STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	:	Case 110 No. 40056 MP-2064 Decision No. 25283-A

Appearances:

Schwartz, Weber, Tofte & Nielsen, Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin, 53403, appearing on behalf of Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack Walker and Ms. Carol Gapen, Suite 600, 119 Martin Luther King, Jr. Blvd., P.O. Box 1664, Madison, Wisconsin, 53701, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Racine Education Association filed a complaint on January 22, 1988, with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District had violated Secs. 111.70(3)(a)1 and 3, Stats., by failing to reinstate those teachers who had been area coordinators to those positions or to restore the area coordinator positions, and Secs. 111.70(3)(a)1 and 4, Stats., by (failing to bargain before) unilaterally implementing changes in wages and other conditions of employment. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Racine, Wisconsin on April 29, 1988, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs and the District filed a reply brief by August 8, 1988. The record was closed on August 18, 1988, when the Association notified the Examiner it would not be filing a reply brief. The Examiner having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Racine Education Association, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has it principal office at 701 Grand Avenue, Racine, Wisconsin 53403; and that James J. Ennis is Executive Director of Racine Education Association and is its agent.

2. That Racine Unified School District, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal office at 2220 Northwestern Avenue, Racine, Wisconsin 53404; and that Frank L. Johnson is Director of Employee Relations of the Racine Unified School District and is its agent.

3. That at all times material to this proceeding, the Association has been the certified exclusive bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the District, excluding on-call substitute teachers, interns, supervisors, administrators, and directors.

4. That the Association and the District have been parties to a series of collective bargaining agreements; that these agreements have provided for final and binding arbitration of unresolved grievances; and that the two labor agreements preceding the current agreement, as well as the current 1985-1988 agreement, contained the following pertinent provision at Article XIV, Section 6:

> Teachers who satisfactorily perform assigned extra-duty responsibilities which are in addition to their regular

> classroom duties and regularly assigned extra-curricular work will be paid additional compensation above the basic salary schedule as set forth in the schedule "Compensable Extra Duty Responsibilities."

5. That one of the extra duty positions listed in the schedule entitled "Compensable Extra Duty Responsibilities" referred to above is middle school coordinator, also known as middle school area coordinator; that this extra duty position has existed since about 1960 and been in the parties' labor agreement since 1969 or 1970; that the position of area coordinator in the middle school is similar to that of department chairperson in the high school; that the middle school area coordinator is a teacher who has the responsibility that a department runs smoothly; that the middle school area coordinator acts as communicator between teachers and administrators, assists in scheduling and inventory, coordinates budget requests, monitors the use of materials and coordinates standardized testing; that pursuant to Article XIV, Section 6, middle school area coordinators receive extra compensation; and that in the 1986-87 school year, there were about 50 teachers in the District's middle schools who held the extra duty position of area coordinator.

6. That in the summer of 1987, the Racine School Board decided to reduce expenses in order to control increases in property taxes; that on July 20, 1987, the Board met to consider adoption of the 1987-88 budget and to vote on numerous proposals to reduce and/or eliminate expenses; that as is customary, the Association received a notice of this meeting, a copy of the agenda for the meeting and back up documents giving information on the budget and detailing which expenses were proposed for reduction and/or elimination; that this informational packet included a recommendation regarding a proposal to eliminate the extra duty position of middle school area coordinator; that the projected cost savings for elimination of the middle school area coordinator position in 1987-88 was $40,000; that at the July 20th meeting, the Board approved budget proposals which, among other things, eliminated the extra duty position of middle school area coordinator, effective at the start of the 1987-88 school year; and that the Association was aware of the School Board's decision to eliminate the extra duty position of middle school area coordinator.

7. That at the time of the School Board's budget decision on July 20, 1987, to eliminate the area coordinator position, the parties did not have a current labor agreement; that the parties 1982-85 collective bargaining agreement had expired August 24, 1985; that after that agreement expired, the parties engaged in negotiations over a successor labor agreement; that during these negotiations, neither side raised the topic of middle school area coordinators; that the Association eventually filed a petition for mediation/arbitration and the parties thereafter engaged in the statutorily proscribed process; that by December, 1986, the parties had exchanged final offers which were thereafter certified; that both final offers included the language set out above in Article XIV, Section 6 and both included the position of area coordinator in the schedule entitled "Compensable Extra Duty Responsibilities", with the only difference being that the payment for all extra duty assignments was pegged to an actual dollar amount in the District's offer while the Association's offer expressed the compensation rate in terms of a ratio; and that the middle school area coordinator position was maintained during this two year contract hiatus period (1985-87) and the persons holding this position were compensated according to the ratios set forth in the Article XIV "Compensable Extra Duty Responsibilities" salary schedule.

