STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of RACINE EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and RACINE UNIFIED SCHOOL DISTRICT	Case 94 No. 36595 DR(M)-392 Decision No. 23380-A
In the Matter of the Petition of RACINE UNIFIED SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and RACINE EDUCATION ASSOCIATION	Case 96 No. 36622 DR(M)-393 Decision No. 23381-A

Appearances:

Schwartz, Weber & Tofte, Attorneys and Counselors, 704 Park Avenue, Racine, Wisconsin 53403, by Mr. Robert K. Weber, appearing on behalf of the Association.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701, by Mr. Jack D. Walker and Ms. JoAnn M. Hart, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The Racine Education Association and the Racine Unified School District having, on February 25, 1986 and March 3, 1986, respectively, filed petitions with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to their duty to bargain with each other over certain matters; and the petitions having been consolidated for the purposes of hearing and decision pursuant to ERB 10.07; and hearing on said petitions having been held in Madison, Wisconsin, on April 15, 1986 and June 24, 1986, before Peter G. Davis, a member of the Commission's staff; and the Association having waived written post-hearing argument; and the District having submitted written post-hearing argument on September 8, 1986; and the Association having amended certain proposals on November 6, 1986; and the District having on November 12, 1986 notified the Commission that it did not wish to modify its position based on said amendments; the Commission, having considered the record and the positions of the parties, makes and issues the following

FINDINGS OF FACT

1. That the Racine Unified School District, herein the District, is a municipal employer having its offices at 2220 Northwestern Avenue, Racine, Wisconsin 53404.

2. That the Racine Education Association, herein the Association, is a labor organization having its offices at 701 Grand Avenue, Racine, Wisconsin 53403.

3. That all times material herein, the Association has been the exclusive collective bargaining representative of certain individuals employed by the District as teachers and related professionals; and that the District and the Association have been parties to a series of collective bargaining agreements

covering the wages, hours and conditions of employment of said employes, the last of which had a term of August 25, 1982 through August 24, 1985.

4. That during collective bargaining between the parties over the terms of an agreement which would succeed their 1982-1985 contract, a dispute arose as to their duty to bargain over certain matters; that the parties were unable to resolve said dispute voluntarily and subsequently filed the petitions for declaratory ruling at issue herein; that the parties thereafter resolved the status of certain proposals which were contained in their respective petitions; but that certain proposals remain at issue.

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

STAFF UTILIZATION AND WORKING CONDITIONS

(1) 1.a. The parties recognize that optimum facilities for both the student and teacher are desirable to insure the high quality of education that is the goal of both the Association and the Board.

(2) b. Reasonable efforts will be made to maintain academic subject class sizes as follows:

Elementary: K-3 -- Recommended 25
Maximum 30

4-5 -- Recommended 25
Maximum 32

Secondary: 6-12 -- Recommended 30
Maximum 35

(3) 2.a. All teachers are expected to be in their respective rooms or assigned places at least fifteen (15) minutes before the time for the tardy signal. Teachers are expected to be present and performing their teaching duties during the time that pupils are required to be there according to the hours of of school as presently established by the Board. Teachers shall be available for a period of at least fifteen (15) minutes after regular pupil dismissal.

STAFF UTILIZATION AND WORKING CONDITIONS

(4) 4. A teacher's regular day has been kept to a minimum (less than eight hours) because certain meetings, conferences and programs outside of that regular day will have required attendance.

Included in those meetings are building staff meetings called by the principals, and subject are meetings called by the Directors of Instruction.

(5) TEACHER ASSIGNMENT AND TRANSFER

1. This article does not apply to extra duty positions.

INSURANCE AND RETIREMENT

(6) 1.b. The Board shall provide a plan comparable to that in effect August 24, 1985, during the term of the Agreement.

INSURANCE AND RETIREMENT

(7) 4. The Board shall provide each teacher the opportunity to participate in a group dental benefit plan comparable to that in effect August 24, 1985.

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

(1) COMPLIMENTS DIRECTED TOWARD TEACHERS

1. Any written compliment about a teacher or written material the teacher's principal or other supervisor deems complimentary shall be promptly called to the teacher's attention and shall be included in the teacher's personnel file.

(2) TEACHER ASSIGNMENT, TRANSFER AND LAYOFF

1. The Board and the Association recognize it is desirable in making assignments to consider the interests and aspiration of teachers. Each further recognizes that an effective educational system requires a fair distribution of experienced teachers throughout the system. All voluntary assignments will be made on the basis of length of service, certification, experience, specialized competence and how these criteria can best meet the educational needs within the District. In the event these factors are determined to be substantially equal, the deciding factor will be length of service.

2. Notices of any vacancy occurring in the bargaining unit will be posted in all buildings within five (5) school days after the Personnel Department has officially received written notice of such vacancy. The vacancy notice shall set forth the job title, the location where the job is to be performed and the date after which applications will not be received. There shall be a ten (10) school day period from the date of posting to make application. Teachers who desire to make application must file a written request with the Personnel Department on a form to be furnished by the District obtained through the building administrator. The teacher selected for a position shall accept or reject the position immediately upon notification by the personnel department. A teacher may request appointment to no more than three (3) different assignments annually.

3. Vacancies occurring during the first semester of a school year shall be filled after a voluntary request under procedures set out in section 1 and 2 above. The position made vacant by this transfer, although posted, may be staffed by a new teacher temporarily assigned and shall be permanently filled no later than the beginning of the next school year. Vacancies occurring during the second semester, will be temporarily staffed in the same manner. Except as stated in this section, all vacancies will be filled no later than the start of the next school year. The District may waive these time restrictions to make assignment at additional times if it deems such to be desirable.

4. A teacher granted a voluntary transfer may not request another assignment earlier than the end of three (3) academic semesters from the time of assignment, unless

6. A teacher who has been notified that he/she will be displaced may post for vacancies for which he/she is certified and has taught with the Racine Unified School District within the previous five (5) years; notwithstanding the limitation in section 3 above. When a displaced teacher posts for an area/subject vacancy that he/she has not taught within the District within the previous five (5) years a meeting shall take place between the Assistant Superintendent, Staff Personnel Services, the Executive Director, Racine Education Association, and the teacher affected. Any party may object based upon qualifications and certification for the position(s) which will cancel the transfer request.

7. In the event a displaced teacher is not assigned through the posting process by the fifteenth of May, the teacher shall select a position held by a teacher with lesser length of service within his/her area(s) of certification. Teahcers displaced after the fifteenth of May will select a position held by a teacher with lesser seniority within five (5) days of displacement.

8. In the event the number of teachers is reduced, the Personnel Department will select teachers who shall be laid off without compensation according to the following:

   a. As to teachers who have not attained tenure, the Personnel Department shall select which non-tenured teacher shall be laid off. As between certified and qualified tenured and non-tenured teachers at any elementary grade level or secondary subject area, non-tenured teachers shall be laid off first.

   b. Teachers who have attained tenure and who are certified and qualified will be laid off in inverse order of their length of employment with the Board, with the teacher with the least length of employment being laid off first. Part-time teachers who have attained tenure shall have their experience prorated to full-time equivalency for layoff purposes. Where teachers have the same length of employment, the Personnel Department will determine which teacher shall be laid off first.

   c. Consideration will be given to minority teachers so that the ratio of minority teachers to white teachers shall be maintained at least at the same ratio that existed on March 16, 1977. In the event that laid off teachers are later recalled, the same consideration for the above ratio will be given.

   d. The Personnel Department will give thirty (30) days notice to teachers who are to be laid off.

   e. The Personnel Department will recall teachers who are laid off in the order of Length of Service, if the Personnel Department determines the teacher is qualified for the position. If such teacher refuses the position, his/her employment shall thereupon terminate immediately. Such recall shall be to the level and step the teacher would be at had the layoff not occurred.

   f. A teacher who is laid off may participate in the group hospitalization and surgical/medical benefit plan, dental and group life insurance plan provided he/she pays the full premium cost.

   g. The employment of a teacher shall terminate two (2)

years from his/her date of being laid off, if he/she has not been recalled.

h. No new or substitute (long-term) appointments may be made while there are laid off teachers who are qualified to fill the vacancies.

(3) 3. Lesson Plans -- Lesson plans shall be prepared by all teachers in their own style. Teachers shall inform the building principal in writing during the first week of school of the location where such plans may be found within the classroom.

(4) 8. Teaching Time

a. Middle and senior high schools -- In the event the District chooses to assign more than two hundred and fifty (250) minutes of student contact time and five (5) teaching periods to middle and/or senior high school teachers, said additional assignments shall be compensated for at a rate of seventeen (17) cents per minute unless covered elsewhere in this Agreement.

b. Elementary schools -- In the event the District chooses to assign more than two hundred and fifty (250) minutes of daily student contact teaching time to elementary school teachers, said additional assignments shall be compensated for at a rate of seventeen (17) cents per minute unless covered elsewhere in this Agreement.

