District, the Association contends that it is a mandatory subject of bargaining.

Discussion of Proposal (10)

We again conclude that, like the preceding proposal, the Association's visitation day proposal is primarily related to wages and conditions of employment and thus is a mandatory subject of bargaining. The fact that the Association has chosen to make the availability of time off from the employes' normal responsibilities subject to the purpose of visiting other classes or other districts is irrelevant to the determination of whether the proposal is mandatory or permissive. We view this proposal as no different than a personal leave or vacation proposal which the Association might choose to submit. While, as the Association points out, the substantial District control which is retained under this proposal serves to minimize any potential argument as to the impact upon the District's educational policy determinations, such factors are not determinative to our conclusion herein. At its most basic level, such a proposal reflects an effort by the Association to bargain over the number of days which employes will actually be required to work in return for their salary. As it is a mandatory subject of bargaining for the Union to bargain over the number of days teachers will teach in return for their salary, Beloit, supra, and Janesville, supra, any proposal which provides for paid leave, and which thereby reduces the number of working days, is, in our view, also a mandatory subject of bargaining.

(11) The disputed proposal is as follows:

Article IX, Professional Improvement, Sections 1-4:

Section 1: Advance University Training and District In-Service Work.

To qualify for advancement on the index scale a teacher shall acquire credits through advanced professional training every three years.

1. A teacher having less than a masters degree plus sixteen credits shall acquire six credits, three of which may be acquired through in-service work within the school system. In-service work shall be approved by the administration with credits approved by the Superintendent. Additional university study shall not be required after the age of sixty for those teachers not holding a masters degree.

2. A teacher having more than a masters degree plus fifteen credits shall acquire three credits. The three credits may be acquired through in-service work within the school system. Additional university study shall not be required after the age of fifty-five for those teachers holding a masters degree in their teaching field.

3. A credit is defined as a semester hour credit which is earned by one hour of study per week for 18 weeks or its equivalent.

4. University credits shall be accepted from approved institutions of higher learning accredited by the North Central Association or similar accreditation agency. Teachers in the vocational training area will be credited with equivalency credits for approved classes and training required for them to maintain their vocational certification. These credits will be reimbursed as stipulated in section 5 of this article and shall apply toward advancement on the salary schedule.

5. A copy of the credits earned shall be filed in the Superintendent's office as a permanent record.

6. The course or courses taken shall be aproved by the Principal and the Superintendent.

7. Credit may be granted for travel. Such credit may be considered as meeting part of the requirements for professional training.

8. One (1) credit for the total required each three years may be travel credit.

9. The following factors shall enter the evaluation of travel credit:

   a. An application shall be submitted to the Superintendent, at least one month prior to the trip. It shall contain amount of time to be spent, itinerary, and educational objectives.

   b. A written report shall be submitted upon completion of travel to the Superintendent. This report shall evaluate the travel in terms of its relationship to the classroom, school and/or community activities, and shall be filed within one month after returning to school, or by October 1 of the current contract year, whichever is later.

c. In general, travel credit shall not be granted for a return to places or locations for which credit has already been granted within one cycle.

d. Within reasonable limits the teacher shall be expected to share learnings with school or community groups.

Section 2: Credit for Advanced University Professional Training.

1. Teachers that have earned their masters degree may select certain undergraduate courses offered by recognized colleges and/or universities for the purpose of maintaining their salary schedule increment eligibility. Per credit salary awards for approved credits may be made in accordance with the Professional Salary Plan. Permission to take certain undergraduate courses for local credit will be made only in the event that suitable graduate courses are not being offered at a given time.

2. Teachers that have earned their masters degree may select certain approved non-credit workshops, T.V. classes, etc. sponsored by a recognized college or university for the purpose of maintaining their salary plan increment eligibility. The amount of local credit equivalency shall be a separate consideration in each individual case. No per credit salary awards shall be allowed for approved equivalencies. Permission to participate in an approved equivalency program for local credit shall be made only in the event that suitable graduate courses are not being offered at a given time.

3. Teachers who have not earned their masters degree are permitted to take for local credit towards salary plan increments approved undergraduate courses. These credits will also entitle such a teacher to advance horizontally to B.A.+30 when he has reached the maximum in the B.A. column. These courses should be in the teacher's own closely related field.

4. All work taken for salary plan increment eligibility shall require prior approval.

Section 3: Credit for District In-Service Work.

1. Local Courses - Two credits for the purpose of salary plan increment eligibility shall be allowed to teachers successfully completing scheduled local courses meeting for a total of at least 18 hours during the semester. Teachers requesting credit in this category should be prepared to give evidence of related professional reading or preparation outside of class. If a teacher participates in a local course offered by a neighboring district, a letter certifying successful completion of the course should be filed with the Superintendent. No per credit salary awards shall be made for credits earned through locally scheduled in-service classes.

   One credit for the purpose of salary plan increment eligibility will be allowed to teachers successfully completing scheduled local courses meeting for a total of at least nine hours during the semester. Related professional study is expected, along with evidence of successful completion of the program.

   Also considered in this category are professional courses offered on television and non-credit universities.

2. Committee Work and Individual Projects - All teachers are expected to participate in at least one curriculum or school program study committee during each school year as a responsibility of professional employment. One local in-service credit for the purpose of salary plan increment eligibility shall be allowed for committee work involving at least nine (9) hours of formal committee work requiring a minimum of one hour of outside work for each hour of scheduled committee work. No per credit salary awards shall be allowed for committee work. In-service committee participation shall be ascertained through a committee log including meeting dates, times, and attendance.

