STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Sections 111.70(4)(b), and 227.41 Wis. Stats., Involving a Dispute Between Said Said Petitioner and THE MILWAUKEE BOARD OF SCHOOL DIRECTORS	Case 163 No. 34305 DR(M)-361 Decision No. 22804-B
In the Matter of the Petition of THE MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Sections 111.70(4)(b), Wis. Stats., Involving A Dispute Between Said Petitioner and THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION	Case 189 No. 37498 DR(M)-408 Decision No. 24287-A

Appearances:

Perry, First, Lerner, Quindel & Kuhn, S.C., Attorneys at Law, by Mr. Richard Perry, 823 North Cass Street, Milwaukee, Wisconsin 53202, for the Milwaukee Teachers' Education Association.

Mr. Stuart S. Mukamal, Assistant City Attorney, City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, for the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The Milwaukee Teachers' Education Association having on December 20, 1984 filed a petition with the Wisconsin Employment Relations Commission pursuant to Secs. 111.70(4)(b), and 227.41, Stats., seeking a declaratory ruling as to the duty of the Association and the Milwaukee Board of School Directors to bargain over certain matters relating to the identity of the health maintenance organizations (HMO's) who would provide health insurance benefits to employes; and the Association having amended said petition on February 6, 1985; and hearing having been held in Milwaukee, Wisconsin on April 17, 1985 before Examiner Peter G. Davis; and during said hearing the parties having: (1) expanded the scope of the Association's request for declaratory ruling to encompass issues relating to various memoranda of understanding; and (2) entered into certain stipulations which resolved certain of the HMO issues; and hearing as to the memoranda of understanding dispute having been conducted before Examiner Davis in Milwaukee, Wisconsin on May 3, 1985; and the Commission having on July 22, 1985 granted a motion from the Board to withdraw from certain stipulations entered into during the April 17, 1985 hearing; and the parties thereafter having agreed to indefinitely postpone further hearing as to the HMO issues pending the ultimate judicial disposition of the Commission's decision in Madison Metropolitan School District, Dec. Nos. 22129-30 (WERC, 11/84); and the Board having on August 26, 1986 filed a petition for declaratory ruling with the Commission pursuant to Sec. 111.70(4)(b), Stats., as to the Board's duty to bargain over certain dental HMO proposals made by the Association; and 14 days of hearing on the HMO issues having ultimately been conducted before Examiner Davis in Milwaukee, Wisconsin

between March 11 and June 2, 1987; and the parties having received a transcript of the hearing on or about August 10, 1987; and the parties having filed briefs, the last of which was received June 16, 1988; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee Board of School Directors, herein the Board or the MBSD, is a municipal employer having its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

2. That the Milwaukee Teachers' Education Association, herein the Association or the MTEA, is a labor organization which functions as the collective bargaining representative of certain employes of the Board including teachers and accountants and has its principal offices at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

3. That as the need arises during the term of their "master" collective bargaining agreements, the Board and the MTEA enter into written memoranda of understanding to resolve certain matters; that some of these memoranda have no specified expiration date and are not limited by their terms to a specific time period; and that a dispute has arisen between the parties as to the status of such memoranda in their collective bargaining relationship.

4. That during collective bargaining between the parties, a dispute has arisen as to the extent, if any, of the Board's duty to bargain with the MTEA over the following two proposals:

(1) k. As a voluntary option to the hospital-surgical and major medical benefits provided for above, (hereinafter referred to as the health insurance plan) the Board shall make available health maintenance organization coverage through Compcare of Wisconsin, Family Health Plan, Maxicare Health Insurance Company, Samaritan Health Plan and Total Care Health Plan.

The benefits offered by each health maintenance organization shall be those defined in the individual contracts between each HMO and the Milwaukee Board of School Directors in effect on January 1, 1985. For the employe selecting health maintenance organization coverage, the Board shall pay an amount equivalent to the single or family health insurance plan premium which would be paid for that employe if enrolled in the health insurance plan. Any amount charged by the health maintenance organization for single or family coverage over and above the amount of the health insurance premium shall be paid by the employe on a payroll deduction basis.

(2) c. As a voluntary option to Blue Cross and Blue Shield Dental Insurance, employes may elect insurance provided by Dental Insurance of Wisconsin subject to the maximum dollar contributions for dental insurance in paragraph b, above.

Schedule for Dental Benefits

DEDUCTIBLE - single	NONE
family	NONE
1. DIAGNOSTIC	
-dental exam	FULLY COVERED
-Dental x-ray	FULLY COVERED
2. PREVENTIVE	FULLY COVERED
-prophylaxis (cleaning)	FULLY COVERED
-flouride treatment	FULLY COVERED

-preventive training	FULLY COVERED
-space maintainers	FULLY COVERED
-emergency treatment	FULLY COVERED
3. RESTORATIVE	
-regular fillings; acrylics, amalgams, composits	FULLY COVERED
-stainless steel crowns	FULLY COVERED
-composite crowns	FULLY COVERED
-cast metal onlays, inlays	LAB FEE ONLY
4. CROWN AND BRIDGE	
-full metal & 3/4 crown	LAB FEE ONLY
-porcelain to metal crown	LAB FEE ONLY
-acrylic to metal crown	LAB FEE ONLY
-bridge	LAB FEE ONLY
-repair to crown or bridge	LAB FEE ONLY
5. PROSTHETICS	LAB FEE ONLY
-full denture	LAB FEE ONLY
-partial denture	LAB FEE ONLY
-denture relines	LAB FEE ONLY
-denture repairs	LAB FEE ONLY
6. ORAL SURGERY	
-simple extractions	FULLY COVERED
7. ENDONTICS	
-pulpal therapy	FULLY COVERED
-root canals	FULLY COVERED
8. PERIODONTICS	
-treatment for diseases of gums and tissue of the mouth	FULLY COVERED
9. ORTHODONTICS	
-maximum	None
-copayment	50% UP TO $1,500
-deductible	NONE
-example: $2,200 case	COVERED PARTICIPANT PAYS
10. LIMITATIONS	
-annual maximum	NO LIMIT
-paperwork	
-preauthorization	NONE

5. That the proposals set forth in Finding of Fact 4 primarily relate to wages.

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

CONCLUSIONS OF LAW

1. That, like the provisions of the "master" collective bargaining agreement between the Board and the MTEA, the memoranda of understanding between the parties which have no specified expiration date and are not limited by their terms to a specific time period are subject to renewal, amendment or elimination during the parties' bargaining over the terms of a successor "master" agreement.

2. That the proposals set forth in Finding of Fact 4 are mandatory 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 present existence of memoranda of understanding between the parties which have no specified expiration date and are not limited by their terms to a specific time period is dependent upon and determined by the result of the parties' collective bargaining over successor "master" agreements.

2. That the Board and the MTEA have a duty to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., with respect to the proposals set forth in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________
S. H. Schoenfeld, Chairman

____
Herman Torosian, Commissioner

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A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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

(Footnote 1/ continued on page 5)

1/ continued

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. 77.59(6)(b), 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. 227.57 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

This case has evolved into two distinct disputes between the parties: (1) the status of certain memoranda of understanding and (2) the duty to bargain over the identity of HMO's and the benefit levels provided by HMO's. Our decision will thus have two parts, the first dealing with the memoranda of understanding and the second with HMO's.

MEMORANDA OF UNDERSTANDING

POSITIONS OF THE PARTIES

The Board

The Board asserts that the following issues are raised with respect to the status of certain memoranda of understanding between the parties:

1. Where the parties, during the term of the "master" collective bargaining agreement, enter into memoranda of understanding, do those memoranda of understanding under the foregoing three circumstances become part of the collective bargaining agreement between the parties? Where they contain no express or implied expiration date, where they have been observed by the parties since the date of execution (which may or may not be in excess of three years), do they become part of the ("master") collective bargaining agreement between the parties for the purposes of negotiating the continuance, modification or deletion of such provisions in the same manner as the collective bargaining agreement itself?

The Board contends that the answer to the foregoing questions should be "no," absent a specific agreement between the MTEA and the Board to incorporate such memoranda of understanding into the "master" collective bargaining agreement.

2. Assuming the foregoing circumstances, does each of the scores of memoranda of understanding between the parties constitute a separate collective bargaining agreement with a separate, statutorily imposed three-year expiration date, and a different time period for collective bargaining concerning the continuance, modification or deletion of such memoranda of understanding?

The Board contends that the answer to this question should be "yes."

3. Assuming the foregoing circumstances, that the Commission accepts the theory that the memoranda of understanding expired three years from the date of their execution as a separate, independent contract, is it mandatory for the parties to negotiate concerning said memoranda when the "master" collective bargaining agreement is open for negotiations?

The Board contends that the answer to this question depends upon the substance of the particular memorandum of understanding at issue, i.e., if the substance of the particular memorandum addressed a mandatory subject of bargaining, its incorporation into the "master" collective bargaining agreement would similarly be a mandatory subject of bargaining at the time that negotiations for such an agreement are proceeding. If the substance of the proposed memorandum of understanding is permissive or illegal, similarly its incorporation into the "master" collective bargaining agreement would constitute a permissive or illegal subject of bargaining. The Board asserts that its position as to this issue does not differ in any respect from the MTEA's position.

