STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 158 No. 33500 MP-1610 Decision No. 21893-B

Appearances:

Perry, First, Reiher, Lerner & Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 1219 North Cass Street, Milwaukee, Wisconsin 53202, on behalf of the Complainant.

Ms. Anne L. Weiland, Assistant to the Executive Director, Department of Employee Relations, Milwaukee Public Schools, P. O. Drawer 10K, Milwaukee, Wisconsin 53201, on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND MODIFYING EXAMINER'S CONCLUSION OF LAW AND ORDER

Examiner Amedeo Greco having issued on February 13, 1985, his Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded that Respondent had not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)(1) or (4), Stats., by refusing to bargain collectively with Complainant; and Complainant having timely filed, on March 4, 1985, a petition for review of a portion of the Examiner's decision; and in its brief filed on April 26, 1985, Complainant having stated additional grounds for its petition for review; and Respondent in its brief filed on May 28, 1985, having objected to any expansion of the grounds for review, and having subsequently, on July 17, 1985, filed a Motion to Strike and/or Limit Scope of Review; and Complainant having replied to said Motion on July 23, 1985; and the Commission having extended the briefing schedule to allow Respondent to brief all substantive issues in advance of the Commission's decision; and Respondent having filed an additional brief on August 5, 1985; and Complainant having informed the Commission on August 14, 1985 that it would not file a responsive brief; and the Commission having reviewed the record in the matter including the petition for review, the Motion to Strike and/or Limit Scope of Review, and all briefs filed in support of and in opposition thereto, and having reviewed the decision of the Examiner, and being satisfied that the Examiner's Findings of Fact should be affirmed and that his Conclusion of Law and Order should be modified;

NOW, THEREFORE, it is

ORDERED 1/

1. That the Examiner's Findings of Fact be, and hereby are, affirmed.

2. That the Examiner's Conclusion of Law be, and hereby is, modified to read:

> 1. By contracting with MATC to use nonbargaining unit personnel to perform the vocational training (described in the Findings of Fact) at the two Alternative Schools without first bargaining about such an arrangement with MTEA, the District violated Secs. 111.70(3)(a)1 and 4 of MERA.
>
> 2. That the District has not been shown to have failed or refused to bargain about the impact of its above-noted contracting with MATC on wages, hours and conditions of employment of the instant bargaining unit represented by MTEA.

(See Footnote 1 on Page 2).

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.

(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, parties who appeared before the agency in the proceeding in which the order

3. That the Examiner's Order be, and hereby is, modified to read:

ORDER

The Respondent District, its officers and agents shall immediately:

(1) Cease and desist from failing to bargain collectively with MTEA in the manner noted in Conclusion of Law 1, above.

(2) Cause copies of the notice attached as "Appendix A" hereto to be signed by an appropriate District official and conspicuously posted for 30 days in places where notices to teacher bargaining unit employes are customarily posted.

(3) Notify the Commission, in writing, within twenty (20) days of the date of this Order as to what steps it has taken to comply herewith.

(4) Except as noted above, the complaint filed herein shall be and hereby is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

APPENDIX "A"

NOTICE TO TEACHER BARGAINING UNIT EMPLOYES

Pursuant to a Decision and Order of the Wisconsin Employment Relations Commission (WERC) regarding a complaint of prohibited practices filed against the Milwaukee Board of School Directors (MBSD) by Milwaukee Teachers Education Association (MTEA), you are hereby notified as follows:

1. The WERC concluded that MBSD violated the Municipal Employment Relations Act by failing to bargain collectively with MTEA before contracting with Milwaukee Area Technical College (MATC) for the services of MATC employes to perform certain vocational training and counseling work at the 68th St. and Kilmer Alternative Schools in school years 1983-84 and 1984-85.

2. MBSD WILL NOT, in the future, unlawfully fail to bargain collectively with MTEA regarding mandatory subjects of bargaining.

MILWAUKEE BOARD OF SCHOOL DIRECTORS

By _____ _____ _____
Signature Title Date

THIS NOTICE SHALL REMAIN POSTED FOR 30 DAYS AND SHALL NOT BE COVERED OR OTHERWISE RENDERED UNREADABLE.