8. That on August 17, 1987, Association Attorney Robert Weber wrote the following letter to Frank Johnson, the District Director of Employee Relations:

> The Racine Education Association has authorized me to formally request bargaining over the school board's recent decision to eliminate the area coordinator positions in the middle schools. The Association anticipates that the duties will either have to be carried on by the same individuals without the additional compensation the assignment formerly carried with it, or by the individual teachers, thereby significantly increasing their job responsibilities.

> The Association believes that, particularly in view of the Board's own final offer, the elimination of these positions is a prohibited practice in any event. For purposes of commencing school in an orderly fashion, however, the Association is prepared to bargain at once.
>
> Please coordinate a date at your earliest convenience with James Ennis. Thank you for your immediate attention to this matter.;

that Johnson responded to Association Executive Director James Ennis with the following letter dated August 19, 1987:

> This is in response to Robb Weber's letter of August 17, 1987 in which he asked me to contact you concerning bargaining the impact of the elimination of the area coordinator positions.
>
> I will be happy to meet with you in this regard. If you wish to propose something in this area please forward it to me in order that it may be reviewed prior to our meeting. This should save some time.
>
> Please let me know whenever you wish to meet.;

that following this exchange of letters, neither the Association nor District made a proposal regarding either eliminating area coordinators or the effect of eliminating same; and that there were no discussions between the parties following the certification of final offers regarding either eliminating the area coordinator position or the impact such elimination may have.

9. That no teachers were assigned to be area coordinators in the middle schools for the 1987-88 school year; that after the 1987-88 school year had begun, the parties negotiated a new 1985-88 collective bargaining agreement which was signed on October 19, 1987; and that this agreement left the section of the agreement on extra duty positions unchanged from previous agreements, and also left the position of area coordinator on the schedule entitled "Compensable Extra Duty Responsibilities."

10. That the record demonstrates that when other extra duty positions on the extra duty compensation schedule were eliminated or reduced, the contract provisions were left unchanged; that in 1981-82, the District reduced the positions of coordinators in foreign language, home economics and vocational guidance from full-time to .6 time; that also in 1981-82, the District eliminated all intern positions and the intern supervisor; that in 1982-83, the District eliminated the position of vocational guidance coordinator; that in 1983-84, the District reduced the number of helping teachers from nine to three, and that this resulted in the elimination of six subject area helping teacher positions (including the music helping teacher); that the positions of subject and music helping teachers, foreign language coordinator, home economic coordinator, vocational guidance coordinator, and supervisor of interns still appear in the schedule entitled "Compensable Extra Duty Responsibilities" in the current contract, even though these positions have been either eliminated or reduced; that where the positions have been eliminated, these duties are not assigned so no one gets paid for them; that the same extra duty salary schedule also lists the compensation for staff involved in middle school dramatics; that if a middle school puts on fewer dramatic productions than are authorized, not all the extra duty positions relating to middle school dramatics are filled and the compensation listed on the schedule does not get used; and that because of the above-noted history, leaving the position of middle school area coordinator in the current labor agreement on the schedule entitled "Compensable Extra Duty Responsibilities" after the position had been eliminated did not reestablish that position.

11. That on January 7, 1988, Mike Frontier, principal of Mitchell Middle School, issued a memo directing teachers to complete certain inventory forms; that the Association filed a grievance on January 21, 1988 alleging that:

> The District has assigned teachers extra-duty responsibilities which are in addition to their regular classroom duties and which have traditionally been performed as compensable extra-duty responsibilities but has not paid for the extra work under the schedule set out in the contract.;

that as a remedy for this alleged contractual breach, the Association sought the following remedy:

> Immediate reinstatement of pay and designation of "coordinator" title and assignment for all middle school teachers so affected.;

that attached to this grievance was Frontier's memo referred to above; that this grievance had not been arbitrated at the time the record herein was closed; that the Association filed the instant complaint on January 22, 1988, the day after the grievance was filed; that the complaint alleged in paragraph 4 that the District, after execution of the 1982-85 (sic) labor agreement:

> failed to reinstate the individual teachers to the extra-duty positions they held or to restore the area coordinator positions.;

that, citing Frontier's memo, the complaint further alleged in paragraph 5 that teachers had been required and/or directed:

> to perform assignments which by contract and by long-standing practice were extra duty assignments not fairly within the scope of daily teaching responsibilities;

and that in order to remedy these alleged statutory violations, the Association sought the following relief:

> 1. An order requiring the Respondent to implement Article XIV of the labor agreement in its entirety
>
> 2. An order requiring Respondent to cease and desist from its directives requiring teachers to perform extra duty work without extra duty compensation.