4. Assuming the same premises concerning these memoranda of understanding, are the memoranda of understanding subject to Sec. 111.70(4)(cm)6., Stats., mediation/arbitration proceedings at the expiration of the three-year period from the execution of each memorandum of understanding in the event of impasse between the parties as to its continuation?

The Board contends that the answer to this question should be "no."

The Board asserts that it is clear in the record that memoranda of understanding between the MTEA and the Board have been negotiated under circumstances considerably different from those underlying the negotiation of the parties' "master" collective bargaining agreement, and that those memoranda of understanding serve purposes quite different and apart from those underlying the "master" agreement. The Board therefore contends that the legal status of a memorandum of understanding is, and should be, different from that of a "master" collective bargaining agreement.

The Board contends that the parties have bargained memoranda of understanding in the following circumstances:

(1) to settle differences with respect to the interpretation of the "master" contract;

(2) to establish the dates of inservice training;

(3) to confirm limited, mutually acceptable deviations from the "master" contract in particular situations;

(4) to establish certain "miscellaneous" conditions not covered by the "master" collective bargaining agreement that involve wages, salaries, and working conditions; and

(5) to confirm matters involving permissive subjects of bargaining that the Board voluntarily negotiates with the MTEA.

Given the foregoing, the Board contends that memoranda of understanding are more analogous to (and serve functions similar to those served by) grievance dispositions or arbitration awards than to provisions of a collective bargaining agreement. The Board alleges that memoranda of understanding differ from "master" collective bargaining agreement provisions in a number of respects:

(1) timing and duration;

(2) "grievability" through the "master" contract grievance-arbitration procedures;

(3) ratification procedures; and

(4) function.

As to the timing and duration of memoranda of understanding, the Board asserts that it has consistently been its position that memoranda of understanding expire three years from the date of their execution, unless a different expiration date is specified within a particular memorandum of understanding, or unless the parties have specifically agreed to renew or extend a particular memorandum of understanding or to incorporate it within the terms of the "master" collective bargaining agreement. The Board notes that this three-year limitation originates in the last sentence of Sec. 111.70(3)(a)4, Stats., which states that "the term of any collective bargaining agreement shall not exceed three years."

As to the "grievability" of memoranda of understanding, the Board contends that the record demonstrates that the contractual grievance-arbitration procedure in the "master" contract is completely silent with respect to its applicability to disputes arising over memoranda of understanding. The Board asserts that, contrary to the MTEA's position, the record does not demonstrate that the grievance-arbitration procedure has in fact been invoked as to memoranda of understanding.

The Board contends that the invocation of the grievance-arbitration procedures in the cases cited by the MTEA in fact involved disputes regarding provisions of the "master" agreement rather than any independent memoranda of understanding. The Board asserts that the memoranda of understanding were merely used in those cases cited by the MTEA as interpretive guides to the applicable "master" contract provisions at issue or as evidence and not as a basis for a grievance disposition or an arbitration award.

As to the factor of ratification procedures, the Board asserts the record demonstrates that memoranda of understanding are generally not submitted either to the membership of the MTEA or to the members of the Board for ratification. The Board notes that this is contrary to the parties' practice with respect to "master" collective bargaining agreements. In this regard, the Board notes that both the "master" collective bargaining agreement and the MTEA's own Constitution and Bylaws require that all collective bargaining agreements be submitted to the full MTEA membership for ratification vote prior to their becoming effective. The Board asserts that the record demonstrates that in virtually all instances at issue herein, this was not done with memoranda of understanding.

As to the function served by memorandum of understanding, the Board asserts that such memos serve as a valuable "back channel" for the resolution of matters involving permissive subjects of bargaining. The Board contends that they utilize this "back channel" to deal with matters of a permissive nature which they might otherwise simply refuse to discuss with the MTEA. In this regard, the Board notes that it did not submit the status of any memoranda of understanding to the Commission during the rather massive declaratory ruling proceeding between the parties in 1982 and in 1983 involving more than 90 separate issues because, in the view of the Board, memoranda of understanding never constituted part of the "master" collective bargaining agreement and (unless otherwise specified) would die a "natural death" as a result of the expiration of their respective three-year terms.

The Board asserts that the MTEA's position respecting the status of memoranda of understanding contravenes both the letter and the spirit of Wisconsin's collective bargaining laws. In essence, the Board contends that this proceeding is a barefaced attempt by the MTEA to obtain through the declaratory ruling process what it has twice attempted to (but could never hope to) obtain through voluntary collective bargaining. In this regard, the Board notes that the MTEA has, in the past, made certain proposals in conjunction with negotiations for "master" collective bargaining agreements that would have incorporated some or all of the memoranda of understanding between the parties into the "master" agreement by reference. While the parties have mutually agreed to incorporate a few particular memoranda of understanding into the "master" agreement, the Board asserts that it has consistently rejected proposals seeking the "wholesale" incorporation of all memoranda of understanding into the "master" contract by reference. The Board admits that it has voluntarily continued to observe the terms of certain memoranda of understanding even past the formal expiration of their respective three-year terms. However, the Board submits that there has never been a stated policy or consistent past practice to this effect.

The Board contends that during the many years that the MTEA and the Board have negotiated memoranda of understanding, there was never any known intention or contemplation on the part of either party that those memoranda would become permanent obligations or that they would become incorporated into the "master" agreement absent a specific agreement to that effect in connection with a particular individual memorandum. If the Commission were to uphold the MTEA's position, the Board asserts that it would in effect deprive the Board of the "benefit of the bargain" that it had a right to expect when it determined to negotiate particular (usually non-mandatory) subjects through the "back channel" of memoranda of understanding. The Board asserts that this result would seriously disrupt the parties' future collective bargaining relationships and is fundamentally inconsistent with the basis of a contractual relationship which, after all, must rest upon a "meeting of the minds."

The Board asserts that the MTEA's own past actions confirm the MTEA's acquiescence with the Board's position in this matter. The Board asserts that with respect to at least one particular memorandum of understanding, the MTEA made no objection whatsoever to the Board's expressed determination to consider it expired at the end of its three-year term. Furthermore, the Board argues that on

or all of the parties' memoranda of understanding into the "master" collective bargaining agreement - precisely what the MTEA seeks herein. The Board asks why the MTEA would make such a bargaining proposal if it believed it was entitled to the benefit of its interpretation herein by operation of law. The Board also notes that the record reflects that the MTEA has on occasion bargained for inclusion of specific memoranda of understanding in the "master" collective bargaining agreement.

The Board contends that the only way that the letter and intent of the three-year limitation upon the length of a collective bargaining agreement can be carried out would be to uphold the Board's interpretation in this matter, i.e., that for instance a January 1, 1981 memorandum of understanding expires on December 31, 1983, unless the parties specifically agree to renew it for an additional term or to incorporate it (again by explicit agreement and not by operation of law) into the successor "master" collective bargaining agreement.

The Board asserts that the continuation or discontinuation of memoranda of understanding where negotiated independently from the "master" collective bargaining agreement is not subject to interest arbitration under Sec. 111.70(4)(cm)6., Stats., citing Dane County, Dec. No. 17400 (WERC, 11/79).

The MTEA

The MTEA contends that memoranda of understanding which do not contain specific expiration dates or which are not by their terms limited to an agreement governing a specific event or a specific period of time are incorporated into the parties' collective bargaining agreement. It argues that unless the parties clearly agree upon a limited duration, the memoranda of understanding are, under commonly accepted principles of labor relations, part of the "master" collective bargaining agreement. The MTEA contends that its view of memoranda of understanding is widely accepted by labor and management spokespersons as well as impartial arbitrators. The MTEA points to Midwest Glasco, 63 LA 869 (Roberts, 1974) as an example of this commonly accepted view wherein the arbitrator stated:

> Most written collective bargaining agreements are not totally encompassing of all possible disputes that may arise or have arisen. It is not unusual for the parties to exchange letters or memorandums of understanding which become part of the contract although not specifically incorporated therein but contained in "side" or collateral agreements. These are almost always regarded as becoming a part of the contract and disputes arising under them are regarded as the proper subject of arbitration under the terms of the master contract. Further, practices may arise which acquire such a mutuality of understanding as to become an applied or tacit term of the contract. Disputes over those practices are normally considered justiciable under the arbitration clause of the master agreements although the practices are not contained therein. This is true where the arbitration clause specifically refers to disputes over the interpretation or application of the contract or agreement.

The MTEA further contends that memoranda of understanding are analogous to a prior practice not specifically included in the "master" contract but accepted by the parties as part of the "master" contract unless modified, deleted, or specifically limited by its terms. Although, like a well established practice, memoranda are not specifically included in the provisions of a "master" contract, memoranda are more formal than a past practice in that they are reduced to writing and executed so that there will be no uncertainty as to exactly what was agreed upon. The MTEA contends that a memorandum of understanding should not be considered less a part of a contract than a past practice which has existed over a period of years but has never been reduced to writing.