(5) 9. In the event the District chooses to assign more than twenty (20) minutes of supervisory duty per day to any teacher, said additional assignment shall be compensated for at a rate of seventeen (17) cents per minute unless covered elsewhere in this Agreement.

(6) 11. Teacher Load

Teachers who are assigned the maximum or fewer students per class in the following categories, shall receive wage compensation in accordance with the salary schedules set forth in Appendices A and B. Teachers who are assigned more than the designated maximum number of students will be compensated for such additional students under the provisions of paragraph 14 of the work overload compensation section in Article XIV.

	Maximum
a. Elementary	
Kindergarten-First	28
Second-Fifth Grade	30
Split Classes	22
All Other Elementary Classes	32
b. Secondary	
6th Grade Core Classes	32
Lab, Home Ec, Ind Arts (Lab Classes)	30
All Other Secondary Classes	35
Pool	24
Study Hall	35

c. Exceptional Education

Visually Impaired	2 (with aide) 1 (without aide)
Hearing Impaired	6 (with aide) 1 (without aide)
Orthopedic	10 (with aide) 1 (without aide)
Multiply/Physically Handicapped	6 (with aide) 1 (without aide)
Emotionally Disturbed	10 (with aide) 6 (without aide)
Educable-Mentally Handicapped	12 (with aide) 9 (without aide)
Trainable-Mentally Handicapped	12 (with aide) 1 (without aide)
Early Childhood	9 (with aide) 1 (without aide)
Learning Disability	12 (with aide) 9 (without aide)

(7) 12. Facilities, Equipment & Materials

a. Listing of Facilities -- All teachers shall be provided with the following facilities:

1) Rest Rooms -- Well-lighted and clean teacher rest rooms.

2) Storage space -- Lockable space for each teacher within each instructional area to store his/her instructional materials and supplies.

(8) 11. Credit Approval for Salary Schedule Advancement -- All credits meeting any of the following criteria shall be approved for advancement on the salary schedule:

a. All credits required by the school district.

b. All credits earned through Department of Public Instruction approved inservice educational programs. (Sixteen (16) education hours is equivalent to one (1) credit toward advancement on the salary schedule).

12. a. The additional 12 and 24 hours indicated for the BA + 12 and BA + 24 in the schedule "Basic Salary Schedule for Teachers" shall include semester hours of graduate credit only. The credits referred to must be from a North Central accredited school or from on accredited by an equivalent agency and must be earned after the indicated degree.

b. The additional 12 and 24 hours indicated for the MA + 12 and MA + 24 in the schedule "Basic Salary Schedule for "Teachers" may include semester hours of graduate and/or undergraduate credit. The credits referred to must be from a North Central accredited school or from one accredited

by an equivalent agency and must be earned after the indicated degree.

(9) **WAGE AND BENEFIT CONTROL SAVINGS CLAUSE**

1. If any wage or benefit provision of this Agreement is nullified or modified by the action of any government agency, the Board and the Association shall meet and negotiate regarding the substitution of wage and benefit provisions of equal value.

2. Any wages or benefits so affected shall be deferred until such time as there is a new benefit provision and such is agreed to and signed and may be legally placed in effect (so as to provide the full benefit value of each deferred provision). The Association shall receive a monthly statement as to the amount of benefits and wages deferred as well as the interest earned on escrowed funds.

3. The Board and the Association will cooperate to seek and obtain appropriate rulings, approvals, exceptions or exemptions of any nullification or modification of any wage and/or benefit provision.

4. In the event that any or all deferred wages and benefits may not be granted, the Board and the Association shall negotiate concerning the reallocation of such unused funds into areas other than wages or fringe benefits.

5. If the parties are unable to agree on the disposition of any deferred wages and benefits, or if the Board and the Association cannot resolve the matter within thirty (30) days after receiving notice of the suspension or modification of any scheduled wage or benefit provision, the matter shall be submitted to arbitration in the same manner as grievances. All of the steps of the grievance procedure shall be waived except the step for binding arbitration.

(10) **INSURANCE AND RETIREMENT**

1. The Board shall provide each teacher (except where both spouses are employees, only one will be eligible for family coverage, however, both may elect single coverage) an opportunity to participate in a group hospitalization and surgical/medical benefit plan as described in Appendix G of this Agreement. The Board shall pay the full cost of such group hospitalization and surgical/medical benefit plan. The plan shall become effective no more than 45 days after the effective implementation date of this contract.

(11) 4. The Board shall provide each teacher the opportunity to participate in a group dental benefit plan as specified

(13) **FAIR SHARE**

1. All employees in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be made available to all employees who apply, consistent with the Association's constitution and bylaws.

2. The District shall deduct in equal installments from the earnings of all employees in the collective bargaining unit, except exempt employees, their fair share of the cost of representation by the Association, as provided in section 111.70(1)(f), Wis. Stats., and as certified to the District by the Association. The District shall pay said amount to the business office of the Association on the date upon which such deduction was made. The date for the commencement of these deductions shall be determined by the Association; however, all employees shall be required to pay their full annual fair share assessment regardless of the date on which their fair share deductions commence. The District will provide the Association with a list of employees from whom deductions are made with each remittance to the Association.

   a. For purposes of this Article, exempt employees are those employees who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to Article XVI(B) or paid to the Association in some other manner authorized by the Association. The Association shall notify the District of those employees who are exempt from the provisions of this Article and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article.

   b. The Association shall notify the District of the amount certified by the Association to be the fair share of the cost of representation by the Association and the date for the commencement of fair share deductions at least two weeks prior to any required fair share deduction.

3. The Association agrees to certify to the District only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. The Association agrees to inform the District of any change in the amount of such fair share costs.

4. The Association shall provide employees who are not members of the Association with an internal mechanism within the Association which is consistent with the requirements of state and federal law which will allow those employees to challenge the fair share amount certified by the Association as the cost of representation and to receive, where appropriate, a rebate of any monies to which they are entitled. To the extent required by state or federal law, the Association will place in an interest-bearing escrow account any disputed fair share amounts.

5. The Association does hereby indemnify and shall save the District harmless against any and all claims, demands, suits, or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the District which District action or non-action is in compliance with the provisions of

this Article; provided that the defense of any such claims, demands, suits or other forms of liability shall be under the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense.

(14) 6. A teacher shall receive an accounting of sick leave usage on their biweekly paycheck.

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

8. That disputed proposals 1, 2 and 4 as set forth in Finding of Fact 5 and disputed proposals 3 and 9 (in part), as set forth in Finding of Fact 7 primarily relate to the formulation or management of educational or public policy.

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 7 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

2. That the proposals referenced in Finding of Fact 8 are permissive subjects of bargaining within the meaning of Sec. 111.70 (1)(a), Stats.

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

DECLARATORY RULING 1/

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

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

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of November, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

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, 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.

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

Background

Legal Framework

While these parties are presumably intimately familiar with the following analytical framework because of their relatively recent involvement in Racine Unified School District, Dec. Nos. 20652-A and 20653-A (WERC, 1/84), Dec. No. 20653-C (WERC, 5/84), aff'd Case No. 85-0158 (CtApp. 3/86, unpublished), herein Racine I, it is still useful to set forth the general legal framework within which the issues herein must be resolved. In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy", respectively. The Court also concluded that the impact of the formulation or management of public policy upon wages, hours and conditions of employment is also a mandatory subject of bargaining. Of course, a finding that a proposal is mandatory and thus subject to collective bargaining and, if necessary, to interest arbitration does not compel either party to agree to include the proposal in a collective bargaining agreement and does not represent a Commission opinion regarding the merits of the proposal under the statutory interest arbitration criteria.

When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express statutory command, the Court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will it be found to be a prohibited subject of bargaining. Board of Education v. WERB, 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977). Otherwise mandatory proposals which limit but do not eliminate statutory powers remain mandatory subjects. Glendale Professional Policeman's Association v. City of Glendale, 83 Wis.2d 90 (1978); Professional Police Association v. Dane County, 106 Wis.2d 303 (1982); Fortney v. School District of West Salem, 108 Wis.2d 169 (1982). Where it is alleged that a proposal is a prohibited subject of bargaining because it infringes upon constitutional rights, powers or duties, any infringement renders the proposal prohibited. Dane County, supra.

District's Proposed Analytical Framework

The District herein advances the proposition that the application of the foregoing legal framework to a proposal differs depending upon whether the proponent of the proposal is the union or the employer. In essence, the District argues that when the legislature specified in Sec. 111.70(1)(a) that:

. . .

> The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. (emphasis added)

. . .

the legislature was only establishing the basis upon which an employer, not a union, could be excused from bargaining about a proposal (i.e. the subject is, on balance, primarily related to management and direction of the governmental unit). Thus, for instance, the District argues that while it need not bargain over a union proposal which specified a certain class size, the Association must bargain over the same proposal because the Supreme Court and the Commission have held that class size impacts on wages, hours and conditions of employment and because the statutory exception to the duty to bargain is unavailable to unions. Thus, only if an employer proposal had no impact at all on

wages, hours and conditions of employment would the union be excused from its duty to bargain.