12. That when the District eliminated the middle school area coordinator position, it did not individually or in concert with others (1) interfere with, restrain or coerce municipal employes in the exercise of their rights; (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; or (3) refuse to bargain collectively with a representative of a majority of its employes; and that by its inaction, the Association waived any obligation on the District's part to bargain about the effect of eliminating area coordinators on the wages, hours and working conditions of employes represented by the Association.

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

CONCLUSIONS OF LAW

1. That the District's decision to eliminate the extra duty position of area coordinator is a permissive subject of bargaining which could be unilaterally implemented by the District.

2. That inasmuch as the District offered to bargain the impact of the decision to eliminate the area coordinator position, the District did not refuse to bargain within the meaning of Secs. 111.70(3)(a)1 and 4, Stats.

3. That inasmuch as the Association never presented any proposals on the impact of the decision to eliminate area coordinators nor raised the issue during the then ongoing bargaining process, the Association waived by inaction its right to bargain over the impact of the District's decision, and therefore, the District did not violate Sec. 111.70(3)(a)4, Stats.

4. That the District has not been shown to have committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 or 3, Stats., by its conduct in eliminating the area coordinator position.

5. That the question of whether the District committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by violating the terms of the labor agreement has neither been raised in the pleadings nor otherwise been made

an issue that may properly be adjudicated herein, so the Commission's jurisdiction will not be asserted to determine whether the District breached the labor agreement in violation of Sec. 111.70(3)(a)5, Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 12th day of October, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones
Raleigh Jones, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the Association alleged that the District violated Secs. 111.70(3)(a)1 and 3, Stats., by failing to reinstate those teachers who had been area coordinators to those positions or to restore the area coordinator positions, and Secs. 111.70(3)(a)1 and 4, Stats., by (failing to bargain before) unilaterally implementing changes in wages and other conditions of employment. The answer admitted that the District eliminated the extra duty position of area coordinator, but denied that in doing so it had violated Secs. 111.70(3)(a)1, 3 or 4, Stats.

ASSOCIATION'S POSITION

The Association states the issues for decision as follows:

> 1. Did the District have a duty to continue the status quo relating to area coordinators beyond the 1986-87 school year?
>
> 2. Were the additional duties assigned to teachers in the 1987-88 school year fairly within the scope of their jobs?
>
> 3. Was the assignment of area coordinator duties, following ratification of a new labor agreement, a prohibited practice?

The Association answers the first issue noted above in the affirmative. It contends that the District violated its duty to maintain the status quo by eliminating area coordinators for the 1987-88 school year. In this regard, the Association notes that following the expiration of the parties 1982-85 labor agreement, the District continued to assign and pay area coordinators during the 1985-86 and 1986-87 school years in accordance with its status quo commitment. The Association asserts that this changed on July 20, 1987, when the School Board voted to eliminate the area coordinator position. According to the Association, this decision was primarily related to wages and working conditions and hence was a mandatory subject of bargaining. It asserts that the District did not offer to bargain over its decision to eliminate the area coordinator position; did not obtain the consent of the Association to modify its pending final offer; and subsequently ratified a new agreement with no intention of abiding by it. The Association therefore argues that the District's unilateral implementation of its new proposal (on area coordinators) changed the status quo (on area coordinators) contrary to the Commission's Brookfield 2/ decision.

The Association answers the second issue noted above in the negative. In this regard, the Association first asserts that the duties formerly performed by area coordinators were subsequently assigned to individual teachers and second that since these duties are semi-administrative in nature, they represent additional duties over and above those fairly within the scope of regular teacher job responsibilities. In support of this first proposition, the Association contends that the District's directive to individual teachers during the 1987-88 school year to perform area coordinator functions without choice or compensation constitutes a violation of the District's good faith bargaining responsibilities. In support of the latter proposition, the Association submits that Exhibit 17 (a description of the area coordinator position prepared by the assistant superintendent for the purpose of justifying retention of the area coordinator position) clearly proves that where the area coordinator duties are being assigned to regular teachers, those duties are beyond the scope of their regular job.