The MTEA argues that it equally well-settled judicially that a memoranda of understanding supplements a "master" contract, or if its terms are inconsistent with the "master" contract, supercedes it. The MTEA contends that where, as here, the memoranda of understanding have been consistently enforced through the collective bargaining agreement's contractual grievance procedure and where, as

here, they have been observed by the parties since the date of their execution which, in many cases, has been in excess of three years, it must be concluded that they have become part of the collective bargaining agreement between the parties. As such, the MTEA argues that if either party wishes to modify or delete the provisions of such memoranda, they must do so in the same manner as they would have to proceed to modify or delete provisions from the collective bargaining agreement itself.

The MTEA contends that its analytical framework is consistent with the Sec. 111.70(3)(a)4, Stats. three-year limitation upon the term of contracts. It argues that each time the master contract is open for negotiations, the memoranda subsumed therein are also open for negotiations and, if left unchanged by the parties, are renewed, and continue in effect for the term of the new contract. The MTEA argues that under its theory, a party urging explicit inclusion of the memoranda in the master contract could persuasively argue to an interest arbitrator that it was simply seeking confirmation of the status quo which already existed.

The MTEA contends that it would be "extremely destructive" of the collective bargaining process for the Commission to accept the Board position that the memoranda in question are separate contracts which expire three years from the date they happen to be negotiated. The MTEA asserts that under the Board's theory, a party seeking inclusion of memoranda in the master contract would bear the burden before an interest arbitrator of justifying a change in the status quo despite the reality that parties were already living under said memoranda as subsumed portions of the master contract. However, should the Commission accept the Board's position, the MTEA argues that interest arbitration is available to resolve any impasse reached as to the renewal of those memoranda which are mandatory subjects of bargaining.

The MTEA argues that a careful analysis of the Board's position reveals certain basic flaws. For instance, the Board correctly contends that memorandum of understanding on occasion serve to confirm that a specific interpretation of master contract language is correct. Without such a memorandum, one of the parties may not have agreed to inclusion of the language in the master contract. Under such circumstances, the contract provision may well be left unchanged in successor agreements. However, under the Board's theory, after three years the interpretive memorandum would expire and the party who had relied upon same as a basis for agreeing to the master contract language would be left at a substantial and inappropriate disadvantage. As another example, the Board accurately states that some memoranda establish certain wage and fringe benefit rights which the MTEA asserts are clearly mandatory subjects of bargaining. Under the Board's theory, such memoranda expire after three years, perhaps in the middle of the term of the master agreement, and the MTEA has no access to interest arbitration to seek renewal. The MTEA asserts that such a result is untenable and destructive of the collective bargaining process.

The MTEA denies the Board's claim that certain memoranda are no longer honored because the three-year term expired. Instead, the MTEA asserts that it was the permissive nature of such memoranda along with related permissive contract language which led the MTEA to conclude that it had no basis for insisting that the Board continue to honor the memoranda upon expiration of the master agreement.

DISCUSSION

The parties' dispute as to memoranda of understanding came to light during hearing on the HMO issues dealt with elsewhere in this decision. Although the parties had entered into almost 700 memoranda during the period of 1971-1985, it seems conceivable that but for their disagreement on HMO's, their fundamental disagreement as to the contractual and statutory framework within which memoranda exist would remain unknown to the parties. Although both parties presented evidence which they believed to be supportive of their respective position, said evidence only confirms for us that the parties have never had a shared understanding as to the status of memoranda and that each party has acted in a manner consistent with its own theoretical framework. Thus, our decision herein is not premised upon our interpretation of the parties' actions as set forth in the factual record and is premised upon our view of the conceptual framework within which memoranda of understanding exist as a general matter of law. Thus,

while our conclusions as to this conceptual framework are supported by the factual record, our conclusions are not reflective of any determination that, for instance, the Board, through its conduct, has tacitly agreed with the MTEA's view of this case.

The focal point of the parties' dispute is the status of those memoranda which have no stated expiration date and are not limited by their content to a specific time period. The Board contends that such memoranda are separate contracts between the parties with a term of three years imposed by Sec. 111.70(3)(a)4, Stats. The MTEA argues that such memoranda are essentially part of the master contract between the parties and thus have a term co-existent with said master contract. We agree with the MTEA for the following reasons.

In Wisconsin, under Sec. 111.70, Stats., as it applies to these parties, the Legislature has created a statutory framework which presumes that collective bargaining over wages, hours and conditions of employment will generally produce a comprehensive written document of limited duration. Thus, for instance, Sec. 111.70(1)(a), Stats., specifies that the product of bargaining be reduced to a written signed document; Sec. 111.70(4)(cm) Stats., provides various mechanisms for peaceful settlement of disputes over what such a document will contain; and Secs. 111.70(3)(a)4 and 111.70(4)(cm)8m Stats. create parameters as to the duration of such a document. This statutory framework reveals a legislative interest in providing order to the collective bargaining process, in giving the process a way to begin and to end, and in providing recurrent but not constant opportunities for the process to establish the terms of the employer-employe relationship.

Not surprisingly, the parties herein, like virtually all of their counterparts across Wisconsin, have responded to the statutory framework by bargaining a "master" contract. The existence of a "master" contract with a known term provides beneficial order to the parties' collective bargaining relationship in several ways. The contract allows both parties to know all wages, hours and conditions of employment which will exist during the term of the contract, subject to whatever additions or modifications the parties subsequently make. The known term of the contract provides the parties with an opportunity to bargain a successor contract as part of one bargaining process with the understanding that upon expiration of the existing contract, all matters of wages, hours and conditions of employment which had been previously agreed upon are now supplanted by the new agreement. Under such a framework, the parties are not subjected to the disruptive prospect of the endless collective bargaining which would occur if the parties had a series of separate agreements with differing expiration dates which were therefore constantly subject to expiration and renewal or amendment.

As a review of the parties' disputed memoranda of understanding reveals, a memoranda of understanding reflects the parties' need during the term of a "master" contract to record their agreement on how to resolve some dispute which has arisen. As such, a memoranda supplements in some fashion the parties' existing "master" contract as to such matters. We think it clear that the collective bargaining process is best served by a conclusion that unless the parties explicitly or implicitly agree otherwise, such memoranda have a duration co-extensive with the "master" agreement. Such a conceptual framework allows each party to enter the process of bargaining a successor agreement with the knowledge that all matters affecting employe wages, hours and conditions of employment will, if desired, be subject to and established by the collective bargaining process at the same time. Such a confluence of the duration of memoranda and master contracts allows the parties to assess in an orderly manner the positions they wish to take as to all terms which will govern during the term of the new "master" agreement. Our conclusion is also consistent with the reality that many memoranda exist to clarify or amend existing portions of the "master" contract. Clearly, the collective bargaining process is best served by having the "clarifications" and "amendments" exist only for as long as the "master" contract provision to which they relate. Then the memoranda, like the "master" contract itself, become subject to renewal, modification or deletion as part of the bargaining for a successor agreement. Under the Board's theory of this case, memoranda of unspecified duration agreed upon during the term of a contract would always expire after the "master" contract to which they relate. Such a theory is antithetical to the legislative desire to provide order to the collective bargaining process, to avoid endless collective bargaining, and to allow the parties the opportunity to meaningfully address all aspects of employe wages, hours and conditions of employment at the same time.

Given the foregoing, we hold that continued existence of the various memoranda between the parties which have no specified duration and are not limited by their terms to a specific event is dependent upon the result of bargaining over successor master agreements between the parties. The parties are free to agree to the renewal, amendment or elimination of said memoranda. If the parties agree to their continued existence and fail to specify a duration, the memoranda assume the duration of the successor "master contract." As the parties have reached agreement on successor master agreements since this record was created, we cannot know and thus cannot decide which of the memoranda before us continue to exist. We are hopeful that the parties will be able to agree upon that matter without need for our services.

HMO

POSITIONS OF THE PARTIES

The Board

When deciding this case, the Board argues it is important for the Commission to grasp the essential points of the MTEA's so-called "HMO proposal" (proposal A/12, Exh. 1). In the Board's view, the essential elements of that proposal are as follows:

> (a) The MBSD must make available as a so-called "voluntary option" to the traditional "indemnity" health plan a specific group of named HMO carriers. Proposal A/12 itself names five carriers (corresponding to those offered by the MBSD at the time of hearing). The MBSD would be precluded from adding or dropping HMO's during the term of the collective bargaining agreement and any "hiatus" period thereafter absent mutual agreement with the MTEA.
>
> (b) The MBSD would be required to guarantee the benefit "package" offered by each named HMO as of a specifically named date (in the case of Proposal A/12, that date was fixed as January 1, 1985). Should HMO's unilaterally delete benefits (an event that occurs with some frequency as shown by the record), the MBSD would be required either to find an alternative entity to provide that benefit or to pay the costs of that benefit out of its own pocket or on a "self-insured" basis.
>
> (c) The MBSD would be required to pay 100% of HMO premiums for employes selecting the HMO "option" up to the premium amounts quoted for the traditional "indemnity" plan (as applicable to inactive employes wo (sic) whom such premium rates actually apply). Employes would be responsible for payment of any HMO premiums over and above the total "indemnity" premium rates. The inevitable effect of this feature is to encourage "shadow-pricing" and to provide a costly "flexible spending account" for employe health insurance on an individual basis up to the stated "indemnity" premium rates.