The District further contends in this regard that limitations on the duty to bargain were designed to protect employers. The District argues that it would be antithetical to pervert this legislative intent by allowing the Association to eliminate the District's proposal to maintain current contract language on class size solely to increase the chances that an interest arbitrator will look more favorably upon the Association's class size impact proposal. The District asserts that limitations on the duty to bargain aimed at protecting employers ought not be allowed to be converted to daggers aimed at the employer because of the interest arbitration process. The District contends that its framework addresses the anomaly of having the Commission ruling on whether an employer proposal unduly restricts an employer, a matter which troubled the Commission in Racine I at p. 20.

In the District's view, existing applicable statutes and administrative rules are not in conflict with the District's position even though both employers and unions are allowed to challenge proposals as nonmandatory. The District notes that there may be subjects, such as internal union rules for full voluntary members, which an employer might seek to bargain about, and which may be nonmandatory as to unions.

While we acknowledge the creativity of the argument set forth above, we reject the District's position. When reduced to its essence, the District's position is that it should be allowed to compel a union to bargain over management prerogatives when it is in the employer's interest to do so but that it is free to refuse to bargain over the same matter when the proponent is a union. We see no support in the text of our Supreme Court's numerous decisions on the duty to bargain for the District's proposed double standard for resolving such disputes. To some extent, the District appears to be arguing that the presence of interest arbitration calls for a modification of the commonly accepted duty to bargain analytical framework. Even if a union's interest arbitration strategy led it to seek a ruling that an employer proposal is permissive because it interferes with management prerogatives, we see no persuasive support for the District's analytical framework in either the interest arbitration law itself or in duty to bargain decisions from our courts rendered since the inception of interest arbitration. We would also note that the District is free to argue to an interest arbitrator that it is the Association that has removed permissive language from the contract.

The Association's Petition

Motion to Dismiss

As to the Association's petition generally, the District notes that the Association did not introduce any evidence and has not filed any post hearing argument in support of the Association's position. The District argues that by the foregoing conduct, it must be concluded that the Association has abandoned its objections to the District's proposals except for those proposals (class size and after school meetings) as to which the Association's pre-hearing Statement in Support of Petition cites case precedent. The District urges the Commission to dismiss the petition as to the abandoned objections arguing that neither the District nor the Commission should be required to surmise the factual or legal basis for or the limits of the Association's nonexistent position and then rebut them (in the case of the District) or consider them (in the case of the Commission) when the Association has not chosen to do so.

We reject the District's request for several reasons. Initially, the Association's conduct does not warrant a conclusion that it voluntarily abandoned its claim that the District's proposals at issue herein are not mandatory subjects of bargaining. Furthermore, the declaratory ruling process under Sec. 111.70(4)(b), Stats., and ERB 18 is intended to give parties a prompt 2/

2/ In our effort to comply with the spirit of the 15 day time limit for the issuance of declaratory ruling decisions under Sec. 111.70(4)(b), Stats., we have concluded that he extensive discussion of each proposal we engaged in Racine I should, where appropriate, be curtailed in future multiple issue proceedings such as that herein.

resolution of bonafide disputes over the duty to bargain within the context of a simple non-adversarial administrative proceeding. Where, as here, the petitioning party has at least minimally set forth its arguments in its statement in support of Petition, (as it is required to do by ERB 18.02), it need do no more to obtain Commission consideration of the merits of the dispute. If a factual record or clarification of a position is needed before the Commission can rule on the status of a proposal, the Commission or its hearing examiner will, on its own initiative seek such facts or clarification. We note that we sought such a post hearing clarification in the process of issuing a decision as to the District's objection to the Association's hours of work proposal in Racine I. While the absence of extensive argument or of a factual record may impact upon the complexity of our rationale or upon the precedential value of that ruling in a subsequent case where new or more extensive argument or facts are presented, such factors are not a basis for us to decline to resolve a bonafide dispute.

Discussion of District Proposals

(1) Citing Beloit, the Association contends that the following District proposal is a permissive subject of bargaining because it primarily relates to educational policy.

> The parties recognize that optimum facilities for both the student and teacher are desirable to insure the high quality of education that is the goal of both the Association and the Board.

The District "invites" us to hold that the "optimum facilities" requirement is unrelated to conditions of employment and, as such, that neither party has a duty to bargain over the proposal. However, should we conclude that there is some relationship between facilities and conditions of employment, then the District asserts the Association must bargain over an employer proposal on the subject although the District, under its general theory (which we have discussed and rejected above), would have no corresponding duty to bargain about an Association proposal "except as to the manner of exercise of the management function."

We find the proposal's relationship to policy choices the District may make regarding level of service and physical plant predominates over any impact on wages, hours and conditions of employment. 3/ We therefore conclude that the proposal is a permissive subject of bargaining.

(2) Citing Beloit, the Association contends that the following District proposal is a permissive subject of bargaining because it primarily relates to educational policy.

> Reasonable efforts will be made to maintain academic subject class sizes as follows:
>
> Elementary: K-3 -- Recommended 25
> Maximum 30
>
> 4-5 -- Recommended 25
> Maximum 32
>
> Secondary: 6-12 -- Recommended 30
> Maximum 35

The District advances no argument as to this proposal other than the novel general duty to bargain argument we have rejected earlier herein.

In Beloit, the Wisconsin Supreme Court affirmed the Commission conclusion that class size is a matter of basic educational policy over which a school district need not bargain. Applying that holding to the proposal before us herein, we find the proposal to be a permissive subject of bargaining because

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3/ We note that in some circumstances, proposals regarding provision of "facilities" for employe comfort and safety are mandatory. See Blackhawk Teachers Federation v. WERC, 109 Wis.2d 415 (Ct. App 1982); Racine I.

educational policy considerations predominate over the impact on wages, hours and conditions of employment.

(3) The Association asserts the the following District proposal is "nonmandatory and prohibited", because it would waive the Association's right to bargain over hours and gives the District the unilateral right to change hours of work and/or require teachers to work at undesirable times.

> All teachers are expected to be in their respective rooms or assigned places at least fifteen (15) minutes before the time for the tardy signal. Teachers are expected to be present and performing their teaching duties during the time that pupils are required to be there according to the hours of school as presently established by the Board. Teachers shall be available for a period of at least fifteen (15) minutes after regular pupil dismissal.

The District notes that its proposal is language from the expired contract between the parties which the Association has proposed should be deleted and replaced by an "overtime penalty clause". Arguing that the Association failed to adduce any evidence that the proposal unduly restricts management or gives the District the right to unilaterally change work hours, the District urges the Commission to dismiss the Association's objection without ruling on the merits of the proposal. As to the Association's objection that the proposal may require work at times which interfere with employe's personal lives, the District responds by arguing that any hours of work interfere with personal life and that its proposal is mandatory "because the public's choice, whatever it may be of particular school hours outweighs the interest of a special interest group of employes."

As to the Association's waiver argument the District contends that any proposal on any subject, if placed in the contract, may have the effect of waiving the parties' duty to bargain further about the subject while the contract is in effect, and that such a waiver, unlike a waiver over matters not contemplated by the parties, is not a basis for finding a proposal nonmandatory.

In School District of Janesville, Dec. No. 21466 (WERC, 3/84) we found the following proposal to be a mandatory subject of bargaining:

> a. The regular teacher workday for employes covered by this Agreement shall be as follows:
>
> Elementary (grades pre-K-6): 8:15 a.m. to 3:00 p.m.
>
> Secondary (grades 7-12): 7:45 a.m. to 3:45 p.m.
>
> The regular teacher workday shall include a duty-free lunch period consisting of thirty (30) minutes.
>
> b. All work assignments scheduled for performance outside the regular teacher workday shall be considered overtime assignments. Unless compensation for such overtime assignments is provided for elsewhere in this Agreement, teachers assigned such overtime assignments shall be compensated, in addition to their scheduled salaries, at the rate of $10.00 per hour, with a one-hour minimum payment per assignment.
>
> c. As used in this Article, teacher's regular hour rate of pay shall be determined by dividing the teacher's yearly salary by the product of 190 (contract days per year) x 8 (hours per workday).

We reasoned generally that:

> As the Association has indicated, the Commission has previously found language which specified both the timing and length of the work day to be mandatory. Indeed, bargaining over "hours" is a basic employe interest because the amount of time which an employe must work has an obvious and direct

relationship upon the time which that employe has available for non-work related activities upon which the employe may well place far greater value in his or her life. In addition, there is the intimate relationship between the number of hours and employe works and the amount of compensation which the employe and the bargaining representative will seek as compensation. However, a close examination of those decisions reveals that in each instance the Commission was satisfied, when balancing the relationship of the proposal to hours and conditions of employment and to public policy concerns, that the proposal in question did not prevent the employer from providing the basic service for which it utilized the employes.