The Association answers the third issue noted above in the affirmative. It contends that it assumed, following ratification of the successor agreement, that

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2/ Decision No. 19822-C (WERC, 11/84).

the area coordinators would be paid through the 1987-88 school year. Inasmuch as that did not happen, the Association asserts that the District, by its settlement, deceived the Association into believing that the (area coordinator) matter would be resolved. What has happened here, according to the Association, is that employes are not being paid for performing area coordinator duties, but are being assigned the duties anyway. It contends that such unilaterally imposed changes in teachers' conditions of employment constitute per se violations of the District's duty to bargain.

DISTRICT'S POSITION

The District states the issues for decision as follows:

1. Did the Association waive its right to bargain when it failed to present any proposals?

2. Alternatively, did the Association release the District from any duty to bargain when it raised the issue, and then agreed to a contract which covered the issue?

3. Alternatively, did the District's assignment of inventory responsibilities to teachers violate Sec. 111.70(2) and 111.70(3)(a)1 and 4, Stats., when those responsibilities are fairly within the scope of a teacher's duties?

It is the District's position that it lawfully eliminated the area coordinator position. According to the District, the decision to eliminate the area coordinator position was not a mandatory subject of bargaining but was instead primarily related to educational policy. The District therefore argues it could unilaterally decide to eliminate the area coordinator position.

With regard to the first issue noted above, the District contends it offered to bargain with the Association over the effects of this decision, but the Association never presented any proposals nor brought up the issue during bargaining. The District asserts it was not responsibile for presenting proposals on the impact of its own policy decision. Thus, it argues the Association has waived any right it had to bargain the impact of eliminating area coordinators. According to the District, the Association has a history of bringing complaints alleging refusal to bargain when the District has made a policy decision. In support thereof, it cites previous instances wherein, it avers, the Association asked to bargain; the District offered to bargain; the Association did not bargain and then was unhappy with the result. In each case, it was held that the District had no duty to bargain with the Association because the Association had waived its right to bargain. The District asks the Examiner to dismiss the instant complaint for the same reason.

Addressing the second issue noted above, the District contends that the Association has released it from any duty to bargain the impact of this decision. In this regard, the District notes that the parties' latest labor agreement included a raise for all teachers and left the area coordinator provision unchanged. According to the District, the Association negotiated a raise for all teachers with the knowledge that the elimination of the area coordinator position would result in less extra duty compensation. In addition, the District cites previous instances wherein other positions on the extra duty compensation schedule were eliminated or reduced but the contract provisions were left unchanged. Because of this history, the District submits that the Association knew, or should have known that leaving the existing language in the contract did not reestablish the position. In response to the Association's allegation that the District acted in bad faith because the Association's expectation was that the District would reinstate the area coordinator position, the District notes that there is no evidence in the record of any intent to mislead; therefore, the District asserts it did not act in bad faith.

With regard to the third issue noted above, the District asserts that the Brookfield 3/ status quo decision does not apply to the work allegedly assigned to teachers because the assignment of any given work to teachers was not an issue in the interest arbitration. Alternatively, even if the District had a duty to maintain the status quo with respect to the effects of eliminating the area coordinator position, it submits it did so because it did not assign additional work to the teachers. Alternatively, the District contends it assigned teachers only duties they had performed before and which were fairly within a teacher's responsibility. Therefore, when Mitchell Middle School Principal Frontier sent the January 7, 1988, memo to teachers at his school directing them to fill out inventory forms, the District argues he was lawfully instructing teachers to perform an assignment (i.e. inventory) within the scope of their responsibilities as teachers. In support thereof, the District cites Board policy 4116.31, which lists the responsibilities of teachers and requires them to "prepare such lesson plans, records and reports as are required by the principal or central office." The District submits that an inventory is such a record and report. It further asserts that teachers have traditionally taken inventory the same way Frontier told them to in his memo. In this regard, the District cites other memos to teachers directing them to inventory their rooms.

Finally, it is the District's position that the Association's true claim herein is that the District has breached the contract by its actions. It notes though that the Association has not brought this contractual claim before the WERC; instead, this contractual claim is being pursued through the arbitration step of the parties' grievance procedure. Although the Association has pleaded claims under various subsections of MERA, the District submits that all these claims are subsumed into the pending grievance claim. The District further avers that the Association has a history of bringing contractual claims as prohibited practice complaints, even though the parties have an arbitration procedure, and cites previous instances wherein the Commission declined to address the Association's breach of contract claims. It therefore asks the Examiner to dismiss the complaint.