In many respects, this case is similar to a "conventional" declaratory ruling proceeding involving the application of the so-called "primary relationship" or "balancing test" mandated by the Wisconsin Supreme Court in Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89, (1977), (hereafter "Racine Schools") and applied on frequent occasions by the Commission and by the courts. However, this case also presents an additional dimension regarding the applicability of the so-called "commercial benefit" and "public welfare" clauses incorporated in Sec. 111.70(1)(a), Stats. Simply put, it is the position of the MBSD that those clauses require the Commission in a context such as this one to make a comparative evaluation of the costs (to the employer) and the benefits (to the employes) of this type of bargaining proposal in conjunction with its analysis of that proposal's mandatory or permissive status. Should the Commission fail to make such a comparative evaluation (e.g., by disregarding the "cost" side of the equation), it would violate Sec. 111.70(1)(a), Stats., which mandates recognition of a municipal employer's duty to further the "commercial benefit" and "welfare" of its constituency. (See also Exhs. 736, 737, 738, 739).

To the extent that the Commission has in fact denied or disregarded its obligation to make such a comparative cost/benefit analysis in prior related cases, the Board respectfully requests that the Commission review and reverse such precedent. A cost/benefit analysis is particularly decisive to the determination of this matter, inasmuch as it is the Board's basic contention that the rendition of the matters in dispute as mandatory subjects of bargaining would result in considerable increases in costs and administrative burdens for municipal employers but only in marginal (at best) improvement in benefits for municipal employes. In such a context, and given the statutory framework as noted above, the need for a cost/benefit approach (and the conclusions that inevitably follow therefrom) is compelling.

This matter cannot be adequately determined without consideration of the degree (if any) to which the Commission's decision in Madison Metropolitan School District (22129, 22130) 11/21/84, affirmed sub nom Madison Metropolitan School District v. Wisconsin Employment Relations Commission, 133 Wis.2d 462, (Ct.App. 1986) (hereinafter "Madison Schools") has on this matter. It is the position of the MBSD that Madison Schools is of little or no bearing to the outcome of this case, because that case involved a very different set of facts and issues relating to the bargainability of the identity of a so-called traditional "indemnity" health plan carrier. Furthermore, Madison Schools by its own terms was confined to a very unique set of facts, and thus lacks precedential value. As is repeatedly noted in this record, HMO's and PDP's constitute a supplemental, alternative system for the delivery of health and/or dental care services not at all comparable to the method of delivery of analagous services by traditional "indemnity" carriers. To the very limited extent that Madison Schools enunciates any principles relevant to the determination of this matter, the Board respectfully submits that the Commission's analysis in that case was fundamentally flawed and contrary to settled and established law governing the scope of collective bargaining, and would accordingly urge the Commission to reconsider and reverse those components of the Madison Schools decision.

Madison Schools bears a superficial resemblance to this case in that there, the "choice of carrier" issue was determined in the context of traditional "indemnity" carriers. (The benefit "package" issue was not involved in that case). However, the parallel between that case and this case ends there. The differences between Madison Schools and this case could hardly be more compelling. Madison Schools involved traditional fee-for-service "indemnity" health insurance carriers, which serve as the "basic" health insurance option for virtually all public employes within this State. An "indemnity" plan operates as a rather simple form of "sickness" insurance, providing reimbursement, in accordance with the terms of the applicable group insurance contract, for all covered services provided by any health care provider without restriction (except as specifically imposed by contract). An "indemnity" carrier contains none of the trappings of an HMO, such as a defined provider "network", "community-based" rating, a "capitation" system of provider compensation, restrictions on provider choice, "wellness" or "health education" programs, restrictions on "out of area care" and the like. Nor do "indemnity" insurance carriers concern themselves, for the most part, with "quality assurance" or "utilization review," although they may adopt certain cost containment features of their own. In contrast, an HMO is a fully "managed" health care system, incorporating all or most of the foregoing features and directly involved in cost containment and financial risk-shifting to providers on a continuous basis. Furthermore, it is a supplemental, voluntary option afforded to employes as an alternative to the traditional "indemnity" plan; employes who do not wish to join an HMO or who wish to disaffiliate from one are free to choose the "indemnity" plan during "open enrollment" periods or at other appropriate periods of time.

Furthermore, it is apparent that in Madison Schools, the Commission was primarily concerned with certain differences in the administration of group insurance contracts from one "indemnity" carrier to another. Its emphasis was upon the differing interpretations of such "terms of art" as "medically necessary," "usual, customary and reasonable," etc. from one carrier to another, as well as differences between carriers in such matters as claims, "turnaround time," and grievance procedures. These factors are not present in this proceeding (Tr. pp. 1682-1685) and virtually no evidence was adduced with respect to them; to the extent that the issues exist, the answers are extensively regulated (if not preempted) by State or Federal law or regulation. This case involves an entirely different set of issues--most notably, the enormous actual and potential costs that would inure to municipal employers were the choice of HMO carriers made a

mandatory subject of bargaining, as well as the practical impossibility of rendering a "package" of HMO benefits as a mandatory subject of bargaining, given the method by which the marketplace operates.

Finally, even by its own terms, Madison Schools does not set firm precedent in the "choice of carrier" area. (Exh. 646). Prior to Madison Schools, the Commission had held that the choice of an "indemnity" carrier was a permissive subject of bargaining. See Walworth County Handicapped Children's Education Board (17433) 11/79; see also Connecticut Light & Power Co. v. NLRB, 476 F.2d 1079 (2nd Cir. 1973). The Commission explicitly recognized the uniqueness of Madison Schools in the final paragraph thereof, wherein it stated that:

> It should also be emphasized that our holding herein does not necessarily render mandatory other health insurance proposals made in different time frames. Nor does our conclusion necessarily apply to carrier proposals for life, dental, disability or other types of insurance. Our conclusion herein is tied directly to this record ... (Madison Schools, Memorandum Decision at p. 11).

It follows that Madison Schools is of little precedential value herein, given both the marked differences in the types of insurance carriers involved and the consequent differences in the type of record developed in this case as compared to the Madison Schools case.

The fate of Madison Schools upon subsequent judicial review is also of little or no consequence to this proceeding. It may be recalled that the Commission's decision in that case was reversed by Judge Danier R. Moeser of the Dane County Circuit Court on May 28, 1985, in Case No. 84-CV-6920. Judge Moeser ruled that the Commission had improperly failed to consider employer interests in applying the so-called "primary relationship" or "balancing test" mandated by Racine Schools, supra. He further held that public policy considerations dictated that an employer be "free to shop for competitive insurance rates," in order to provide an incentive for insurance carriers to control insurance costs and premiums, and to forestall a situation where an employer is "in effect held hostage to the carrier and the carrier is free to charge monopoly prices for insurance." (Case No. 84 CV 6920, Memorandum Decision at p. 8).

The Court of Appeals reversed Judge Moeser's decision, but did not address or overrule the premises upon which said decision was based. Instead, the Court of Appeals upheld the Commission's determination on the narrow grounds that the Commission's reasoning had a "rational basis," and that sufficient evidence had been adduced in the record to support the Commission's analysis. 133 Wis.2d 462, 467-472. See argument at Tr. pp. 2280-2288. The Court of Appeals did not consider the merits of the Madison Schools dispute de novo. It may be fairly concluded that had the Commission reached a conclusion similar to that reached by Judge Moeser, the Court of Appeals would just as readily have sustained such a conclusion on the grounds that it too would have had a "rational basis" in the record.

In one respect, however, the MBSD requests that the Commission review and reverse one element of the dicta enunciated in Madison Schools, particularly, the sentence at p. 10, that states that: "(t)he actual or potential cost of a compensation proposal and the implications of such costs on the employer's level of services are considerations which are relevant to the merits of the proposal but not to its mandatory or permissive nature." (Citations omitted). The Board respectfully submits that such an approach to an evaluation of the bargaining status of a proposal that confers enormous costs but relatively few benefits runs contrary to the definition of "collective bargaining" enunciated in Sec. 111.70(1)(a), Stats. That provision specifically recognizes the obligation of the municipal employer to act on behalf of the "commerical benefit" and "public welfare" of the area within its jurisdiction and of the citizens thereof in conjunction with a definition of the scope of collective bargaining. In connection with such obligation, a municipal entity must act to improve those elements of the community subsumed within the broad label of "business climate," which most certainly includes the level of the community's public expenditures and tax levy, and the ability of that community to obtain public services in an efficient manner and at reasonable cost. See City of Brookfield v. WERC, 87 Wis.2d 819, (1979).