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S
FINDINGS OF FACT AND MODIFYING
EXAMINER'S CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint initiating the instant prohibited practice proceeding, Milwaukee Teachers Education Association (MTEA) alleged that the District committed prohibited practices within the meaning of Sec. 111.70(3)(a)(1) and (4) by contracting out bargaining unit work normally performed by employes in the bargaining unit while failing and refusing to bargain with MTEA about the matter. MTEA alleged that the arrangement by which the District received money from certain State Pool Funds to pay for two instructors from the Milwaukee Area Technical College (MATC) to come into two District Schools to provide "Diversified On-The-Job Training" to District students was a mandatory subject of bargaining. MTEA requested that the Commission find that the District violated Secs. 111.70(3)(a)(1) and (4) by refusing to negotiate "concerning the decision and the impact on the bargaining unit of contracting out bargaining unit work"; and that the District be ordered to cease and desist from refusing to negotiate concerning "both the decision to, and the impact of the decision to contract out bargaining unit work."

At hearing on the matter, there was no testimony adduced. Instead, the parties submitted a number of joint exhibits and reached a number of factual stipulations.

THE EXAMINER'S DECISION

In summary, the Examiner's Findings of Fact include the following: The Department of Public Instruction (DPI) sent notice to the District of a pool of federal money, referred to as the Pool Fund, to be used for providing vocational education for youth in the public schools, in contrast to vocational education for adults outside the public school system. Certain conditions were attached to receipt of the funds, which meant that the District could not receive any of the funds if it provided the vocational training with its own personnel, nor could the funds be used to supplant any existing programs. Subsequently, the District applied for, received and used Pool Funds to contract with Milwaukee Area Technical College (MATC) for two MATC employes to come into two Alternative Schools in the District to provide "Diversified On-The-Job Training" to Special Needs students. It is undisputed that bargaining unit employes were qualified to provide the same services to students and that the services provided by the MATC personnel were similar to those provided by bargaining unit employes.

In determining whether the District's decision was a mandatory or permissive subject of bargaining, the Examiner applied the "primary relationship" standard established by the Wisconsin Supreme Court in Unified School District No. 1 of Racine County, 81 Wis.2d 89 (1977). The Examiner found that a key fact distinguishing this situation from the situation in Racine is that "DPI has mandated that school district participation in the Pool Fund project is contingent upon the vocational services herein being offered by local VTAE schools, rather than the school districts themselves." The Examiner further stated:

> . . . here the District will be adversely affected if it cannot contract with MATC because it then will be unable to receive any of the vocational services offered by the Pool Fund. The possible loss of these services therefore primarily impacts upon the District's ability to fulfill its chief duty of providing maximum educational opportunities - including vocational training - to its students.

The Examiner went on to state:

> The wages, hours and conditions of employment of bargaining unit employes, on the other hand, are not primarily affected by the District's decision since: (1) no unit employes have been adversely affected by the performance of

these vocational services; and (2) there is no indication that any bargaining unit employes will be able to participate in Pool Fund if the District is forced to rescind its decision. Accordingly, and pursuant to the Court's "primary relationship" balancing test, it follows that the District's decision to participate in the Pool Fund project and to enter into its agreement with MATC constituted a permissive subject of bargaining.

In response to MTEA's argument that the Commission has never considered that the source of funds is decisive in determining bargaining unit status, the Examiner concluded that the instant fact situation was distinguishable from any of the cases cited by MTEA.

With regard to the District's obligation to bargain over the impact of a permissive subject of bargaining, the Examiner found that MTEA had failed to show how this decision had impacted upon the bargaining unit. The Examiner concluded that even if impact bargaining would have been required, MTEA had waived whatever rights it may have had by failing to respond to the District's letter of May 1, 1984 which offered to "further explore" the matter. The complaint was dismissed in its entirety.

THE PARTIES' ARGUMENTS ON REVIEW

MTEA

MTEA has made no objections to the Examiner's Findings of Fact. In its Petition for Review as initially filed, MTEA challenged only the Examiner's Memorandum comments to the effect that MTEA had waived impact bargaining, but MTEA stated that it did not contest the Examiner's conclusion that the District was not required to bargain over its decision to use MATC employes for the vocational training in question. However, MTEA subsequently modified that position and now contests that conclusion of law as well as other statements by the Examiner. While acknowledging that the scope of review now being argued is broader than its description of the grounds for dissatisfaction set forth in the Petition for Review, MTEA urges the Commission not to limit its review. Otherwise, MTEA asserts, the Commission would implicitly place its stamp of approval upon an important principle of law which is contrary to established Commission law and decisions of the Wisconsin Supreme Court. MTEA contends that the timely filing of a petition for review is jurisdictional, but that once a timely petition is filed, the Commission must with reasonable diligence review an Examiner's entire decision so that it does not adopt as Commission precedent decisions or portions thereof which are contrary to the provisions of MERA.