DISCUSSION

As noted in the Findings of Fact, in the summer of 1987 the Racine School Board responded to increases in local property taxes by cutting the budget. On July 20, 1987, the School Board met and voted on proposals to reduce and/or eliminate expenses. Among other things, the Board decided as a cost cutting measure to eliminate the extra duty position of middle school area coordinator. In the 1986-87 school year, there had been approximately 50 extra duty area coordinator positions which had been filled by teachers who acted to facilitate communication between teachers and administration and assisted in scheduling and other organization. Area coordinators received extra duty compensation which was estimated to be $40,000 for the 1987-88 school year. As a result of this Board action, no middle school teachers were assigned to be area coordinators for the 1987-88 school year.

The issues herein turn on whether by this conduct (i.e. the elimination of the extra duty area coordinator position), and the events flowing therefrom, the District violated MERA.

Alleged Violation of Sec. 111.70(3)(a)4 and 1, Stats.

The Commission has held that in disputes subject to final and binding interest arbitration, the MERA duty to bargain, which is enforced by Sec. 111.70(3)(a)4, Stats., and, derivatively, by Sec. 111.70(3)(a)1, Stats., ordinarily requires that the parties maintain the status quo as regards mandatory subjects of bargaining until a settlement or arbitration award is reached in the matter. 4/ However, in the case of permissive subjects of bargaining, there is no such bargaining duty. 5/ Here, the Association asserts that the elimination of the area coordinator position is a mandatory subject of bargaining while the

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3/ Ibid.

4/ City of Brookfield, supra at 7.

5/ Greenfield School District No. 6, Dec. No. 14026-B (WERC, 11/77).

District contends it is not. Thus, the first line of inquiry, then, is whether the elimination of the area coordinator position is a mandatory subject.

Under Wisconsin law, the principle determining mandatory or permissive status is whether the subject is primarily related to wages, hours and conditions of employment or whether it is primarily related to the formation and choice of public policy; the former subjects are mandatory and the latter permissive. 6/ In applying this "primary relationship" test, the Wisconsin Supreme Court concluded that bargaining is not required with regard to "educational policy and school management and operation" or the "management and direction of the school system." 7/ In accord therewith, the Commission has held that a school district's allocation of the time and energy of its teachers is a consequence of its basic educational policy decisions. 8/

In Oak Creek 9/, the Commission found that the school district could unilaterally establish the positions of department heads and unit chairmen. This finding was reaffirmed in Milwaukee Board of School Directors wherein the Commission determined that the school board need not bargain over the formation of a unit leader position nor the manner in which the unit leader's time would be allocated as such decisions "primarily relate to educational policy and the organizational structure which the Board believes is most appropriate to the fulfillment of the educational policy goals." 10/ Since these decisions provide that a school district can unilaterally establish the position of department head, it logically follows from them that a district can likewise unilaterally eliminate said position. Inasmuch as the extra duty area coordinator position here is the middle school equivalent of a high school department head, these cases control herein and warrant the conclusion that the decision to eliminate the extra duty area coordinator position was a permissive subject of bargaining.

Implicit in a finding that a subject is a permissive subject of bargaining is the conclusion that the employer may act without obtaining the prior agreement of the Union. 11/ To hold otherwise would be to reduce the distinction between mandatory and permissive subjects to a nullity. 12/ Inasmuch as the District was not obligated to obtain the prior agreement of the Association before it eliminated the area coordinator position, the District could unilaterally eliminate said position as a matter of school policy without bargaining over the decision itself with the Association. 13/ Therefore, contrary to the Association's

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6/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977); Beloit Education Association v. WERC, 73 Wis.2d 43 (1976).

7/ Beloit, supra at 52, 67.

8/ Oak Creek Franklin Jt. School District, Dec. No. 11827-D, E(WERC, 9/74) aff'd (CirCt Dane, 11/75); See e.g. Milwaukee Board of School Directors, Dec. No. 23208-A (WERC, 2/87).

9/ Oak Creek, supra at 17.

10/ Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) at 46.