By including the "commercial benefit" and "public welfare" factors as a component portion of the definition of the obligation of "collective bargaining," the Legislature explicitly recognized that an analysis of relative costs and benefits is part and parcel of the definition of the scope of the collective bargaining process itself. An approach that entirely divorces the "cost" dimension from an analysis of the bargaining status of a particular proposal contravenes the Legislature's intent to incorporate considerations of "commercial benefit" and "public welfare" within the definition of the scope of an employer's duty to bargain. This is particularly true where, as here, a particular union bargaining proposal produces considerable costs and relatively few benefits in an aggregate sense, and where the cost/benefit "balance" weighs heavily on the side of "costs."

Carried to its logical extreme, an attempt to divorce "costs" from a determination of bargaining status leads to the conclusion that virtually everything constitutes a mandatory subject of bargaining, because virtually every conceivable bargaining proposal bears at least some slight relationship to a "benefit" that may accrue to public employes. If one focuses entirely on the "benefit" side of the cost/benefit "balance," virtually everything would be mandatory and virtually nothing would be permissive. This, of course, is in contravention of the "primary relationship" test mandated by Racine Schools and necessarily inconsistent wiht the representative function of municipal government as explicitly recognized by Sec. 111.70(1)(a), Stats.

The obligation to collectively bargain, as set forth by statute and as further defined by the Racine Schools "primary relationship test," requires a balance of "costs" and "benefits," and such an analysis must be undertaken in this instance (i.e., a comparative analysis of the costs of the disputed proposals herein to the MBSD as compared with the benefits of those proposals to the MTEA's bargaining unit members). In this limited respect, the Commission's dicta in Madison Schools directly contradicts the scope of the obligation to collectively bargain as set forth by Sec. 111.70(1)(a), Stats., and thus must be reconsidered and reversed.

Although the record of this matter is voluminous, the Board's position with respect to the issues raised herein can be quite simply described. These arguments equally apply to HMO's and PDP's, although the term "HMO's" will be used for purposes of convenience.

With respect to the issue of "choice of carrier," the Board contends that the choice of HMO carriers and/or the "array" of particular HMO carriers to be offered to bargaining unit members constitutes a permissive subject of bargaining, for the following reasons:

1. Given that HMOs are an alternative voluntary option to the basic "indemnity" plan, and that they represent a system for delivering health and/or dental care benefits entirely distinguishable from the "fee-for-service" system to which "indemnity" plans are adapted, the employe interest in the "choice of carrier" is much more attenuated than is the case with the basic "indemnity" plan. If employes are dissatisfied with the choice of HMOs, and the services provided by the HMOs that they may select, they have the option of returning to the "indemnity" plan. This is not an option applicable to the basic "indemnity" plan itself. In contrast, the employer interest in selecting the HMO "array" and in maintaining its freedom to negotiate with HMOs (including its freedom to exclude HMOs that are uncooperative or unduly expensive) is, if anything, greater than the corresponding employer interest with respect to "indemnity" plan carriers, given the profound effects that such matters have upon employer costs for providing health and/or dental insurance to its employes and the consequent effects of those costs upon tax levies and the "commercial benefit" of the municipality and/or other jurisdictional entity served by the employer.

2. The nature of HMOs and the market within which they operate (particularly within the Milwaukee area and with respect to the MBSD's employes) indicates that HMOs induce considerable "adverse selection" against "indemnity" carriers. In particular, the emphasis and design of HMO benefit "packages" favors younger, healthier individuals over older, sicker individuals, inducing the former to switch from "indemnity" carriers to HMO plans and leaving "indemnity" carriers with older, sicker employes. Consequently, "indemnity" rates rise. Furthermore, due to "community-rating" systems for rate-setting as well as the natural economic tendency for corporations to charge whatever the market will bear, HMO rates "track" the rates offered by "indemnity" carriers (a phenomenon known as "shadow-pricing"). This results in enhanced profits for HMOs, and considerably higher costs for employers in <u>both</u> the "indemnity" and HMO categories. In this case, it has resulted in sharp increases in the amount expended by the MBSD for employe group insurance over and above what the MBSD would have incurred in the absence of the "HMO" effect, particularly given the "self-funded" nature of the MBSD's "indemnity" insurance plan.

3. In contrast to the foregoing considerably increased costs (which act to the detriment of the "commercial benefit" of the citizens of the City of Milwaukee), employes of the MBSD realize little or no additional benefits, because HMOs are essentially alike and "generic" in terms of structure, operation, and benefits provided. The "primary relationship" thus lies in the direction of costs and not of benefits when dealing with "choice of carrier" in the HMO context. Stated otherwise, the primary impact of rendering such a matter a mandatory subject of bargaining would <u>not</u> be to provide additional benefits to employes but would rather be to increase the MBSD's costs and administrative burdens associated with the provision of group health insurance and to rob the MBSD (and other municipal employers) of the leverage that they need in order to negotiate effectively with HMOs in an effort to hold premiums to reasonable levels and thus to curtail spiraling health care costs.

With respect to the issue of benefit "packages," the Board contends that such an item constitutes a permissive subject of bargaining for a different reason. In contrast to benefit levels offered by "indemnity" carriers, the composition of "packages" of benefits offered by HMO's are quite inflexible, and largely governed by Federal and/or State mandates. Furthermore, HMO's offer benefit "packages" on a <u>community-wide</u> basis, and have not (and in all likelihood will not) "tailor" benefit "packages" for particular employers, because of the administrative burdens and loss of efficiency that would result. HMO's almost invariably offer <u>one</u> benefit "package" throughout the entire community, which is varied only by the provision of a few "riders" for peripheral benefits that might be purchased at additional cost or a few "co-pay" or "deductible" options that may produce a marginal cost savings for the employer or its employes. HMO benefit "packages" are designed by the HMO's themselves and are impervious to specific needs of individual employers, in direct contrast to the corresponding practice in the "indemnity" market where benefit levels may be "fine-tuned" to suit the needs of individual employers. Thus, requiring negotiations over the "package" of benefits offered by HMO's and PDP's (including the "tailoring" of benefit "packages") for individual employers is contrary to the established business practice of industry, impracticable, and would likely be rejected by the HMO's and PDP's themselves as to most of the benefits at issue.

The foregoing considerations are in no way comparable to those raised in the "indemnity" carrier context by the Madison Schools decision; therefore, Madison Schools is of relatively little guidance herein.

With respect to Case 189 (the so-called "dental HMO" or "PDP" declaratory ruling), the Board takes the position that (in a fashion parallel to that applicable to "medical" HMO's) the selection of the PDP carrier or carriers and the level of benefits to be offered by such carrier or carriers constitute permissive subjects of bargaining. In most respects, the Board's rationale for this position is identical to the analysis made heretofore with respect to HMO's. (See also discussion at Tr. pp. 2248-2252). Stated succinctly, these items are permissive for the following reasons:

1. Since "indemnity" dental insurance plans are always available to employes of the MBSD, the impact of the identity of voluntary, alternative PDP carriers and the level of benefits to be offered by such carriers to employes automatically has a much-reduced impact upon the wages, hours and working conditions of MBSD employes as compared to the impact that would exist were the "indemnity" dental plan not readily available.

2. The additional premium costs that would result from a determination that the identity of PDP carriers constituted a mandatory subject of bargaining would far outweigh whatever (marginal) benefits (if any) might accrue to MBSD employes as a result of such a determination. Accordingly, and for the same reason as that applicable to the "medical" HMO context, such a result conflicts with the definition of "collective bargaining" as set forth in sec. 111.70(1)(a), Wis. Stats., and most particularly concerning the obligation of a municipal employer to act in the best interests of the "commercial benefit" and "welfare" of the public.

3. As is the case with "medical" HMOs, the benefit "packages" offered by PDP carriers are "generic," off-the-shelf" products that are not capable of individual negotiation or "fine-tuning" through the collective bargaining process. Requiring that the level of benefits be collectively bargained would thus conflict with the realities of the marketplace.

Given the foregoing, the Board asks the Commission to find the MTEA proposals to be permissive subjects of bargaining.

The MTEA

The MTEA argues that the record demonstrates, beyond question, that the choice of a particular HMO carrier has a significant impact upon the benefits received by members of the bargaining unit. Sometimes these differences will literally mean the difference between an essential life sustaining medical service (i.e., only CompCare makes heart, heart/lung and liver transplants available as part of its basic plan). In other respects, the choice of a particular carrier will be substantially determinative of the doctor who will perform the services. Choice of an HMO will often determine the distances patients must travel to receive their medical care. It will determine whether particular medical treatment is covered or not (for example, gastric bypass, medical treatment for infertility, availability of chiropractic services, and many other medical services).

The evidence also makes it clear that the administration of HMO plans varied from liberal to very rigid and that such administration often determined whether particular medical services were deemed necessary in a given instance.