In Racine I, we applied the Janesville analysis to find the following proposal to be mandatory:

> If teachers are given work assignments outside the following teacher workday, they shall be considered overtime assignments:
>
> 1. A continuous period of seven (7) hours and twenty-one (21) minutes at the High School level;
>
> 2. A continuous period of seven (7) hours and ten (10) minutes at the Junior High School level;
>
> 3. A continuous period of six (6) hours and fifty (50) minutes at the Elementary School level;
>
> 4. A continuous period of seven (7) hours and thirty (30) minutes with a thirty (30) minute duty-free lunch, or, in the alternative, a continous period of eight (8) hours with a sixty (60) minute duty-free lunch, for all unassigned teachers.
>
> The Board shall advise the REA in writing and by posting in the individual schools, the starting time of the teacher work day at each school. Said notification and posting shall be completed each school year on the first day teachers are required to report to school.

We reasoned:

> As we noted in the quoted portions of our decision in Janesville, proposals establishing the length of the workday have a direct and substantial relationship to both "wages" and "hours." The length of the workday impacts upon a basic employe interest because the amount of time which an employe must work has an obvious and direct relationship upon the time which that employe has available for non-work related activities upon which the employe may well place far greater value in his/her life. There is also an intimate relationship between the number of hours an employe works and the amount of compensation which the employe and the bargaining representative will seek a compensation therefor. However, when analyzing workday proposals, the Commission must also ascertain whether the contractual provision would prevent the employer form providing the basic service for which it utilizes the employes. As we indicated earlier herein, we do not interpret this proposal as restricting the hours when any bargaining unit emloyes can be required to work by the District to provide basic educational service. Even if the last sentence of the proposal were to be interpreted as something more than a pro forma requirement that teachers be notified as to when they are expected to appear for work (the second of the two above-noted plausible interpretations) the proposal remains, in essence, and overtime proposal under which the District retains the ability to provide the

> educational services that it desires subject to the payment of the overtime premium should the District subsequently modify the starting time of the workday or make work assignments to teachers outside the workday which is established and maintained at the school(s) involved throughout the school year. Employe interests in being compensated if the starting time of his/her workday is altered after being initially established at the commencement of the school year relate to employe preferences as to the scheduling of their own non-work activities with family members or friends.
>
> As we have concluded that this proposal does not prevent the District from requiring employes to perform duties, even on a daily basis, outside the length of the workday specified herein or outside the starting and ending times of the teacher workday which the District will unilaterally establish, and as we have concluded that the proposal bears a substantial and direct relationship to employe concerns as to "wages" and "hours," we find the proposal to be mandatory subject of bargaining.

Applying this analytical framework to the proposal before us, we view the District's proposal as establishing the parameters of the basic teacher workday in a manner which does not prevent the District from providing the basic service for which it utilizes employes. Thus, we find that the "wages" and "hours" aspects of the proposal predominate over any policy relationship and therefore the proposal is found to be mandatory.

Contrary to the Association's claim, the proposal does not constitute a waiver of the Association's right to bargain over hours. The proposal simply represents the District's view as to the manner in which it wishes to see a mandatory subject of bargaining addressed in the contract. The Association is of course free to propose that a different "hours" proposal be included in the contract so long as the proposal primarily relates to wages, hours and conditions of employment.

As to the Association's contentions that the proposal is undesirable because the precise hours of work are subject to change, we concur with the District's assertion that such concerns go to the merits but not to the mandatory or permissive status of the proposal.

(4) The Association asserts that the first sentence of the following proposal is a permissive subject of bargaining. It contends that a similar proposal was previously found to be permissive by the Commission in Racine I.

> A teacher's regular day has been kept to a minimum (less than eight hours) because certain meetings, conferences and programs outside of that regular day will have required attendance.
>
> Included in those meetings are building staff meetings called by the principals, and subject area meetings called by the Directors of Instruction.

The District makes no argument other than that which we have already rejected in the Motion to Dismiss and analytical framework portions of this decision.

In Racine I, as noted by the Association, we found the following proposal to be permissive.

> It is recognized that an effective instructional program requires the participation of teachers in meetings and conferences outside the students day in school. The teachers regular day is deliberately kept to minimum in order to provide teachers - as professional - with the greatest opportunity for freedom and flexibility. With this freedom and flexibility goes the responsibility of attending such meetings as conferences with parents and/or students, staffings on students, multidisciplinary team meetings, team and unit meetings, committee meetings, and so forth.

We stated:

> We initially note that the unique positions of the parties taken as to this issue place the Commission in the posture of ruling on whether an employer proposal is permissive because it unduly restricts the employer's ability to insure that teachers will be available for certain educationally related duties. We conclude that 6(a) ... (is) permissive because the language therein primarily relates to educational policy decisions regarding the assignment of duties which are fairly within the scope of a teacher's responsibilities.

As we conclude that the disputed proposal herein also primarily relates to educational policy decisions regarding the assignment of duties which are fairly within the scope of a teacher's responsibilities, we find it to be a permissive subject of bargaining.

(5) The Association argues that the following proposal is nonmandatory because it does not define the term "extra duty". Thus, the Association asserts it is impossible to tell whether the positions in question are fairly within the scope of a teacher's job and/or what implications assignments or transfers to "extra duty" positions not covered by Article XI will have on teacher wages, hours and conditions of employment.

TEACHER ASSIGNMENT AND TRANSFER

1. This article does not apply to extra duty positions.

The District contends that because the term "extra duty" is defined elsewhere in its final offer proposal, the Association's vagueness argument lacks merit. The District further argues that even if the proposal were vague, the fact that the proposal doesn't produce any affirmative regulation affecting extra duty positions renders the Association's vagueness argument unpersuasive. The District concludes by asserting that it cannot see the relationship the Association contends exists between the question of whether not including extra duty assignments in transfer language is mandatory and issues of whether such assignments are fairly within the scope of a teacher's job.

Contrary to the Association's argument, reference to the District's Article XIV final offer does provide a lengthy list of "extra duty" positions which the District's proposal excludes from Teacher Assignment and Transfer language contained elsewhere in the District's final offer. Having rejected the Association objection and finding no other basis for the proposal to be deemed permissive, we find the proposal to be mandatory.

(6) The Association contends that while the District's health insurance proposal may generally involve a mandatory subject of bargaining, the specific proposal set forth below is nonmandatory and prohibited because it is vague and uncertain and represents an attempt to unilaterally alter existing benefit levels.

> The Board shall provide a plan comparable to that in effect August 24, 1985, during the term of the Agreement.

The District initially urges the position we have earlier rejected in the Motion to Dismiss Portion of this decision. The District then asserts that the Association's vagueness and uncertainty arguments are equally applicable to the term "just cause" in a discipline proposal or "reasonable" in a work rule proposal. The District has no objection to its proposal being found nonmandatory on that basis so long as all such general definitional proposals, including the examples just recited, are also found nonmandatory.

The proposal in question can most reasonably be interpreted as obligating the District to provide employes with health insurance benefits "comparable" to those in effect on the specified date. Since proposals which primarily relate to insurance benefit levels are mandatory subjects of bargaining, we find the instant proposal to be mandatory. The Association's concern that it may be difficult to ascertain precisely what benefit level must be maintained goes to the merits of the proposal not its bargainable status. We also reject the Association's contention regarding the impropriety of a proposal which may allow for some change in benefit level. When bargaining a successor contract, both parties have the statutory right to seek changes in mandatory subjects of bargaining.

(7) As with the District's health insurance proposal, the Assocation contends that the following dental insurance proposal is nonmandatory because the benefit level is vague and uncertain.

> The Board shall provide each teacher the opportunity to participate in a group dental benefit plan comparable to that in effect August 24, 1985.

The District reiterates the arguments presented as to the health insurance proposal.

We see no basis for departing from the rationale we expressed as to District's health insurance proposal and therefore find the dental insurance proposal to be mandatory on the same basis.

The District's Petition

The District generally asserts that because the Association has neither adduced evidence or filed written post hearing brief concerning the Association's proposals at issue herein, the Commission has nothing upon which to base a finding in favor of the Association. While we will, if necessary, respond specifically to the impact, if any, which the status of the record has upon the mandatory, permissive or prohibited nature of a proposal, we note that the Association did file the Statement in Response to Petition mandated by ERB 18.03 in which it briefly set forth its position or each disputed Association proposal. As we noted above when ruling upon similar contentions as to the District's Motion to Dismiss the Association's petition, so long as there is at least minimal compliance with ERB 18, we have a sufficient basis for proceeding to resolve bonafide duty to bargain disputes.

(1) The proposal states:

> Any written compliment about a teacher or written material the teacher's principal or other supervisor deems complimentary shall be promptly called to the teacher's attention and shall be included in the teacher's personnel file.