11/ Racine Unified School District No. 1, Dec. Nos. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78) at 45; City of Madison (Police), Dec. No. 17300-C (WERC, 10/83) at 7. This is not to say though

contention, the Commission's Brookfield status quo decision is inapplicable here because it was expressly held therein that "this holding does not, of course, affect the municipal employer's rights to implement changes in permissive subjects of bargaining." 14/ Thus, since Brookfield's prohibition against implementing changes in mandatory subjects, pending interest arbitration, does not apply to permissive subjects, the District had no obligation to maintain the status quo on a permissive subject of bargaining. Likewise, the District was not precluded from implementing the unilateral change involved here even though it was a change from what was contained in the District's certified final offer.

The Association also relies on the U.S. Supreme Court's decision of NLRB v. Katz 15/ for the proposition that unilaterally imposed changes in conditions of employment constitute a per se violation of the employer's duty to bargain. In that decision, the Court found that the employer had violated its statutory obligation to bargain where it unilaterally implemented changes which were mandatory subjects of bargaining and still under negotiation. Here, though, the unilaterally imposed change involved a permissive subject, not a mandatory subject, so the Katz decision is distinguishable from the instant situation on that basis alone.

Having found that the decision to eliminate the middle school area coordinator position was permissive, this decision nevertheless had an impact on the wages, hours and working conditions of middle school teachers which was bargainable. Thus, the question remains whether the District refused to bargain with regard to the impact thereof.

The Commission has previously held that the extent of a municipal employer's obligation to bargain impact is dependent on the extent of the Union's request in that regard. 16/ Here, the District offered to bargain with the Association over the effects of its decision. Following receipt of this offer to bargain, it was incumbent upon the Association to make a proposal regarding the matter. 17/ Put conversely, the District was not responsible for presenting proposals on the impact of its own policy decision. 18/ However, the Association never raised the matter in the then ongoing negotiations. Similarly, at no time up to the hearing herein did the Association ever submit any proposals dealing with the effects of the decision to eliminate the area coordinator position over which the District could bargain. What happened here then is that the Association asked to bargain, the District offered to bargain and then the Association never followed through with same. In the opinion of the Examiner, these circumstances will simply not support a finding that the District ever refused to bargain with regard to the impact of its decision to eliminate the area coordinator position. Rather, the Examiner is persuaded that these circumstances support the conclusion that the Association waived its right to bargain over the impact of the District's decision by its inaction.

Next, the Association contends that the District acted in bad faith in implementing its decision to eliminate the area coordinator position because the Association expected that the District would reinstate the area coordinator position following the ratification of the new labor agreement. It is true that when the parties signed the 1985-88 labor agreement on October 19, 1987, the extra duty contract provision was left unchanged from the previous labor agreement. This meant that the position of area coordinator was again listed in the extra duty compensation schedule, even though the School Board had voted two months before to eliminate said position. Be that as it may, this listing of the area coordinator position in the extra duty compensation schedule did not reestablish the position which had just been eliminated by Board action. This is because the record indicates the parties have previously left the extra duty compensation

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14/ Brookfield, supra at 11.

15/ 369 U.S. 736, 50 LRRM 2177 (1962).

16/ City of Madison (Police), supra, at 6.

17/ Racine Unified School District, Dec. No. 18810-A (Shaw, 7/82) at 8, aff'd by operation of law, Dec. No. 18810-B (WERC, 8/82).

18/ Racine Unified School District No. 1, supra, at 45.

schedule unchanged when other positions on the extra duty compensation schedule were eliminated by Board action. For example, the extra duty positions of intern supervisor, vocational guidance coordinator and music helping teacher have all been eliminated in recent years, yet the positions still remain listed on the extra duty compensation schedule of the current labor agreement. In light thereof, the Examiner is persuaded that the Association knew or should have known that leaving the position of area coordinator in the extra duty compensation schedule did not reestablish the position after it had been eliminated. Moreover, notwithstanding the Association's claim that it was deceived into believing that the (area coordinator) matter would be remedied, there is no evidence in the record of any intent by the District to mislead the Association with regard to the area coordinator matter. What the Association claims it expected, but never communicated to the District, is not dispositive herein. This is because one party's unilateral expectation is not a basis for inferring bad faith or misleading the other party. 19/ It is therefore held that the District did not act in bad faith in implementing its decision to eliminate the area coordinator position and hence, its implementation of same was lawful.

The Examiner now turns to the Association's contention that the District's ongoing unilateral assignment of area coordinator duties to regular teachers constitutes a prohibited practice because such duties are not within the scope of teachers' regular job responsibilities.

When faced with the conflict between management's desire to assign work and a union's desire to bargain over work assignments, the Commission has previously determined that management has the right to unilaterally assign duties generally recognized as fairly within the scope of the job. 20/ Under this test, a school district need not bargain about the allocation of duties to be performed during the normal teacher work day that are fairly within the scope of a professional educator's job. 21/ Only new, changed, additional or increased duties which are also not fairly within the scope of the responsibilities applicable to the type of work performed must be bargained. 22/ Therefore, the question here turns on whether the duties referred to in this case fall within the scope of teachers' employment.

Although the Association contends that the duties referred to in the instant record (i.e. inventory, coordinating, budgeting and scheduling) are semi-administrative in nature and therefore represent additional duties over and above those fairly within the scope of regular classroom teachers, the Examiner is not persuaded that such is, in fact, the case. It is uncontested that prior to July 20, 1987, all of these duties were performed by area coordinators. Since these duties were performed by area coordinators, and area coordinators were, first and foremost, teachers, it follows that the duties performed by area coordinators must be within the scope of a teacher's job. Therefore, even if the Association is correct in its assertion that the District is ordering teachers to perform duties formerly performed by area coordinators, or that the responsibilities of middle school teachers in the areas of inventory, coordinating, budgeting and scheduling have increased since the area coordinator position was eliminated, the District has the right to unilaterally assign such duties because they are fairly within the scope of teachers' employment.

19/ Racine Unified School District, Dec. No. 20941-B (WERC, 1/85) at 8-9.

20/ City of Milwaukee, Dec. No. 16602-A (Greco, 5/79), aff'd, Dec. No. 16602-B (WERC, 1/80).

21/ Whitnall School District, Dec. No. 20784-A (WERC, 5/84).

22/ Sewerage Commission of the City of Milwaukee, Dec. No. 17302 (WERC, 9/79).

In summary then, it is held that by eliminating the extra duty area coordinator position, and the events flowing therefrom, the District did not violate Secs. 111.70(3)(a)4 or 1, Stats. 23/

Alleged Violation of Sec. 111.70(3)(a)3, Stats.

Inasmuch as there is no evidence whatsoever to support a finding that the District encouraged or discouraged membership in the Association by discrimination in regards to hiring, tenure or other terms and conditions of employment, that portion of the complaint alleging a violation of Sec. 111.70(3)(a)3, Stats. has been dismissed.

Availability of Sec. 111.70(3)(a)5 Claim

Finally, although the instant complaint did not plead a contract violation, nor did the Association indicate at hearing that it was pursuing a breach of contract claim in this forum, the Association's brief contains a passing reference to Sec. 111.70(3)(a)5, Stats. If and to the extent the Association intended by this reference to raise a breach of contract claim against the District, such a claim will not be adjudicated here. The record indicates that a grievance covering essentially the same subject matter as is raised in paragraph 5 of the instant complaint is pending and is being pursued through the arbitration step of the parties' grievance procedure. Under these circumstances, the Commission's long-standing policy regarding breach of contract allegations has been to not assert its jurisdiction where the complainant has failed to exhaust the parties contractual grievance and arbitration procedures. 24/ In light thereof, the Examiner will not assert the Commission's jurisdiction to determine whether the District has breached the labor agreement by allegedly assigning teachers extra duty responsibilities without compensation for same.

Dated at Madison, Wisconsin this 12th day of October, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones, Examiner

23/ While the Commission has, in appropriate cases, deferred Sec. 111.70(3)(a)4 unilateral change/refusal to bargain claims to the parties' contractual arbitration procedure, e.g. Brown County, Dec. No. 19314-B (WERC, 6/83), it is apparent from the above discussion that the Examiner considers deferral of these claims inappropriate here. The reason the Examiner has reached the merits of the unilateral change/refusal to bargain claims, rather than deferring them to arbitration, is because the instant case necessitated a determination as to the mandatory-permissive nature of the District's decision to eliminate the area coordinator position. Thus, in the opinion of the Examiner, the instant case falls within what was called in Brown County, supra, at 14, the "important policy question requiring Commission attention" exception to the deferral policy described in the Commission's Menomonie Schools case, Dec. No. 16724-B (WERC, 1/81).

24/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-B (WERC, 12/79); Oostburg Joint School District, Dec. No. 11196-B (WERC, 12/72).