Each HMO plan has its own provisions relating to payment for prescription medications which range from complete payment under Family Halth Plan, to co-pay of $2.00 or $3.00 per prescription in various other plans and a $50.00 annual deductible under CompCare. These and a myriad other differences between the health maintenance organization plans available in the Milwaukee area make clear

beyond cavil that the choice of the particular carrier or carriers will have a major impact upon the medical services obtained under an HMO program. Indeed, the very selection itself, as the Board's own annual comparative analyses demonstrated, will determine the nature of the medical benefits which are covered under the health insurance plan. It is that selection which, to a far greater extent than is true in fee-for-service health insurance plans, determines the level of benefits employes in the bargaining unit will receive.

Perhaps the most striking aspect of the instant litigation is the Board's contention that although there are indisputably major, even life sustaining, differences in medical benefits depending on the identity of a carrier, the proposal is nonetheless a permissive subject of bargaining because it may have a cost impact upon the employer. In Madison Metropolitan School District, Dec. Nos. 22129, 22130 (11/84), it was undisputed that all levels of benefits were identical but the selection of a carrier was nonetheless a mandatory subject of bargaining because relatively minor procedures had some impact upon members of the collective bargaining unit. It was extensively argued by the school district therein that the impact had to be "material or significant" before the selection of a carrier constituted a mandatory subject of bargaining (see Employer Brief to the Circuit Court, MTEA Exh. 637, pp. 6-7). Even where the impact upon employes was relatively minor (i.e., speed of payment of claim, only a tiny fraction of claims ever denied), the WERC, with the approval of the Court of Appeals (sustained by the Wisconsin Supreme Court), held that the identity of a group health insurance carrier was a mandatory subject of bargaining.

Under such circumstances, it is clear that the identity of the HMO carriers to be made available to employes in the bargaining unit is a mandatory subject of collective bargaining. Madison Metropolitan School District v. W.E.R.C, 385 N.W.2d 825, 133 Wis.2d 462 (1986), review denied 401 N.W.2d 10, 134 Wis.2d 457 (1987).

The MTEA further asserts that the record establishes that HMO's are currently operating in a highly competitive market and are extremely responsive to market pressures.

The MTEA notes the Board insistence that because of the interest in cost containment, the Board must have the power unilaterally to drop HMO carriers at any time and not be obliged to negotiate with their employes' collective bargaining agent concerning such decision. This argument attempts to elevate the Board's ability to negotiate rates with the HMO carrier to a level that is so absolute that it obliterates employe rights to collective bargaining pursuant to Sec. 111.70. This is also an argument made to the Commission and to the Circuit Court by the Madison Metropolitan School District in support of its argument that it must be permitted to unilaterally select and/or drop insurance carriers. The Madison Board argued that "in order to satisfy its obligations under Ch. 120, it must be permitted to shop the insurance marketplace to secure the bargained for insurance benefits in the least expensive manner" unfettered by an obligation to bargain concerning the identity of particular insurance carriers (see Brief of Madison Metropolitan School District to Circuit Court, p. 14, MTEA Exh. 736). The Commission rejected the District's argument but the Circuit Court, committing reversable error, accepted the argument of the District (see Madison Metropolitan School District v. W.E.R.C., 395 N.W.2d 825, 829, 133 Wis.2d 462 (1986), review denied 401 N.W.2d 10, 134 Wis.2d 457 (1987)).

In the instant litigation, the Board has argued that it is charting new ground and dealing with concepts not heretofore considered by the Commission or the courts when it contends that the school board's responsibility to provide for the "commercial benefit" and "welfare of the public" must be considered under Sec. 111.70(1)(a), Stats. This argument is clearly contrary to the facts. In its Brief to the Circuit Court, the Madison School District argued as follows:

> In addition to its obligation to manage the District under Ch. 120, the School Board has the responsibility to provide for the "commercial benefit" and "welfare of the public" under Sec. 111.70(1)(a), Stats. One of the means through which the Board can provide for the commercial benefit of the District is by shopping the insurance marketplace and purchasing the negotiated benefits in the most economic manner

possible. Similarly, the primary means through which the Board can provide for the public welfare is to control the District's tax levy. This fact was stated by the Supreme Court in City of Brookfield v. WERC, 87 Wis.2d 819, 830 (1978).

> "The citizens of a community have a vital interest in the continued physically responsible operation of its municipal services."

Clearly, the School Board can achieve a lower tax rate by shopping the insurance marketplace and contracting for coverage at a lower premium. The right to enter into such a contract is necessary for the Board to satisfy its statutory obligation to "manage" the affairs of the District, provide for the "commercial benefit" of the District and look out for the "welfare of the public." That right cannot and must not be abrogated through collective bargaining.

(MTEA Exh. 736, p. 15)

Again, not only was this concept argued, but the Circuit Court accepted the argument and found that the identity of the insurance carrier was a permissive subject of bargaining based in part on the argument of the District concerning the "commercial benefit" and "welfare of the public" arguments. The Court of Appeals reversed the Circuit Court for its conclusion that the identity of the insurance carrier was a permissive subject of bargaining. This decision was, of course, ultimately sustained by the Wisconsin Supreme Court.

The Court of Appeals in Madison also rejected the arguments of the Milwaukee Board of School Directors in its Brief Amicus Curiae in which the Milwaukee Board argued that the WERC 's holding that the identity of a group health insurance carrier as a mandatory subject of bargaining was violative of Sec. 111.70, Stats. In support of its argument, the Milwaukee Board specifically argued the "welfare and 'commercial benefit' of the taxpaying public" required that the identity of a group health insurance carrier be a permissive subject of bargaining (see Brief of MBSD, MTEA Exh. 739, pp. 4-5). There, the Board argued:

> The City and the MBSD do not deny that the choice of a group health insurance carrier may have some (albeit slight) impact upon employe compensation. However, once the level of heath insurance benefits is established through collective bargaining, the choice of a carrier to confer those benefits has only a marginal impact upon employe compensation, but a very considerable impact upon the fiscal affairs of (and taxes levied by), the municipal employer.

(MTEA Exh. 739, p.5)

It is strange that the MBSD presently argues that its theory is essentially a new concept not previously considered since it made the same argument several years ago in its brief to the Court of Appeals in the Madison case.

It is further clear that the Board's argument that sufficient economic impact renders virtually any subject (presumably including wages) permissible has also been previously considered and rejected. In this argument, the Board contends it must be free to unilaterally threaten HMO group health insurance carriers with termination even during the term of a negotiated collective bargaining agreement. It argues with a straight face that this is a novel theory not heretofore considered by the Commission or the courts. Once again, the record demonstrates the contrary. In Madison, the Milwaukee Board argued:

> The existence or absence of competition among insurance carriers for the business of municipal employers also exerts considerable influence upon the level of quoted premiums for essentially identical services. As the Circuit Court correctly (sic) noted at p. 8 of its Decison:

> "Once a particular insurer is deisgned (sic) in the collective bargaining agreement, that insurance carrier has no incentive to keep costs down and keep premiums, down. Since the District is not free to switch carriers, the District is in effect held hostage to the carrier and the carrier is free to charge monopoly prices for insurance."
>
> As is known to every student of economics, a monopolistic pricing structure will result in the highest "equilibrium" level of prices for any good or service, including insurance (whether "standard" or HMO). Yet this factor received no discussion or consideration whatsoever by the WERC.
>
> (MTEA Exh. 739, p. 8)

The Circuit Court accepted this argument but was reversed by the Court of Appeals.

It is to be noted that the Board also specifically argued that if the identity of group health insurance carriers is mandatory:

> Employers would be deprived of the discretion to react to changing conditions in the insurance market during the mid-term or multi-year collective bargaining agreements, and to react to opportunities for cost savings and improved deficiencies that might result from such changes, were a particular carrier or administrator "locked into" the collective bargaining agreement for its entire duration.
>
> (Ibid, p. 9).

Again, the Court of Appeals rejected the foregoing contention.

In its most succinct statement of its erroneous cost impact theory, the MBSD argued:

> The WERC failed to apply the comparative analysis mandated by the "primarily related to" or "balancing" test and normally applied in declaratory rulings proceedings. The existence of an effect upon wages, hours and terms and conditions of employment, or of a cost impact does not in and of itself render a subject a "mandatory" subject of bargaining. A "mandatory" subject of bargaining exists only when the impact on employe wages, hours and terms and conditions of employment outweighs the impact upon the municipal employer's formulation, implementation, and management of public policy. (Emphasis in original.)
>
> (MTEA Exh. 739, p. 12)

In describing the holding of the Circuit Court, the Court of Appeals stated:

> The district argues, however, that the commission's decision cannot stand because it never considered the district's "obligation to act for the commercial benefit of the municipality." We disagree.
>
> The commission's decision contains a lengthy discussion of the district's "commercial benefit" argument. In part, the commission noted:
>
> "The District argues that ... it (has) ... the responsibility and obligation to provide (the employee health) benefits in the most economic manner. To accomplish that goal, the District asserts that it must have the unfettered right to shop the insurance marketplace ... The District contends that its ability to manage ... would be severely restricted if it had to negotiate the identity of the (carriers) ... The District further argues that it has the responsibility to provide for the welfare of the public ... (by controlling) the District's tax levy."