MTEA argues that the Examiner incorrectly applied the standard articulated by the Wisconsin Supreme Court in Racine to the facts before him. In MTEA's view, the fact situation conforms exactly to the Racine standard for subcontracting. MTEA argues:

> Bargaining unit employees had long performed counselling services similar to those performed by the MATC contracted employees. The Employer made no decision to discontinue such services. It simply expanded those traditionally performed duties and services, but for economic reasons utilized non-bargaining unit employees to perform the expanded services. The same work was being performed in the same places and in the same manner as had traditionally been performed by bargaining unit employees, but with respect to the two MATC employees, were (sic) performed pursuant to the outside contract with MATC.
>
> The Examiner concluded that the work in issue here is materially different from that in Racine in that the Employer would not be able to obtain the economic advantage of the State Pool Fund to provide the additional two counselling positions. This, however, is not a material difference from Racine or indeed from any subcontrcting decision. All subcontracting decisions are made because an employer believes there is an economic advantage to having an independent contractor employee perform the services and the employer is

> unwilling to bear the additional financial burden of providing them with its own employees.

MTEA asserts that the Examiner's erroneous conclusion resulted from confusing two separate considerations. In the view of MTEA, the Examiner correctly acknowledges that the source of funds for employe wages is not determinative of the bargaining unit status of employes. The Examiner then erroneously concludes that there was no duty to negotiate concerning the decision to subcontract because there was no employer/employe relationship. The MTEA argues that this is true of any subcontracting arrangement. The real significance of the funding source cases is that the Commission has uniformly rejected arguments about the possible discontinuation of separate funding or about external restrictions placed upon use of funds, and held that the funding source is irrelevant with respect to whether the duties performed are bargaining unit duties. Yet here the District argues that it is not obligated to negotiate about its decision to enter into a contract with MATC to provide bargaining unit services because the funding source placed restrictions upon the receipt of its funds by the District. This restriction is a purely economic one, and the District's decision to enter into the contract is a purely economic one, i.e., that it is cheaper to have these services performed through the MATC subcontract with the State Pool Fund than to fund the services itself. In MTEA's view, this was an economic decision rather than a policy decision to provide or not provide such services. The employer is obligated to bargain about subcontracting bargaining unit duties whether it results in layoff of unit employes or only in the employer's failure to expand bargaining unit duties.

MTEA also contends that the Examiner erred in his broad conclusion that MTEA had waived its right to bargain concerning the impact of the District's decision to subcontract. The record and the briefs in this case establish that there was never any dispute concerning the necessity of negotiating the impact of the District's decision to subcontract. The narrowly defined issue as joined by the parties and litigated before the Examiner was whether the District has an obligation to bargain its decision. Until this question was decided by the Commission, there could be no meaningful good faith bargaining about the impact of the decision. Thus, the parties put no evidence in the record concerning the impact of the decision. The Examiner inappropriately stated in his memorandum that "MTEA failed to show how this decision has impacted upon the bargaining unit." He then went on to broadly conclude that "MTEA has waived whatever rights it had in this subject." (at p. 8). This unrestricted statement is unwarranted by anything in the record. The May 1 letter from Ed Neudauer, the District's agent, to Donald Deeder, MTEA's Assistant Executive Director, is simply a statement of position and not an offer to bargain either the decision to enter into a contract with MATC or the impact of that decision.

MTEA requests that the Commission reverse the Examiner's Conclusion of Law and Order, and instead find that the District violated its duty to bargain, and order the District to cease and desist from failing and refusing to negotiate. In its Petition for Review as initially filed, MTEA had requested only that the final three sentences of the Examiner's Memorandum (dealing with the issue of impact bargaining) be stricken since they were, in MTEA's view, "beyond the scope of the issues presented to him or litigated." In its April 26 brief, MTEA requests, instead, that the Commission find that MTEA did not waive its right to negotiate concerning impact.