The District initially asserts that the following proposal is nonmandatory because it is not limited to compliments or material which are primarily related to wages, hours and conditions of employment and because the timing ("promptly") is irrelevant to a teacher's employment. The District contends that because the proposal makes no reference to District evaluation of teacher performance, a relationship between the evaluation process and the instant proposal should not be presumed. If such a relationship is found to exist, the District contends that the proposal is overbroad and permissive under the rationale of Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83), at p. 60, because it covers compliments which may have no connection to teacher job responsibilities or performance. The District asserts that it has no duty to bargain over an obligation to place material in a file which is unrelated to job performance.

The Association argues that the proposal is mandatory because it relates to the consistency of evaluations and to employe discipline under a just cause standard as those concepts were defined in School District of Janesville, Dec. No. 21466, (WERC, 3/84).

In Janesville we found the following proposal to be a mandatory subject of bargaining:

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

> Chapter 19 and section 103.13, Stats.) and shall not require disclosure or review of material which the District has determined is exempt under section 103.13, Stats.

We reasoned:

> . . .
>
> the Supreme Court in Beloit properly focused upon the reason why a proposal, such as that herein and that in Beloit, are primarily related to wages, hours and conditions of employment. That relationship is established because matters in a personnel file may well be utilized to evaluate a teacher for the purpose of deciding whether that teacher should continue to be employed, or whether that teacher should be subjected to some lesser from of discipline. As the Commission found in Beloit, the proposal there (and the proposal here) relate "directly to the teacher's ability to respond to 'threats' to continued employment." As it is reasonable to conclude that the District might attempt to utilize the entire content of an employe's personnel file may be utilized for the purposes of evaluating the employe's job performance, we do not view the Court's decision as imposing any explicit requirement that a proposal such as that herein contain a statement that it only applies to the content of a personnel file which may "have effect on evaluation or continued employment."
>
> . . .

The proposal before us herein seeks to protect employes from negative evaluations or other adverse employer action not through employe access to material already in personnel file but instead by mandating inclusion of positive material therein. As the District's position tacitly acknowledges, the opportunity to preemptively rebut adverse material is primarily related to employe protection from adverse employer action and thus to employe conditions of employment. The District instead argues that the clause may be overbroad. As the above quoted portions of Janesville indicate, we have rejected the need for a clause limiting applicability to matters which "have an effect on evaluation or continued employment" because of the possibility that all material in a personnel file, positive or negative, may become relevant as to both employer evaluations of employes and employer discipline decisions. We therefore reject the argument that the breadth of the proposal renders it something other than mandatory.

We also reject the District's argument that the timeliness of placement of material is irrelevant to employe conditions of employment. By requiring prompt placement, the proposal seeks to minimize the potential for positive material to be missing at times when the District is reviewing the file for evaluative or disciplinary purposes. Thus, we see this timeliness requirement as having a relationship to employe conditions of employment which outweighs any impact on employer prerogatives or managerial discretion.

(2) The District's objection to the Association's Assignment, Transfer and Layoff language is limited to the proposed applicability of that proposal to extra duty positions. The District notes that language in the parties' expired agreement specifically excludes extra duty positions from existing Assignment and Transfer provisions. Thus, the District was able to follow what it asserts was the sound educational policy of assigning teachers, whenever possible, to extra duty positions at the school in which they teach. If the District were obligated to follow the Association's proposal which would mandate District-wide posting of these positions, the District argues that the logistical and educational desirability of the current practice would be disrupted. Because the District believes the Association has failed to make any showing or argument that the existing District practice impacts on wages, hours and conditions of employment, the District contends that the educational policy dimension must be found to predominate and the Commission should find the proposal to be permissive.

The Association responds by contending that, in a general sense, the proposal primarily relates to wages, hours and conditions of employment and, more specifically, that selection criteria among qualified unit applicants for a unit position are mandatory subjects of bargaining.

As the parties' positions indicate, the dispute over this proposal is limited to whether the Association can require the District to bargain over a proposal which has the effect of obligating the District to fill extra duty vacancies in the same manner as are all other unit vacancies. The District asserts, in essence, that because no impact on teacher wages, hours and conditions of employment has been shown or argued to exist and because such a clause may produce less than exemplary educational consequences, it need not bargain with the Association. We disagree.

As the Association has argued, proposals which specify how unit work vacancies will be filled from among qualified unit applicants have previously been found to be mandatory subjects of bargaining. For instance, in Beloit, supra, the Wisconsin Supreme Court affirmed a Commission determination that a proposal obligating a school district to recall qualified teachers from layoff to fill unit vacancies was a mandatory subject of bargaining. In Oconto County, Dec. No. 12970-A (WERC, 3/75); Sheboygan County, Dec. No. 16843 (WERC, 2/79) and Janesville, we found various posting and transfer proposals mandatory. Indeed, as the parties herein are no doubt aware, in Racine I, we found a proposal which mandated the posting of "extra-curricular" vacancies to be mandatory.

In all of these cases, the mandatory nature of the proposal was premised upon the undeniable and predominant impact upon wages, hours and conditions of the decision as to who will fill unit vacancies which provide not only wages but also concomitant hours and working conditions that current qualified unit employes may find desirable. On balance, employer interests in securing the "best" person for the job or the person who can fill the job with the least disruption to the educational program have not been found and are not herein sufficient to predominate over the above noted impact on wages, hours and conditions of employment. We thus find the applicability of the proposal to "extra duty" positions to be a mandatory subject of bargaining.

(3) The proposal states:

> Lesson Plans -- Lesson plans shall be prepared by all teachers in their own style. Teachers shall inform the building principal in writing during the first week of school of the location where such plans may be found within the classroom.

The District contends that the following Association proposal is a nonmandatory subject of bargaining because the determination of whether and how lesson plans are prepared is a matter of educational policy and because the preparation of lesson plans is fairly within the scope of a teacher's job. The District asserts that to allow teachers to prepare lesson plans "in their own style" and to determine where the plans will be kept in the classroom impact on the District's ability to accomplish its educational policy goals and have no impact on wages, hours and conditions of employment.

The Association argues that the proposal is mandatory because it primarily relates to job duties of teachers. It asserts that since teachers are required to prepare and keep lesson plans, the District has a duty to bargain over their format and location.

For the reasons expressed by the District, we find that the portion of the proposal which allows the teacher and not the District to determine "style" is permissive because the impact upon District determinations of educational policy predominates over impact on wages, hours and conditions of employment. We also conclude that the impact upon the management and direction of the school of allowing the teacher to specify where lessons plans may be picked up by administrators predominates over the impact on teacher's wages, hours and conditions of employment. Thus, the "location" portion of this proposal is also permissive.

(4) The proposal states:

> 8. Teaching Time
> a. Middle and senior high schools -- In the event the District chooses to assign more than two hundred and fifty (250) minutes of student contact time and five (5) teaching periods to middle and/or senior high school teachers, said additional assignments shall be compensated for at a rate of

seventeen (17) cents per minute unless covered elsewhere in this Agreement.

b. Elementary schools -- In the event the District chooses to assign more than two hundred and fifty (250) minutes of daily student contact teaching time to elementary school teachers, said additional assignments shall be compensated for at a rate of seventeen (17) cents per minute unless covered elsewhere in this Agreement.

The District asserts that the Association's proposal, which requires additional wage payments for student contact minutes above a certain level, is still nonmandatory because no evidence or argument of impact on teacher wages, hours and conditions of employment was presented in this proceeding and because of the impact which such proposal has upon educational policy choices.

The Association argues that the District's assertions have previously been rejected in Racine I.

Our ruling and rationale in Racine I, pp. 40-42, 44-45 and School District of Franklin, Dec. No. 21846 (WERC, 7/84), wherein we rejected the arguments the District has reiterated herein, persuade us that this proposal is primarily related to wages, hours, and conditions of employment and thus is mandatory.

(5) The proposal states:

9. In the event the District chooses to assign more than twenty (20) minutes of supervisory duty per day to any teacher, said additional assignment shall be compensated for at a rate of seventeen (17) cents per minute unless covered elsewhere in this Agreement.

The Association's supervisory duty proposal requires the payment of extra money to a teacher who the District requires to supervise students for more than 20 minutes per day. The District asserts that such a proposal is nonmandatory where, as here, there is no showing that the amount of supervisory time has any effect on teacher's wages, hours and conditions of employment. The District contends that because the Association has other separate proposals providing (1) additional pay if a certain level of preparation time is not provided, (2) additional pay for student contact time above a certain level, and (3) additional pay for time worked after certain hours, the Association's proposal cannot be presumed to be an impact proposal providing extra pay for extra work. Thus the District asserts the proposal is simply an effort to improperly infringe upon the District's right to determine how the teacher day will be allocated.

The Association argues the proposal is mandatory and, citing School District No. 5, Franklin, asserts that it merely provides a method for determining impact pay for student contact time.