Responding to the argument, the commission noted that "the specific interest identified by the District" was the "need for freedom to shop the insurance marketplace ... in the least expensive manner" in order to meet its "statutory obligation ... to 'manage and to provide for the 'welfare of the public' ... through (the) lowest possible tax levies." The commission also noted the district's "management interests" in securing the reliable and cooperative carrier and stated that the interests so identified "must be balanced against the proposals' relationship to wages." The commission discussed the latter relationship at some length and eventually concluded that, "(o)n balance, ... the proposals' relationships to wages predominate."

The commission assessed the competing interests identified by the district and the union and proceeded to weigh them to determine whether the proposed subjects should be characterized as mandatory, and that is precisely what the law requires to do. School Dist. of Drummond, 121 Wis.2d at 138, 358 N.W.2d at 291; West Bend, 121 Wis.2d at 9, 357 N.W.2d at 538 (footnote omitted).

What is clear is that all of these arguments were made to the Court of Appeals and rejected by it in its decision in the Madison case which was ultimately sustained by the Wisconsin Supreme Court.

There, of course, is no serious argument that the Board and, ultimately, the employes, have an interest in the reasonable containment of health insurance premium rates. Certainly the same interest is present with respect to fee-for-service health insurance or indeed any part of the economic package negotiated by labor organizations on behalf of employes. Nonetheless, because group health insurance is so clearly and intimately related to the employe's wages and conditions of employment, it is a mandatory subject of collective bargaining.

Having failed in its effort to demonstrate that HMO's were essentially all the same and therefore that the choice of a carrier made no difference to employes in bargaining units, the Board ultimately conceded that there were differences between every HMO plan presented in the Milwaukee metropolitan area. It further attempted to minimize the differences but was faced with the obvious wide range of differences in every plan (Tr. 871). The Board then shifted its argument to contend that although there were significant differences between the plans, nonetheless, the HMO carriers would never be responsive to the realities of their market place unless the employer alone had the unilateral right to terminate a carrier at any time of the employer's choosing. This latter argument not only was unsupported by the entire record in this case, but in fact was in contradiction to the direct evidence presented by every representative of the HMO carriers who testified at the hearing.

What is clear is that HMO carriers are keenly aware of the pressures of the market place. In particular, large employers are the primary market target of HMO's. A large employer was defined at the hearing as meaning any employer having 250 or more employes (Tr. 1041). MBSD, with in excess of 10,000 employes, is an extremely coveted target for any HMO carrier. The testimony at the hearing made clear that every one of the HMO representatives would go a long way in efforts to retain such an account.

The Board also contends that where the identity of an HMO was negotiated into the contract by a collective bargaining representative, HMO's would escalate premium costs by unnecessarily increasing benefits. This theory is somehow premised on the idea that HMO carriers are oblivious to the legitimate pressures of the marketplace. It is utterly without a logical basis and is contrary to experience.

What is clear is that HMO's must respond to market complaints as to costs and, if their rates are too high, they reduce those rates (Tr. 1050-1051). Where employers and labor organizations negotiate concerning the level of benefits, as in the MTEA proposal, individual employers will know what their obligation is with respect to their employes' health plans and will require that any HMO carrier, as

a precondition to continuing to be a carrier, will contractually agree to provide the benefits which have been negotiated by the labor organization and incorporated into the collective bargaining agreement (Tr. 1055).

It is also clear that an employer can and does negotiate the premium or rates charged by HMO carriers (Tr. 900).

The MTEA proposal requiring the Board to maintain the level of benefits during the life of the collective bargaining agreement is a mandatory subject of collective bargaining. The MTEA proposal, in pertinent part, reads as follows:

> The benefits offered by each health maintenance organization shall be those defined in the individual contracts between each HMO and the Milwaukee Board of School Directors in effect on ... (the date of agreement).

It is clear that the MTEA's proposal was intended to, and does, require the Board to maintain the level of benefits which are found in the HMO contract as of the date of the agreement. There is no doubt that any sensible employer, faced with a multi-year obligation under the collective bargaining agreement to maintain existing level of benefits, will be compelled to negotiate its annual contracts with the HMO carrier on a basis that ensures that there will be no reduction in the level of such benefits. For a skilled negotiator, this should not be a difficult task since it can be made a condition of the agreement allowing the carrier to be made available to employes in the collective bargaining unit. As the record made clear in the instant case, all of the HMO carriers which were asked about this maintenance of benefit requirement indicated that their company had the flexibility to assure an employer, particularly one the size of the Board, that it could maintain existing benefits during the life of a collective bargaining agreement.

What the clause requires additionally, of course, is that the employer coordinate its agreement concerning the identity of HMO carriers with a guarantee by the HMO that it will maintain existing benefits during the life of the agreement. Again, this coordination should not be difficult for a skilled negotiator. This is particularly true in negotiations between the MTEA and the Board since the period of negotiations leading up to final agreement on a collective bargaining agreement typically do not take place in a period of merely a few weeks. The bargaining history between the parties for the past 20 years has demonstrated that the time taken to negotiate collective bargaining agreements was ample in every instance to ensure that the Board could incorporate in any agreement with an HMO that the HMO would maintain existing benefits if it wished to be made available to employes of Board.

If the rather unlikely situation arose that the MTEA insisted upon a particular carrier which in return refused to contractually agree to maintain the level of benefits during the life of the collective bargaining agreement, the matter could well go to impasse pursuant to the provisions of Sec. 111.70, Stats. It does not take any great conjecture to conclude which party would prevail if the union insisted upon the inclusion of a carrier which refused contractually to agree to maintain the level of benefits during the life of the collective bargaining agreement. It is clear that an arbitrator would not look favorably on a proposal for which the employer demonstratably could not get the designated insurance carrier to agree to the terms insisted upon by the union.

In Racine Unified School District, Dec. No. 23381-A, the Commission had occasion to rule upon the mandatory or permissive nature of the following proposal:

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

The Commission held:

> 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.
>
> (Racine, Dec. No. 23380-A, p. 17)

Clearly, in the instant proposal, the MTEA seeks to maintain the level of benefits which existed on the target date set forth in the proposal. The Board, on the other hand, insists it should have the power to change HMO benefits during the life of a collective bargaining agreement. The Board's argument in this respect has been answered by the Commission which has held that a proposal which would give an employer the ability to change benefits during the term of a union contract, is a mandatory, not permissive, subject of bargaining. As the Commission stated in Racine:

> We also reject the Association's contention regarding the impropriety of a proposal which may allow for some change in benefit level (during the life of a collective bargaining agreement). When bargaining a successor contract, both parties have the statutory right to seek changes in mandatory subjects of bargaining.
>
> (Ibid, p. 17)
>
> It is clear that if the Board wishes flexibility in dealing with level of benefits during the life of the contract, it cannot achieve this goal through unilateral fiat. It must negotiate with the collective bargaining representative of its employes.

In the MTEA's view, the Racine case also goes a long way in deciding the issues in the instant declaratory ruling proceeding relating to dental coverage under health maintenance organization plans. In Racine, the Commission stated as follows:

> As with the District's health insurance proposal, the Association contends that the following dental insurance proposal is nonmandatory because the benefit level is vague and uncertain.
>
> "The Board shall provide each teacher with the opportunity to participate in 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.
>
> (Racine, Id., p. 18)

It is clear in the instant case that there is no basis for departing from the rationale expressed by the Commission in its Racine decision. The Commission should find that the MTEA HMO-Dental proposal with respect to the maintenance of existing levels of benefits is a mandatory subject of collective bargaining.

In summary, it is respectfully submitted that the MTEA proposals consitute mandatory subjects of collective bargaining. The identity of the HMO group medical insurance carriers clearly has a direct and significant impact upon the level of medical benefits which are received by members of the collective bargaining agreement. Since the HMO plans vary greatly with respect to basic plan and additional riders, their availability to members of the bargaining unit has a direct and substantial impact upon the level of medical benefits members of the bargaining unit will have available to them during the life of a collective bargaining agreement. The aspect of the proposal requiring maintenance of the level of benefits is also clearly a mandatory subject of bargaining.

DISCUSSION

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

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

We commence our analysis of the specific proposals at issue herein by noting that the scope of insurance benefits available to employes as well as the cost, if any, of such benefits to employes are "wages" within the meaning of Sec. 111.70(1)(a), Stats., and thus have long been held to be mandatory subjects of bargaining. Mid-State VTAE, Dec. No. 14958-B, D (WERC, 4/78); Sewerage Commission of the City of Milwaukee, Dec. No. 17302 (WERC, 9/79); Madison Schools, supra. See also, Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); Labor Board v. General Motors Corp., 179 F.2d 221 (CA-2 1950); W.W. Cross & Co. v. Labor Board, 174 F.2d 875 (CA-1 1949); Inland Steel Co. v. Labor Board, 170 F.2d 247 (CA-7 1948). Mandatorily bargainable insurance benefit issues have been said to include not only the type and level of expenses to be covered by insurance but also the manner in which the insurance policy or plan is administered when said administration impacts upon wages, hours and conditions of employment. School District of Menomonie, Dec. No. 16724-B (WERC, 1/81); Keystone Steel and Wire v. NLRB, 606 F.2d 171 (CA-7 1974). Thus administrative matters such as speed of claims processing, availability of a labor consultant and claim filing procedures have been held to be mandatory subjects of bargaining because they determine the speed and ease with which employes may procure the bargained for benefits. Keystone, supra.