THE DISTRICT

The District requests that the Examiner's decision be affirmed in its entirety. It further submits that the Commission's scope of review should be limited to the grounds for dissatisfaction stated in the Petition for Review filed by MTEA. In order to assure a separate ruling on this procedural issue, the District submitted a separate Motion to Strike and/or Limit Scope of Review.

At the request of the Commission, the District also submitted a supplemental brief concerning the merits of the complaint. The District argues that the Examiner complied with the Section ERB 12.06(2) of the Wisconsin Administrative Code in concluding that the District had not violated Sections 111.70(3)(a)(1) or (4) of MERA. The District agrees that the "primary relationship test" outlined in Racine is the applicable standard and asserts that the Examiner properly considered the following factors in applying that standard, arguing:

> MPS would be adversely affected if it were not allowed to contract with MATC because it would not be able to receive any

> of the vocational services provided by the Pool Fund Project; that the possible loss of these services prohibits MPS from providing maximum educational opportunities for its students; and that the wages, hours, and working conditions of members of the bargaining unit are not affected by MPS's decision since there is no proof that any members of the bargaining unit would be able to participate in the Pool Fund Project if MPS is compelled to rescind its decision and since there is no indication that any bargaining unit member has been adversely affected by the performance of these vocational services. On the basis of this and the "primary relationship test" outlined in Racine, the hearing examiner concluded that the contract between MPS and MATC constituted a permissive subject of bargaining in which MPS was not obligated to bargain.

The District contends that if the clear and satisfactory preponderance of evidence test is applied, the Examiner's conclusion that the contract between the District and MATC did not constitute a mandatory subject of bargaining should be sustained.

The District also contends that its decision to contract with MATC to provide vocational training services at the alternative schools constituted a policy decision and not an economic decision:

> This is so because MPS was fulfilling its chief educational responsibility of providing educational enrichment in terms of vocational training services to its students. In providing this service, MPS had to follow the guidelines established by DPI which required the use of VTAE vocational teachers as instructors for these vocational services. If MPS did not follow the guidelines established by DPI, it would not have received the funding needed to finance the program. Without the funding, MPS would have been affected adversely in not being able to provide the vocational training services to students. There were therefore no economic implications derived from the decision of MPS to contract with MATC to provide vocational training services at the Alternative School. The decision was simply that of policy. Without the pool fund monies there could be no services.

Further, the District argues that the funding cases cited by the MTEA are factually distinguishable from the present situation. In the funding cases, the employes who were funded by outside sources entered into an employer/employe relationship; here, there is no such relationship. Therefore, the Examiner correctly distinguished them from the instant case.

The District fully supports the Examiner's conclusion that MTEA waived its right to bargain over the impact of the District's decision to use MATC employes. It asserts that the initial complaint is part of the record and there the Complainant's demand for judgment specifically alleges a failure to bargain over the decision and the impact of that decision. The complaint was never amended to withdraw this allegation or to limit the dispute. The Examiner correctly determined that Neudauer's letter was an offer to bargain impact and the MTEA presented no evidence showing that it responded in any way to the letter.

The District further argues that the parties' labor agreement (Part 1, Section F(2)(d)) allows the MTEA to bargain over a new Board rule or policy which is primarily related to education or public policy but which has an impact on wages, hours or working conditions. The record establishes no request by MTEA to bargain over impact pursuant to this contractual language.

The District requests that the Examiner's decision be affirmed in its entirety.

DISCUSSION

SCOPE OF REVIEW

The Commission has established certain procedural rules regarding Petitions for Review, the relevant portion of which reads as follows:

> ERB 12.09
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> . . .
>
> (2) PETITION FOR REVIEW: BASIS FOR AND CONTENTS OF. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:
>
> (a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner, designating all relevant portions of the record.
>
> (b) That a substantial question of law or administrative policy is raised by any necessary legal conclusions in such order.
>
> (c) That the conduct of the hearing or the preparation of the findings of fact, conclusions of law and order involved a prejudicial procedural error, specifying in detail the nature thereof and designated portions of the record, if appropriate.

Another Commission Rule, ERB 10.01, provides generally as follows:

> . . . These rules shall be liberally construed to effectuate the purposes and provisions of subch. IV, ch 111, Stats. The Commission . . . may waive any requirements of these rules unless a party shows prejudice thereby.

Thus, the relevant Commission rule requires that "the petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order . . .". While there would be no prejudice to the District were we to waive that Rule altogether in this case 2/, we do not find it appropriate to waive the above Rule as a matter of MTEA's right in the instant circumstances. MTEA's petition for review expressly stated its agreement with Examiner's Conclusion of Law that the District's decision was a permissive subject of bargaining. 3/ MTEA has not claimed that any unusual circumstances caused it

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2/ When the District objected to MTEA's expansion of the issues for Commission review beyond those initially identified in its Petition, the District was afforded an opportunity both to argue in support of its motion to limit the scope of the Commission review and to present arguments on the broader issues addressed by MTEA in the event that the Commission ruled that its review would reach those issues, obviating any prejudice to the District. The District thereupon briefed the broader issues on August 5, 1985. Moreover, it is well established that the procedural requirements of ERB 12.09 are not jurisdictional. Cooperative Educational Services Agency No. 4, Dec. No. 13100-G (WERC, 5/78); School Board of Wauwatosa, Dec. No. 14985-B (WERC, 9/78).

3/ In its petition, MTEA stated that it concurs with the following sentence of the Examiner's discussion: "Nevertheless, while the District was not required to bargain over its decision to use MATC employes for the vocational training in issue, it also is well-recognized that an employer generally is required to bargain over the impact of any such permissive subject of bargaining."

to modify and expand its position. If we were to agree in these circumstances to waive the rule and address the mandatory/permissive issue as a matter of petitioner's right, the rules requiring the prompt filing of a petition for review and relevation of the grounds for the request would be effectively rendered meaningless. Thus, we find it appropriate, technically speaking, to grant the District's motion to strike MTEA's attempt to amend its Petition for Review.

While we will not review the mandatory/permissive issue as a matter of the petitioner's right, we will act consistent with our practice of choosing whether to engage in a discretionary review of the entirety of a case when a timely petition for review is filed regarding any portion thereof. In this instance we choose to review the mandatory/permissive nature of the District's disputed decision in order to resolve a substantial and novel question of fact and law with potential statewide significance.

MERITS OF THE COMPLAINT

In evaluating whether a school district's decision to subcontract its food services was a mandatory subject of bargaining, the court in Racine reaffirmed the following standard for determining whether any particular decision is mandatory or permissive:

> . . . The question is whether a particular decision is primarily related to the wages, hours and conditions of employment, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representative of the people. This test can only be applied on a case-by-case basis, and is not susceptible to "broad and sweeping" rules that are to apply across the board to all situations. 4/

In that instance, the Court found that the school district's decision was a mandatory subject of bargaining for the following reasons:

> . . . The decision to subcontract the district's food service program did not represent a choice among alternative social or political goals or values.
>
> The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected. . . . 5/

Because the two Alternative Schools in this case are attended by students with a number of problems, the instruction traditionally offered to the students already stresses job readiness skills, educational planning, career planning, job planning, etc. These programs are taught either by teachers or trained counselors in the bargaining unit. Thus, at all times material herein, the District, through its own teachers and counselors, was providing certain vocational training to its students. Further, the parties have stipulated that bargaining unit personnel are qualified to perform the tasks performed by the MATC personnel, and that the MATC employes and bargaining unit employes "perform virtually the same functions with the same group of students." 6/ It is evident that the work being performed by the two MATC instructors is work for which bargaining unit personnel are qualified and, further, work of a type that has historically been performed by District employes in the bargaining unit.

4/ Racine, supra, at p. 102.

5/ Racine, supra, at p. 102-103.

6/ Transcript, p. 7, 9.

As a result of the instant contracts between the District and MATC, two MATC employes now come into these two Alternative Schools and provide vocational training and supervision to some of the students in those schools. While the record in this case is quite minimal, a consideration of that record indicates that what the Pool Fund program amounts to is essentially an expansion of the District's existing vocational training program. The record does not show that there is anything unique about the type of services being provided through the Pool Fund project except that they come free of cost to the District in that they are paid for out of Pool Funds. 7/ Clearly the decision to expand vocational services could have been made and implemented by the District on its own without any assistance from DPI. Had the District chosen to expand its vocational training with its own funds through a subcontracting arrangement, it would have been required to bargain such a decision with MTEA. The District chose not to use its own funds for such expansion but instead participated in the DPI program which allowed for expansion at no cost through use of MATC teachers.