In Franklin, we found mandatory the underlined portions of a proposal 4/

4/ The proposal stated:

Section 10: Contact Minutes

A. Contact minutes shall be defined as the time assigned for the instruction or supervision of one (1) or more

(Footnote 4 continued Page 22)

which provided additional compensation for a certain level of student contact minutes with "contact" being defined in a manner which included the supervisory assignments referenced in the proposal before us herein. In the Franklin proposal, the union chose to lump together for the purposes of additional compensation what the Association here has elected to separately address as "teaching time" and "supervisory duty". In our view, the distinction betwen a combined or separate approach to the issue of how an employe will be compensated if his/her work day is allocated in a certain manner is a distinction without a difference as to a mandatory/permissive analysis. To the extent the District may be correct when it argues that this is not a proposal aimed at compensating employes for extra work, the proposal nonetheless remains a compensation proposal which specifies different levels of pay for different types ofwork which may be perceived by the employe as more difficult or less desirable. Such a proposal is analytically no different than a proposal which might specify that an employe in a blue collar unit receives one rate of pay when working on one piece of equipment for a certain amount of time but a higher rate if the assignment exceeds a certain length or if assigned to a different piece of equipment. Such proposals are primarily related to wages and as such are mandatory.

(6) The proposal states:

> 11. Teacher Load
>
> Teachers who are assigned the maximum or fewer students per class in the following categories, shall receive wage compensation in accordance with the salary schedules set forth

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(Footnote 4 continued)

> 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 day 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)

in Appendices A and B. Teachers who are assigned more than the designated maximum number of students will be compensated for such additional students under the provisions of paragraph 14 of the work overload compensation section in Article XIV.

a.	Elementary	Maximum
	Kindergarten-First	28
	Second-Fifth Grade	30
	Split Classes	22
	All Other Elementary Classes	32
b.	Secondary	
	6th Grade Core Classes	32
	Lab, Home Ec, Ind Arts (Lab Classes)	30
	All Other Secondary Classes	35
	Pool	24
	Study Hall	35
c.	Exceptional Education	
	Visually Impaired	2 (with aide) 1 (without aide)
	Hearing Impaired	6 (with aide) 1 (without aide)
	Orthopedic	10 (with aide) 1 (without aide)
	Multiply/Physically Handicapped	6 (with aide) 1 (without aide)
	Emotionally Disturbed	10 (with aide) 6 (without aide)
	Educable-Mentally Handicapped	12 (with aide) 9 (without aide)
	Trainable-Mentally Handicapped	12 (with aide) 1 (without aide)
	Early Childhood	9 (with aide) 1 (without aide)
	Learning Disability	12 (with aide) 9 (without aide)

The District asserts that the Association's Teacher Load proposal applicable to exceptional education students is a poorly disguised attempt to limit class sizes and dictate certain other educational policy choices regarding the use of aides in all exceptional education classes. The District argues that the record is devoid of any evidence of "impact" on teaching employes or of any rational relationship between any "impact" which might improperly be presumed by the Commission and the proposal.

The Association asserts that Racine I definitively establishes the mandatory nature of this impact proposal which only provides a method for computing pay and leaves the District free to set class sizes.

We agree with the Association that our decision in Racine I is dispositive of the District's arguments herein. We adopt the rationale of that decision (see

pp. 14, 29-33, 37-38) which we conclude is as applicable to exceptional education classes as it is to other classes. The District remains free under this proposal to use an aide or not and to set class sizes at any level it chooses. The proposal is found to be mandatory as a compensation proposal primarily related to "wages."

(7) The proposal states:

> 12. Facilities, Equipment & Materials
>
> a. Listing of Facilities -- All teachers shall be provided with the following facilities:
>
> 1) Rest Rooms -- Well-lighted and clean teacher rest rooms.
>
> 2) Storage space -- Lockable space for each teacher within each instructional area to store his/her instructional materials and supplies.

As to the Association's proposal regarding the availability of well lit and clean restrooms, the District argues that there is no evidence in the record as to the predominant impact upon conditions of employment of the quality of restrooms. The District contends that the interest of teachers in such matters ought not outweigh that of all people involved with the District and that to hold to the contrary invites proposals regarding the number of urinals and soap dispensers to be present.

As to the storage space proposal, the District contends the record demonstrates that teachers are not held responsible for material lost for reasons beyond their control. Thus the Commission cannot continue to rely upon this potential impact upon employes to find such proposals mandatory. The District argues that the impact of the proposal on the District's right to manage and control the physical plant is greater than any impact upon employes.

The Association asserts the proposal is mandatory because both matters dealt with therein primarily relate to conditions of employment under the rational of Racine I and Blackhawk VTAE, Dec. No. 16640-A (WERC, 9/80).

In Racine I, we found that following proposal to be mandatory:

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

We held:

> The record demonstrates that employes are held responsible for the availability of certain equipment and are expected to maintain the security of grade books. Given these requirements and expectations, we believe that it is a mandatory subject of bargaining for the Association to attempt to provide the employes with means by which they may meet those requirements and expectations. In addition, as there is no substantial basis for concluding that this proposal would interfere in any significant way with the District's ability to manage existing facilities, we believe that a proposal which would provide some lockable storage space as a matter of personal security and convenience for employes also primarily relates to conditions of employment. Support for this conclusion is found in Blackhawk, supra, wherein the provision of lounges and restroom facilities was found to be mandatory due to a primary relationship to working conditions. Thus, the proposal is a mandatory subject of bargaining.

We continue to find our above quoted analysis persuasive. As to storage space, the record (tr. 25) continues to establish the potential exposure of teachers to discipline for lost material. Turning to restrooms, we conclude that the impact upon conditions of employment predominates over the impact on management of the physical facilities. Thus the proposal is mandatory.

(8) The proposal states:

> 11. Credit Approval for Salary Schedule Advancement -- All credits meeting any of the following criteria shall be approved for advancement on the salary schedule:
>
> a. All credits required by the school district.
>
> b. All credits earned through Department of Public Instruction approved inservice educational programs. (Sixteen (16) education hours is equivalent to one (1) credit toward advancement on the salary schedule).

The District argues that the Association's credit approval proposal impinges upon the District's right to determine the minimum qualifications for a classification (i.e. BA + 12 vs. BA + 24, etc.) and, as such, is permissive.

The Association asserts that its proposal merely establishes the conditions under which employes qualify for advancement and, as such, is mandatory under the Commission's rationale in Franklin.

Contrary to the District's assertions, the Association's proposal does not establish qualifications for a teaching position but instead is simply part of compensation formula which establishes what types of credits are acceptable for advancement on the salary schedule. We remain persuaded by our reasoning in Racine I, pp. 21-22, and Franklin, pp. 33-37, and thus find this proposal a mandatory subject of bargaining.

(9) The proposal states:

> 1. If any wage or benefit provision of this Agreement is nullified or modified by the action of any government agency, the Board and the Association shall meet and negotiate regarding the substitution of wage benefit provisions of equal value.
>
> 2. Any wages or benefits so affected shall be deferred until such time as there is a new benefit provision and such is agreed to and signed and may be legally placed in effect (so as to provide the full benefit value of each deferred provision). The Association shall receive a monthly statement as to the amount of benefits and wages deferred as well as the interest earned on escrowed funds.
>
> 3. The Board and the Association will cooperate to seek and obtain appropriate rulings, approvals, exceptions or exemptions of any nullification or modification of any wage and/or benefit provision.
>
> 4. In the event that any or all deferred wages and benefits may not be granted, the Board and the Association shall negotiate concerning the reallocation of such unused funds into areas other than wages or fringe benefits.
>
> 5. If the parties are unable to agree on the disposition of any deferred wages and benefits, or if the Board and the Association cannot resolve the matter within thirty (30) days after receiving notice of the suspension or modification of any scheduled wage or benefit provision, the matter shall be submitted to arbitration in the same manner as grievances. All of the steps of the grievance procedure shall be waived except the step for binding arbitration.

The District asserts that Sections 2, 3 and 4 of the Association's wage and benefit control savings clause are nonmandatory because they create the possibility that the terms of the agreement will extend beyond the three year of statutory limit, specify that the District must take certain legal positions which may not be in the best interest of the District and the public at large and require bargaining over budget concerns which are "other than wages and benefits". The District rejects the Association's claims that this provision is analogous to the wage reopener at issue in Racine I and further asserts that the

Association's reference to Milwaukee County, Dec. No. 16713-B (WERC, 11/81) is unpersuasive.

The Association contends that its proposal is mandatory because it seeks to protect mandatory contract provisions bargained by the parties. It argues that its proposal provides the opportunity for the collective bargaining process to replace wages and benefits lost through unforseen circumstance. The Association asserts that the proposal is "directly analogous" to the reopener provision in Racine and is distinguisable from the clause in Milwaukee County, because it provides for the replacement of prohibited benefits with similar but legal benefits of equivalent value.

In general, we agree with the Association's contention that the proposal is analytically analogous to the reopener provision we found mandatory in Racine I, pp. 48-50. We turn to the specific objections raised by the District to ascertain whether they are bases upon which certain specific portions of the proposal are nonetheless permissive or prohibited subjects of bargaining.