The MTEA medical HMO proposal states:

> 1. k. As a voluntary option to the hospital-surgical and major medical benefits provided for above, (hereinafter referred to as the health insurance plan) the Board shall make available health maintenance organization coverage through Compcare of Wisconsin, Family Health Plan, Maxicare Health Insurance Company, Samaritan Health Plan and Total Care Health Plan.
>
> The benefits offered by each health maintenance organization shall be those defined in the individual contracts between each HMO and the Milwaukee Board of School Directors in effect on January 1, 1985. For the employe selecting health maintenance organization coverage, the Board shall pay an amount equivalent to the single or family health insurance plan premium which

> would be paid for that employe if enrolled in the health insurance plan. Any amount charged by the health maintenance organization for single or family coverage over and above the amount of the health insurance premium shall be paid by the employe on a payroll deduction basis.

As an alternative to the health insurance benefits offered by the Board through a self-insured plan administered by Blue Cross-Blue Shield, the MTEA proposal would allow employes to select the benefits offered by one of five listed HMO's. Under the proposal, the Board would be obligated to assume the cost of the HMO option up to a specified level and the benefits would be those in effect as of a specified date.

In Madison Schools, we concluded that a proposal which specifies the identity of an insurance carrier as the source of health insurance benefits is a mandatory subject of bargaining where it established that the named carrier provides a unique package of benefits to employes. Our conclusion was upheld by the Court of Appeals in Madison Metropolitan School District v. WERC, 133 Wis.2d 462 (1986). In Madison Schools, we concluded that the record created by the parties established the unique nature of the benefit plan offered by the carrier named in the proposal. We commented:

> Our review of that record satisfies us that at the time in question, all insurance carriers and/or administrators involved herein provide unique benefit packages. We so find because, even where the policy provisions are identical, carriers and/or administrators frequently interpret and/or administer said provisions in different manners and these differing interpretations yield different benefits for employes. Tr. 101, 302, 320, 387-388 425, 490-492, 516. For example, certain benefits in all policies are paid at a level specified as "usual, customary and reasonable" or "reasonable and customary." The evidence demonstrates that carriers utilize different procedures to generate the data upon which the "usual, customary and reasonable" payment level determinations are based, resulting in different payments for identical claims in a least some circumstances. Tr. 72, 86, 97, 129, 147, 173-177, 182-183, 223-224, 283-284, 326, 336, 364-365, 425-427, 496. Moreover, the record reveals that insurance policies typically limit certain benefits to medical procedures which are "medically necessary." The record establishes that the different decisionmakers for each carrier/administrator ultimately define the term "medically necessary" differently in at least some circumstances and thus the benefit levels related thereto are different from carrier to carrier. Tr. 64-65, 140, 318, 417, 488. MTI's proposals herein thus seek to maintain what are unique benefit packages and hence the proposals have a direct relationship to employe wages.

Here, the record created by the parties during 14 days of hearing definitively establishes that the benefit packages offered by the five HMO's named in the MTEA proposal are unique on their face. See, for example, Tr. 94, 147, 212-213, 230, 418, 430, 473, 594-595, 884, 904, 923, 957; Exh. 20-27, 609-610, 612-615, 633, 637-638, 642, 691, 731. As was the case in Madison Schools, even where benefit provisions appear identical, the interpretation/administration of said benefit provisions produce different benefits for employes. See, for example, Tr. 129, 133, 139, 153, 226-227, 238-240, 263-264, 593, 880, 883-834.

The Board herein does not assert that the MTEA proposal implicates any "educational policy" or "managerial" interest in the operation of schools which must be balanced against the proposal's relationship to "wages." Instead the Board argues that we must balance the "cost" implications of the "wage" proposal against the value of the proposal to the employe. The Board herein asserts that even though there are differences between the benefits provided by HMO's, the differences are not significant enough when balanced against the cost implications of the proposal to render the proposals mandatory subjects of bargaining. The Board premises this argument in large part upon the underlined portions of Sec. 111.70(1)(a), Stats.:

(a)"Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employe to perform law enforcement and fire fighting services under s. 61.66, except as provided in s. 40.81 (3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employes under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. 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. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

We have consistently held that considerations of "cost" are fundamentally irrelevant to a proposal's mandatory or permissive status. 2/ City of Wauwatosa, Dec. No. 17947 (WERC, 7/80); School District of Campbellsport, Dec. No. 20936 (WERC, 8/83); Racine Unified School District, Dec. No. 20653-A (WERC, 1/84) aff'd (CtApp II, 1986, unpublished); School District of Janesville, Dec. No. 21466 (WERC, 3/84); Wausau Area Transit System, Dec. No. 25563 (WERC, 7/88). Indeed, in Madison Schools, we rejected the argument that Sec. 111.70 (1)(a), Stats., compels such an analysis stating:

Section 111.70(1)(a), Stats., which defines "collective bargaining" and is cited by the District as primary basis for the foregoing argument, explicitly makes the exercise of the public employer's powers for the welfare of the public "subject to those rights secured to public employes . . . by this subchapter." Thus, municipal employes' right to bargain, which is secured by said subchapter, serves as a limitation upon employer power to act for the public welfare. Equally as significant, in our view, is the reality that if cost became a basis for finding matters of employe compensation (i.e., "wages") to be permissive subjects of bargaining, municipal employes' right to bargain over the compensation they will receive for their services would be seriously undermined. Therefore, we have consistently held that the actual or potential cost of a compensation proposal and the implications of such costs on the employer's level of services are considerations which are relevant to the merits of the proposal but not to its mandatory or permissive nature.

2/ Even if one were to engage in such an analysis, the record herein would easly allow one to quarrel with the Board's contention that there are only "minimal" differences between HMO's and that the "cost" implications of the proposal are self-evident. In any event, such arguments are grist for the bargaining table or interest arbitration hearing and not a declaratory ruling proceeding.

As we remain persuaded that considerations of "cost" are irrelevant to our determination, we reject the Board's contention that we should engage in such an analysis herein.

We have also historically rejected any analysis which would involve our making judgements as to whether the employes "need" or "deserve" the compensation which a proposal seeks to provide. Thus, in Racine Unified School District, Dec. No. 20653-A (WERC, 1/84); aff'd (CtAppII, 1986) unpublished, we noted:

> District concerns as to whether the levels of compensation specified in the proposals are warranted because teachers may not be working harder or may not be exerting sufficient additional effort to justify the additional compensation are appropriate for discussion at the bargaining table or before a mediator-arbitrator. They are not relevant when determining whether a proposal is mandatory or permissive. We do not find Beloit or any other existing Commission or court decision to be contrary to our conclusion in this regard.

Given the foregoing, we find irrelevant the Board argument that the availability of a choice among HMO providers is not particularly significant to employes because a "traditional" indemnity plan is also available. Such argument should be reserved for the bargaining table or interest arbitration hearing.

The Board has also argued herein that the aspect of the MTEA proposal which sets benefit levels is permissive because HMO's have no flexibility as to benefit offerings. 3/ This argument is also irrelevant to a determination of the proposal's mandatory or permissive status. If the Board can persuade the MTEA or an interest arbitrator of the validity of its premise, presumably the likelihood of this aspect of the proposal appearing in a contract would be impacted. However, resolution of the parties' dispute as to the validity of the Board's premise has no place in our determination of the proposal's bargainable status.

As we have found the MTEA proposal to establish unique benefit levels to employes and thus to have a direct relationship to "wages"; as the Board's "cost" and "flexibility" arguments are not relevant considerations to be balanced against the proposal's "wage" relationship; and as we are satisfied that any other "managerial" interests which, although not argued, may be present herein 4/ are insufficient to overcome the "wage" relationship of the proposal, we find the proposal to be primarily related to "wages" and thus a mandatory subject of bargaining.

As the parties' argument as to the "dental" HMO proposal set forth in Finding of Fact 4 is essentially the same as that applicable to the "health HMO proposal and as our analysis thereof is equally applicable to the "dental" HMO proposal, we also find said proposal to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 23rd day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

(Footnote 3/ and 4/ found on page 28)

3/ As was the case with the Board's cost analysis arguments, the Board's factual premise regarding lack of flexibility is not necessarily borne out by the record.

4/ In Madison, we noted:

> While we have found no educational policy impact and have rejected the District's arguments based on cost, where (as here), the majority representative proposes that the municipal emloyer obtain health insurance for employes, there are management interests in having a carrier that will be reliable and cooperative with the District that must be balanced against the proposals' relationships to wages. On balance, however, we find that the proposals' relationships to wages predominate.