This is not a situation where MATC instructors are being brought in to provide any new type of service or to effectuate a change in the social or political goals of the District. As noted, there is nothing unique to the District about the types of services provided through the Pool Fund Project except that they allow for expansion of existing services at no cost. In that context, the decision is primarily an economic one rather than one involving significant choices among alternative social or political goals. 8/

While the bargaining unit has not suffered any immediate effects such as layoffs or reductions in hours, the District's decision nonetheless has wage, hour and condition of employment dimensions. 9/ The District's decision to expand vocational services by use of nonbargaining unit personnel has implications for the future job security of present and future bargaining unit personnel, and for the overall integrity of the bargaining unit. Present and future bargaining unit members stand to lose future work or transfer opportunities, and MTEA has a legitimate interest in seeking to maximize the extent to which the District's present and future educational services are provided by MTEA bargaining unit personnel.

7/ The parties even stipulated that the pupil/teacher ratio for both bargaining unit personnel and the MATC instructors was the same, i.e. 15 to 1. Transcript p. 10.

8/ The Examiner emphasized at p. 7 of his decision that "the District will be adversely affected if it cannot contract with MATC because it then will be unable to receive any of the vocational services offered by the Pool Fund." We would emphasize in that regard that requiring the District to bargain about the decision at issue would not have meant that the District was unable to contract with MATC and/or unable to take advantage of the Pool Fund. Bargaining might have produced a prompt agreement affording the District the right to enter the contract with MATC. Had the parties reached a bona fide impasse, it appears likely (from the limited factual background in this record) that the District could have lawfully implemented a proposed decision to contract with MATC after having bargained to impasse during the term of an existing agreement over a subject matter that is apparently not governed by the terms of that agreement. See, Green County Dec. No. 20308-B at 12-13 (WERC, 11/84) and discussion thereof in City of Eau Claire, Dec. No. 22795-B at 3 (WERC, 3/86), setting aside and remanding Dec. No. 22795-A (1/86). Moreover, there is no showing herein that the District would necessarily have lost access to the Pool Funds had it taken the time needed to meet its in-term bargaining obligation with MTEA about the decision to contract with MATC before deciding to enter into that contract.

9/ The absence of a present displacement or economic disadvantage to individuals currently in the bargaining unit does not require the conclusion that the decision or proposal is not primarily related to wages, hours and conditions of employment. See, City of Oconomowoc, Dec. No. 18724 (WERC, 6/81) and City of Green Bay, Dec. No. 18731-B at 10 (WERC, 6/83) (dicta).

On balancing the pertinent factors under the Racine Schools test, we have concluded that the wage, hour and condition of employment dimensions of the District's decision to contract with MATC through use of Pool Funds predominates over the public policy dimensions of that decision. The decision was basically one to take advantage of an opportunity to provide additional services of the sort it was already providing, but at low cost by reason of the availability of Pool Funds. In our view, the significant implications of the decision for the integrity of the MTEA bargaining unit and the future implications of such decisions on bargaining unit members' work opportunities outweigh the limited public policy dimensions of the decision.

We have therefore modified the Examiner's Conclusion of Law to declare that the District violated its duty to bargain about the decision to contract with MATC in these circumstances, and we have ordered that the District cease and desist from such violations in the future and to post an appropriate notice to that effect.

Finally, in our Conclusion of Law 2, we have concluded that the District has not been shown to have unlawfully failed to bargain about the impact of its decisions to enter the instant contracts with MATC. However, we do not conclude that MTEA waived its right to bargain about impact of those decisions. For, any failure on MTEA's part to request bargaining about the impact of the District's decision to contract with MATC would not constitute a waiver of that right since it occurred in the context of what has been determined herein to be the District's unlawful failure to bargain about the decision itself. 10/

Dated at Madison, Wisconsin this 1st day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

10/ There is no contention or proof that the District ever offered to bargain about the decision itself or otherwise indicated a willingness to bargain about the decision itself, despite its knowledge that the MTEA objected to the contracting with MATC on the grounds that it constituted subcontracting of bargaining unit work. The District's Neudauer letter of May 1, 1984 is not an offer to bargain about the decision. Rather it expresses reasons why the District does not consider the activity to be subcontracting of bargaining unit work and expresses a willingness to meet with MTEA representatives to explore the factual bases for its position.