We are not persuaded by the District's contention that Section 2 of the proposal may have a term of more than the statutory maximum of three years. While the obligation to defer wages and benefits until a new benefit provision is in place has no specified term, this provision is subject to the overall two year term specified in the Association's offer. Thus, any contractual obligation to honor this proposal is limited to the two year term of the overall proposal. Thereafter, should a contractual hiatus occur, the District's statutory duty to bargain obligation to maintain the status quo would be operative.

We are persuaded that Section 3 of the proposal is permissive because it requires (in contrast to the option available under the indemnification proposal discussed later in this decision) that the District take certain legal positions and actions which may be inconsistent with the District's obligation and/or policy decision to act in compliance with its own interpretations of administrative, judicial or statutory rulings which alter the status of the law existing at the time agreement was originally reached on the nullified provision.

As to Section 4, we agree with the District that the proposal can reasonably be interpreted as requiring bargaining over nonmandatory matters, and thus this portion of the proposal is found to be permissive. If the proposal were amended to specify that bargaining was over the reallocation of unused funds to "mandatorily bargainable areas other than wages or fringe benefits", it would be found to be mandatory.

(10) and (11) The proposals specify:

> 1. The Board shall provide each teacher (except where both spouses are employees, only one will be eligible for family coverage, however, both may elect single coverage) an opportunity to participate in a group hospitalization and surgical/medical benefit plan as described in Appendix G of this Agreement. The Board shall pay the full cost of such group hospitalization and surgical/medical benefit plan. The plan shall become effective no more than 45 days after the effective implementation date of this contract.
>
> 4. The Board shall provide each teacher the opportunity to participate in a group dental benefit plan as specified in Appendix H. The Board shall pay the full cost of such group dental plan.

The District disputes the Association's assertion that the health and dental insurance proposals are mandatory because they simply list benefits. The District argues that an examination of the appendices referenced in the proposals reveals material which has no bearing on employe benefits, duplicates existing statutory mandates, or simply references administrative matters.

The Association contends that the proposals are mandatory because they address benefit levels and the cost to employes of insurance benefits.

Initially, it must be emphasized that the Association proposals do not specify the source from which the benefit plans are to be acquired. The Association has clearly stated during this proceeding that the proposals do not

require that any specific insurance carrier provide the "benefit plan." Thus, this is not a proceeding which raises the issue of whether a proposal specifying that identified benefits be provided by an identified insurance carrier is a mandatory subject of bargaining. See Madison Metropolitan School District, Dec. Nos. 21129, 21130 (WERC, 7/84); rev'd, Dec. No. 84 CV 6920 (CirCt Dane, 7/85); aff'd Dec. No. 85-1493 (CtApp IV, 9/86); appeal pending Wis Sup Ct.

Appendix G, as referenced in the Association's health insurance proposal, is identified on its cover as a

"FRONT-END DEDUCTIBLE HEALTH PLAN PROPOSAL"

Summitted To:

RACINE UNIFIED SCHOOL DISTRICT

From:

WEA INSURANCE TRUST

Underwritten by WEAIT Insurance Corporation

November 4, 1985

Appendix H, as referenced in the Association's dental insurance proposal, was represented by the Association in this proceeding as being the dental insurance policy in effect between Blue Cross & Blue Shield United of Wisconsin and the District during the parties most recent expired agreement.

The District argues that the Association's method for listing benefits by including entire insurance contracts in the Appendices is overbroad and imprecise because of the inclusion of title pages, signature pages, administrative language, indexes, certificate forms, rate quotes, etc. The District is essentially asserting that such matters have no relationship to benefits and thus are not mandatory. While it may well be that the Association could have better refined its intent, 5/ we nonetheless find the proposals to be mandatory as submitted. 6/

As demonstrated by the record in Madison Metropolitan School District, which we have taken notice of herein, the benefits which an insurance policy provides are inextricably mixed with and defined by the manner in which the policy is administered. Thus it is entirely appropriate and mandatory to include administrative language. Nor do we believe that the collective bargaining process has been reduced to such a legalistic state that index or title pages which aid in the overall interpretation of the policy must be artificially excised from an otherwise mandatory proposal. See Racine I, p. 33. Similarly, there is interpretative value to references to a specific carrier (because as we noted in Madison, different carriers interpret identical language differently) so the Association's proposals are not flawed in that respect either. To the extent the proposals reference statutory mandates, such references are mandatory because, as we have previously concluded, contractual inclusion of statutory rights which are primarily related to wages, hours and conditions of employment is a mandatorily bargainable matter.

(12) The proposal specifies:

> The Board shall provide liability insurance which covers the cost of legal defense and judgments up to $1,000,000 for tort

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5/ The District correctly notes that the dental appendix includes approximately 70 pages of what appear to be health insurance provisions. While we presume such inclusions were inadvertant, they are nonetheless mandatory as a description of benefits.

6/ The Association stipulated on the record that the composition of the appeals board referenced in its health insurance proposal is not a "benefit" within the meaning of the proposal and thus that matter is not before us herein.

liability incurred in the course of employment with the Board. In addition, the District shall defend all legal actions against a teacher which arise out of the performance or nonperformance of his/her regular duties, including, but not limited to, negligence or malpractice claims and which are not otherwise covered by the liability insurance provided by the Board, in accordance with sec. 895.46, Wisconsin Statutes.

The District asserts that the Association's liability insurance proposal is nonmandatory because it conflicts in various ways with Sec. 895.46, Stats. and interferes with the policy decision of whether to obtain such insurance. The District further argues that the proposal is akin to a proposal that seeks to guarantee the financial solvency and performance of a party to a contract, and that such a proposal is a nonmandatory subject of bargaining under federal labor law. Lastly, the District contends that the proposal is nonmandatory because the Association has failed to present evidence or argument of impact on employes.

The Association contends that the proposal is mandatory because it is directly related to the scope of insurance benefits available to employes.

The proposal in question has two basic components. The first obligates the District to provide liability insurance in a specified amount to cover judgements and legal costs. The second component specifies the District's obligations in situations not covered by the insurance purchased as per the first component. Contrary to the District's argument herein, we conclude that there is an obvious relationship between an employe's wages and conditions of employment and the insurance benefits provided by this proposal. The insurance is, at its most elemental level, another means by which an employe is compensated for services rendered. It is also apparent that the proposal is not a performance bond by which the union seeks to guarantee performance by the employer under a labor contract and thus the District's proposed analogy in that regard is found unpersuasive. We also find that the proposal does not conflict with Sec. 895.46, Stats. That statute provides:

> **895.46 State and political subdivisions thereof to pay judgments taken against officers.** (1) (a) If the defendant in any action or special proceeding is a public officer or employe and is proceeded against in an offical capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employe and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employe in excess of any insurance applicable to the officer or employe shall be paid by the state or political subdivision of which the defendant is an officer or employe. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the government unit, if it does not provide legal counsel to the defendant officer or employe, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employe did not act within the scope of employment. If the employing state agency or the attorney general denies that the state officer, employe or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employe to give notice to his or her department head of an action or special proceeding commenced against the defendant officer or employe as soon as reasonably possible is a bar to recovery by the officer or employe from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employe legal counsel and the offer is refused by the defendant officer or employe. If the officer, employe or agent of the state refuses to cooperate in the defense of the litigation, the officer, employe or agent is

not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

It is initially noted that the statute explicitly references the potential availability of the insurance required by the first component of the Association's proposal herein. Thus the proposal does not conflict with but rather supplements and complements the statute. We find the above noted relationship to employe wages predominates over any policy impact which the decision to procure such insurance may have.

The second component of the proposal simply appears to require that the District meet its statutory obligations under Sec. 895.46, Stats. The statute is explicitly referenced and the language of the proposal is sufficiently broad to encompass the various options and requirements which the statute creates. As a contractual statement of a statutory benefit related to employe wages, hours and conditions of employment, we find this portion of the proposal is also mandatory. See Racine I, p. 17; Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) p. 64.

(13) The proposal states:

FAIR SHARE

1. All employees in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be made available to all employees who apply, consistent with the Association's constitution and bylaws.

2. The District shall deduct in equal installments from the earnings of all employees in the collective bargaining unit, except exempt employees, their fair share of the cost of representation by the Association, as provided in section 111.70(1)(f), Wis. Stats., and as certified to the District by the Association. The District shall pay said amount to the business office of the Association on the date upon which such deduction was made. The date for the commencement of these deductions shall be determined by the Association; however, all employees shall be required to pay their full annual fair share assessment regardless of the date on which their fair share deductions commence. The District will provide the Association with a list of employees from whom deduction are made with each remittance to the Association.

   a. For purpose of this Article, exempt employees are those employees who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to Article XV(B) or paid to the Association in some other manner authorized by the Association. The Association shall notify the District of those employees who are exempt from the provisions of this Article and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article.

   b. The Association shall notify the District of the amount certified by the Association to be the fair share of the cost of representation by the Association and the date for the commencement of fair share deductions at least two weeks prior to any required fair share deduction.