   The committee log shall be kept by the committee secretary and certified by the committee chairman. Persons working on the approved individual projects will keep and certify their own project log. Project logs are due at completion of the committee project.

   Teachers wishing recognition for individual research of projects should consult with their principal or the director of instruction prior to starting their project. Policies relating to committee work will also apply to individuals.

Section 4: Credit Claim Procedure.

All credits must be claimed. This includes:

Credits for salary plan increment eligibility.
Credits for per credit salary awards.

Claims made by filing the proper request form with the Principal. The form titles are:

1. REQUEST FOR PRIOR APPROVAL (Blue).

   If you plan to claim salary program benefits as a result of credits earned, approval must be obtained first in accord with School District Policy.

2. CLAIM FOR ALLOWANCE FOR LOCALLY EARNED CREDITS FOR SALARY PLAN INCREMENT ELIGIBILITY (Yellow).

   All credits earned through the local in-service program must be claimed. Credit is not given automatically.

3. CLAIM FOR REIMBURSEMENT FOR CREDITS EARNED IN ACCORDANCE WITH THE SALARY SCHEDULE (Green).

   Claim forms must be filed in duplicate. One copy will be returned.

The District asserts that the disputed proposal deals directly and specifically with the number and types of credits which can be utilized by teachers to advance on the salary schedule, and the procedures which must be utilized to receive credit for advanced training. Significantly, in the District's view, the disputed proposal does not address in any manner the reimbursement which shall be granted for professional improvement credits. Thus, the District argues that these proposals do not primarily relate to the amount of compensation which will be provided for credits or for advancement on the salary schedule, but rather relate to the type of credits which will be allowed by the District for the purposes of credit reimbursement.

The District contends that the Association's proposal directly affects District decisions to establish a minimum level of educational excellence which must be maintained by teachers in the District. It asserts that decisions as to any such requirements are matters of policy which go directly to the quality and level of educational services which will be provided by the District. In essence,

the District argues that additional credit requirements are akin to job qualifications which bargaining unit members must maintain. Thus the District asserts that the Association's proposal is a permissive subject of bargaining. The District notes, however, that it is aware of its duty to bargain the impact which such job qualifications may have upon teachers' wages, hours and conditions of employment. Accordingly, the District has not challenged the provisions of Section 5 of the Association's proposal.

The Association asserts that its proposal has three basic components:

(1) a contractual requirement that, in order to qualify for advancement on the salary schedule, a teacher must continue his/her education and professional training by acquiring a certain number of credits every three years;

(2) the criteria for defining and determining the nature, types and amounts of continuing education or professional training which satisfy that contractual requirement;

(3) the procedure for obtaining District approval and/or reimbursement for a teacher's continuing education and professional training.

The Association disputes the District's assertion that the proposal involves "the job qualifications" which bargaining unit members must maintain. Rather, the Association asserts that the proposal deals exclusively with the type and amount of continuing education which teachers must acquire to qualify for advancement on the salary schedule. In this regard the Association asserts that the District itself concedes that the primary impact of the provisions which it has challenged is monetary. The Association cites the Commission's recent Racine decision wherein the Commission found an analogous proposal to be a mandatory subject of bargaining since it primarily related to teacher advancement on the salary schedule and thus to teacher wages.

As to the District's objection that the provision defines the types of credits which will qualify for salary schedule advancement eligibility, the Association argues that if a contractual provision requiring continued education and training for salary advancement is a mandatory subject of bargaining, the criteria for determining which types of education or training qualify must also be a mandatory subject of bargaining since those criteria are primarily and exclusively related to the continuing education requirement. The Association notes that the structure of the teachers' salary schedule itself reflects additional value received by the District from a teacher who has acquired additional educational training. Since the credits defined and described in the proposal form the basis of the teachers' advancement on the salary schedule, the Association asserts that this portion of the proposal is primarily related to teacher wages.

The Association also cites the Commission's decision in Janesville, supra, upholding as a mandatory subject of bargaining a continuing education/credit reimbursement proposal which included the criteria for approval, for the purposes of reimbursement and placement on the salary schedule, of graduate and undergraduate credits earned by bargaining unit teachers.

As to the procedural aspects of the proposal, the Association contends that no lengthy citation of prior Commission decisions is necessary to support the proposition that the procedure for obtaining salary schedule increment credit reimbursement is a mandatory subject of bargaining. The Association asserts that such procedures are an inherently necessary and incidental component of any wage-related proposal and thus primarily related to employe wages. Accordingly, the Association asserts that the procedural provisions of its proposal are mandatory subjects of bargaining.

Discussion of Proposal (11)

In Racine, supra, the Commission held the following proposal to be a mandatory subject of bargaining:

1. Each teacher shall be required to complete a five year credit requirement cycle by obtaining five semester hours

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

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

The Commission reasoned:

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

We find the above quoted analysis to be dispositive herein. The proposal in question is related exclusively to the means and manner by which teachers qualify to receive additional compensation. The proposal does not, contrary to the District's assertions, establish job qualifications. While the District's view of what it desires its teachers to pursue educationally happens to be reflected in certain portions of this proposal, that choice is related only to the merits of whether this proposal should be placed in a collective bargaining unit and is irrelevant to a determination as to its mandatory status. Thus we find the Association's proposal to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 16th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

I did not participate as to Proposal 1. (See Note 2, supra)