3. The Association agrees to certify to the District only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. The Association agrees to inform the District of any change in the amount of such fair share costs.

4. The Association shall provide employees who are not members of the Association with an internal mechanism within the Association which is consistent with the requirements of state and federal law and which will allow those employees to challenge the fair share amount certified by the Association as the cost of representation and to receive, where appropriate, a rebate of any monies to which they are entitled. To the extent required by state or federal law, the Association will place in an interest-bearing escrow account any disputed fair share amounts.

5. The Association does hereby indemnify and shall save the District harmless against any and all claims, demands, suits, or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the District which District action or non-action is in compliance with the provisions of this Article; provided that the defense of any such claims, demands, suits or other forms of liability shall be under the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challeging the application or interpretation of this Article through representatives of its own choosing and at its own expense.

The District contends that the Association's fair share proposal is unconstitutional on its face and therefore is a prohibited subject of bargaining. It cites the proposal's reference to an "internal" mechanism for challenging fair share deductions as being in irreconcilable conflict with the mandate of the Supreme Court in Chicago Teachers Union v. Hudson, ___ U.S. ___, 89 L.Ed 2d, 232 (1986) that an "impartial" decision maker be part of any such mechanism. The District argues that the proposal should be also be found nonmandatory because the Association has failed to provide any evidence to support the facial validity of the proposal. In the alternative, the District urges the Commission to reconsider its decision granting the Association's Motion to Quash Subpoena so that information about the Association's Hudson procedure can become part of the record and be evaluated for compliance with Hudson.

The District further asserts that the portion of indemnification clause which specifies that the defense of liability claims arising under the fair share proposal "shall be under the control of the Association and its attorneys" is nonmandatory. Under such language, the District argues that it would be forced to align itself with the Association or lose the protection of the clause. The District contends that the decision of what position to take in a law suit which, for instance, might challenge the constitutionality of the proposal is a matter which should remain within the discretion of the school board as an elected body and not be dictated by the terms of the contract.

The Association argues that the Commission's recent decision in Richland County, Dec. No. 23103 (WERC, 12/85), is dispositive of the District's objections. The Association asserts that under the rationale of Richland County, a fair share proposal is legal and mandatory if it is facially couched in the terms of Sec. 111.70(1)(f), Stats. The Association contends that the proposal presently before the Commission is distinguishable from the Richland County proposal only to the extent that the instant proposal includes language providing additional guarantees of an intent to comply with the law. The Association argues that as the proposal specifies that the "internal mechanism" will be consistent with the requirements of state and federal law, the District's argument to the contrary is unpersuasive. The Association therefore requests that the proposal be found mandatory.

Earlier in this proceeding, we granted the Association's Motion to Quash Subpoenas wherein we concluded that the issue before us herein was limited to a determination of whether the Association's fair share proposal, on its face, is consistent with existing statutory and constitutional requirements. We commented:

> The District herein asks us to conclude that when determining whether there is a duty to bargain over a proposal, it is relevant to look behind the proposal itself to examine the manner in which the proposal would be implemented. In this specific case, we are being asked to examine the

procedures the Association would utilize when attempting to implement the fair share proposal in a constitutional manner. We reject that invitation because the breadth of the question before us is limited to whether the Association's fair share proposal, on its face, is consistent with existing statutory and constitutional requirements.

Our conclusion herein is consistent with Richland County where, in a declaratory ruling proceeding in which a fair share proposal was being challenged as an illegal subject of bargaining, we quashed a subpoena which sought information inter alia regarding past union expenditure of fair share monies as well as "procedures for nonmember employees to challenge the fair share amounts and receive refunds and/or reductions of the fair share amount." While the District correctly notes that Richland County was issued prior to Hudson, the fact that the constitutional requirement vis-a-vis fair share are now clearer is irrelevant because our focus is limited to the language of the proposal.

If it is determined that the language used comports on its face with the law, the proposal will be found mandatory. Because the information sought by the District is not relevant or material to the legality of the proposal on its face, we have granted the Motion to Quash. (Footnotes omitted)

As to the District's argument that the proposal is facially illegal because of the reference to an "internal mechanism", we conclude that the use of the word "internal" is not a sufficient basis for finding the proposal to be inconsistent with Hudson procedures. The reference in question can reasonably be interpreted as simply reflecting the fact that it is the labor organization's obligation to establish and maintain the Hudson mandated procedures. We also note that the sentence in question explicitly references consistency with state and federal law.

With regard to the hold harmless language, we recognize that there is a substantial body of private sector law to the effect that reallocation of the economic or legal consequences of a party's compliance with a provision of the agreement is too far removed from the employer-employe relationship and from wages, hours and conditions of employemnt to fall within the scope of mandatory bargaining. See, e.g., NLRB v. Borg-Warner Corp., 353 US 342, 42 LRRM 2034 (1958); Arlington Asphault Co., 318 F.2d 550, 53 LRRM 2462 (CA 4, 1963) and cases cited therein; and Hall Tank Co., 214 NLRB 995, 88 LRRM 1208 (1974) (hold harmless); cf. NLRB v. Borg-Warner Corp., 353 US 342, 42 LRRM 2034 (1958). Thus, except where such clauses merely restate the law, see, Radiator Specialty Co., 336 F.2d 495, 57 LRRM 2097 (CA 4, 1964), proposals for performance bonds, indemnification and hold harmless provisions have been held to be nonmandatory under the National Labor Relations Act.

We nevertheless, find that the fair share hold harmless clause involved here in a mandatory subject because the proposal is closely related to the mandatory subject of a fair share agreement, because its wages, hours and conditions of employment dimensions outweigh whatever formulation/management of public policy dimensions it may have, and because it does not unduly interfere with the Association's status or ability to function as exclusive bargaining representative.

The administration of the instant fair share provision is in the primary control of the Association, and the fair share provision itself is of particular advantage to the Association. Though facially lawful, and hence mandatory, as noted above, the fair share provision nonetheless exposes the District to potential legal proceedings arising out of that provision. The hold harmless proposal at issue seeks only to reallocate the consequences of allegations of illegality in the fair share provision or its administration to the party primarily benefiting from and primarily controlling the administration of that provision and away from the employer. The hold harmless proposal has little if any effect on internal union matters between the Association and bargaining unit employes, since it would only impose on the Association the liability and litigation costs that the District would otherwise incur in connection with defense of alleged unlawful nature or unlawful administration of the fair share provision. This is therefore not the sort of incursion into internal union

matters or into the nature of the exclusive representative's status that was involved in the pre-strike ballot proposal in Borg-Warner. The instant proposal does not require the Association to secure the solvency of its promise by posting a bond, unlike the performance bond cases relied upon in Arlington Asphault. Moreover, since the Association's financial exposure under the proposal is limited to that which the District would have faced in defending fair share related litigation, the proposal does not constitute an arbitrary penalty or other financial imposition such as would threaten to render the Association unable to perform its role as exclusive representative. Compare, Waupun Schools, Dec. No. 22409 (WERC, 3/85) (held permissive a proposal depriving exclusive representative of access to contract grievance procedure on grounds proposal undermined employes' enjoyment of statutorily protected right to bargain collectively through chosen exclusive representative). Finally, the instant hold harmless proposal relates directly to employe claims arising out of the proposed fair share agreement. It is therefore unlike the Arlington Asphault proposal which was held permissive, in part, because it sought to protect the employer from harm in its relationships with outside unions and employers, rather than limiting its scope to the employer's relationships with its own employes.

While we do not have occasion to address the status of hold harmless clauses relating to other types of agreement provisions, we are satisfied for the reasons noted above, that the fair share hold harmless proposal at issue herein is a mandatory subject of bargaining.

In reaching this conclusion, we have considered the District's contention that the indemnification clause is nonmandatory because it improperly restricts the District's exercise of its policy making powers. We see no such restriction in the proposal. The District is free to take whatever position it wishes in litigation. All the clause specifies is that the indemnification protections become available only under certain specified circumstances. We therefore reject the District's argument in this regard.

(14) The proposal states:

> 6. A teacher shall receive an accounting of sick leave usage on their biweekly paycheck.

As to the Associations's sick leave accounting proposal, the District contends that the method and frequency of advising employes of their leave usage primarily relates to the management and discretion of the District. The District asserts that the Association has failed to provide evidence or argument as to the impact of the proposal on wages, hours or conditions of employment.

The Association argues that its proposal is primarily related to wages and conditions of employment.

In our view, because an employe's knowledge of the status of his or her fringe benefits impacts upon use thereof, this proposal does impact minimally upon on wages and conditions of employment. On balance, we conclude that this impact predominates over whatever miniscule impact the proposal has upon the management and direction of the District. Therefore, the proposal is mandatory.

Dated at Madison, Wisconsin this 18th day of November, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner