STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HARTFORD ELEMENTARY EDUCATION ASSOCIATION, CEDAR LAKE UNITED EDUCATORS COUNCIL, Complainant, vs. HARTFORD JOINT SCHOOL DISTRICT NO. 1, Respondent.	Case 14 No. 47923 MP-2638 Decision No. 27411-A

Appearances:

Mr. Anthony Sheehan, Staff Counsel, Wisconsin Education Association Council, and Ms. Chris Galinat, Associate Counsel, on the brief, P. O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainant.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger Walsh, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-3101, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Hartford Elementary Education Association, Cedar Lake United Educators Council filed a complaint with the Wisconsin Employment Relations Commission on August 18, 1992, alleging that Hartford Joint School District No. 1 had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., when it unilaterally increased the number of student contact minutes for certain teachers by implementing a new definition of full time and then refused to bargain over the corresponding impact. The Commission appointed Raleigh Jones to act as Examiner 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 Hartford, Wisconsin on November 11, 1992, at which time the parties were given full opportunity to present their evidence and arguments. Afterwards, the parties filed briefs, whereupon the record was closed February 12, 1993. The Examiner has considered the evidence and arguments of the parties, and now makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Hartford Elementary Education Association, hereinafter referred to as the Association, is a labor organization with its offices located at Cedar Lake United Educators Council, 111 North River Road, West Bend, Wisconsin 53708.

2. Hartford Joint School District No. 1, hereinafter referred to as the District, is a municipal employer with its offices located at 600 Highland Avenue, Hartford, Wisconsin 53027. The School Board is an agent of the District.

3. The Association and the District have been parties to a series of collective bargaining agreements, including one in effect from August 27, 1989 through August 26, 1992. That agreement contained, among its provisions, the following:

ARTICLE III
BOARD FUNCTIONS

3.01. It is recognized and agreed by the Association that the Board has and will continue to retain the exclusive rights and responsibilities to operate and manage the school system and its programs, facilities, properties and teaching activities of its employees, unless such rights and responsibilities are specifically abridged, delegated or modified by another provision of this Agreement. Included in these exclusive rights and responsibilities, but not limited thereto, are:

. . .

(b) The direction of all the working forces in the system, including the right to hire, promote, suspend, demote, discharge, discipline, lay off or transfer employees;

(c) The creation, combination, modification or elimination of any teaching position or department deemed advisable by the Board;

(d) The determination of the size or composition of the working force, the allocation and assignment of work to employees, the determination of the work to be performed by the working force, the determination of policies affecting the selection of employees, the establishment of quality standards and evaluation of employee performance, and the determination of the competence and qualifications of the employees;

. . .

ARTICLE XI
DAILY CLASS LOAD

11.01. The Administration will make reasonable efforts to maintain normal class loads for teachers by schedule modification or through the employment of additional part-time or full-time qualified teachers.

. . .

ARTICLE XXIII
PROFESSIONAL COMPENSATION

23.01. Travel Time.

(a) Teachers who travel daily to one school within the District shall receive one hundred dollars ($100.00) per year for mileage and inconvenience. For each additional school traveled to, teachers shall be paid at the rate of one hundred dollars ($100.00) per year per school. Part time travel will be adjusted accordingly.

(b) Pupil Personnel employees travelling (sic) outside the District to serve Pupil Personnel Cooperative Schools shall receive twenty one cents ($.21) per mile, with payment being made in the manner presently provided, except that any teacher hired for or transferred to a Pupil Personnel Cooperative School after the 1983-1984

school year will not be paid mileage to the teacher's

first assigned school nor home from the last assigned school. Mileage between school assignments would be paid.

. . .

ARTICLE XXXI
REDUCTION IN FORCE

31.01. In the event of a layoff of employees in the bargaining unit to take effect at the beginning of a school year, a preliminary notice of such layoff shall be given no later than the previous May 1 and a final notice no later than the previous June 1. In the event of a layoff of such employees to take effect at the beginning of the second semester, a preliminary notice of such layoff shall be given no later than the previous December 1 and a final notice no later than the previous January 1. Such layoffs will be in the inverse order of appointment of such employees who are then currently employed within the specific grade, subject area, teaching area or job function involved in the layoff. Any employee affected by the layoff may, if the affected employee has more service with the District, displace the employee with the least amount of service with the District in the affected employee's area of certification. An employee's appointment date refers to the first day the employee is scheduled to start employment in the District. In the event two (2) or more employees have the same appointment date, the order will be determined by a coin toss. This coin toss will occur the first day of the start of employment.

31.02. Employees will be reinstated to vacancies inversely to the order of layoffs, if certified for available vacancies. Teachers or other employees who fail to reply within ten (10) calendar days after receiving notice shall lose all recall rights, provided, however, that if the inability to return to work on the date specified in the notice is caused by a serious medical condition which requires the employee to be under the care of a licensed physician, then such employee will not lose recall rights for a future recall. Recall notices will be sent by certified mail, return receipt requested, to the teacher's last address on file in the District and will be deemed received on the date listed on the return receipt.

31.03. Teachers and other employees will receive no service credits for any time on layoff, but shall not lose prior service credits unless such teacher or other employee is on layoff for thirty-six (36) consecutive calendar months. Teachers and other employees who are on layoff for thirty-six (36) consecutive calendar months shall also lose any recall rights. No new appointments to teachers or other employees may be made while there are laid off teachers or other employees who have recall rights who are available and qualified to fill available vacancies.

31.04. Laid off teachers and other employees may, if they desire, be placed on a substitute list and shall have priority in the calling order of substitute teachers if they are qualified and available for such substitute work. Any teacher on layoff shall, while on layoff, be allowed to enter into a contract of employment with another school board, notwithstanding the provisions of Section 118.22(2), Wis. Stats.

31.05. A teacher laid off will be granted a monetary

consideration of two hundred dollars ($200.00).

4. In November, 1991, the School Board became concerned that some of the District's full-time elementary art, music and physical education teachers were averaging substantially less student contact time per day than were other classroom teachers. Specifically, classroom teachers averaged 295 minutes per day of student contact time, while art teachers averaged 241 minutes per day, music teachers averaged 197 minutes and physical education teachers averaged 214 minutes per day. The Board responded to this situation by deciding to give the elementary art, music and physical education teachers more student contact time. In order to accomplish this, the Board unilaterally formulated a new policy/guideline whereby full-time elementary special teachers (i.e. those teachers of art, music and physical education) were to have 250 to 300 minutes per day of student contact time.

5. After this new policy/guideline was formulated, the Board directed the principals at the District's elementary schools to implement it, which they did. Specifically, they changed the teaching schedules of the aforementioned special teachers so that each teacher had between 250 and 300 minutes per day of student contact time. After this was done, the least senior teachers in the aforementioned areas did not have enough classes to warrant full-time employment. This resulted in four special teachers either being laid off or having their contracts reduced. Specifically, Kim Ickert and Dawn Warner received full layoffs and Taira Grubb and Tom Palen were reduced from full time to 80 percent contracts. The School Board gave preliminary notice of this action on November 25, 1991, and final notice concerning same on December 19, 1991. The District gave written notice to these four special teachers on December 20, 1991, concerning their layoffs and/or reduction in time.

6. After this action was taken, the elementary special teachers who remained had their student contact minutes increased. This resulted in their picking up more classes, students and report cards than they did before the Board decided to assign additional student contact minutes to full-time special teachers. As an example, one of the remaining physical education teachers, Robert Lay, was given a class that he had never taught before. This class was at a different school building, so he was required to travel between the two buildings. Lay had not been required to travel to a different building the previous school year. Another example concerns music teacher Katherine Spies. The increase in student contact time required her to spend more time preparing lesson plans with a corresponding reduction in the amount of preparation time allowed during the regular school day. Additionally, she felt that the extended time she spent singing with her students had an adverse effect on her voice.

7. On January 3, 1992, Anthony Falkenthal, the Head Negotiator for the Hartford Elementary Education Association, sent the following letter to the School Board:

To the School Board of Hartford Joint No. 1:

> At the December 19, 1991, School Board Meeting the following teachers had their jobs cut back, or were laid off: Mrs. Kim Ickert, Mrs. Taira Grubb, Ms. Dawn Warner, and Mr. Tom Palen. These layoffs and cutbacks were achieved by defining a teacher's daily class load based solely on student-contact minutes.
>
> This is a change in the contractual definition of Daily Class Load, Article XI of the Master Agreement 1989-1992, and must be bargained and agreed to by both the School Board and the Hartford Elementary Education Association (H.E.E.A.). Refusal to bargain this change will result in the filing of a prohibitive practice suit against the School Board. The H.E.E.A. will expect to receive

a written response by January 17, 1992, as to the Board's intention concerning this matter.

It is our hope that the School Board and H.E.E.A. can reach a satisfactory solution to this situation.

Sincerely,

Anthony Falkenthal
Head Negotiator

8. On January 17, 1992, Patti Schultz, the School Board President, sent the following reply to Falkenthal:

Mr. Anthony Falkenthal
Head Negotiator
Hartford Elementary Education Asso.
Hartford, WI 53027

Dear Mr. Falkenthal:

In reply to your January 3, 1992 letter regarding the layoffs of Kim Ickert, Taira Grubb, Dawn Warner and Tom Phalen, it is the School Board's position that the School Board has acted in full compliance with its contractual and statutory obligations in this matter and that it has no further legal obligation to bargain with you on any matter related to these layoffs or to the establishment of daily class loads.

Article XI contains no definition of daily class load. Furthermore, the provisions of Article III, Board Functions, clearly recognize the School Board's authority and prerogative to establish and change daily class loads.

The layoff procedure and the impact of layoffs are fully covered in Article XXXI.

Although the School Board's position is that it has no legal obligation to bargain with you on the issues raised in your January 3, 1992 letter, representatives of the School Board are always willing to meet with you to discuss employer-employee problems that may arise from time to time. If you would like to meet to discuss these matters, please contact me.

Very truly yours,

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF HARTFORD JOINT NO. 1

Patti Schultz /s/

Patti Schultz
President

9. Following the District's January 17, 1992 letter, there was no formal request by the Association to the District that the District bargain over the impact of the Board's decision to assign additional student contact time to full-time special teachers until the Association submitted its initial bargaining proposals on May 6, 1992, for a successor to the parties' 1989-1992 contract. The Association's bargaining proposals contained several provisions which related to the impact of the Board's decision to assign additional

student contact time to special teachers. The District subsequently bargained with the Association over the impact issues. The parties stipulated that during the negotiations for a successor to their 1989-1992 contract, the School Board never refused to bargain over the Association's impact proposals. The parties further stipulated that the Association later voluntarily withdrew these impact proposals from the bargaining table.

10. In the negotiations which resulted in the 1987-89 collective bargaining agreement, the Association made a proposal to retain the then-current amount of preparation time. Later during those negotiations the Association submitted the following proposal: "Prep time: to be no less than the present." These proposed language changes relating to preparation time were not included in the 1987-89 collective bargaining agreement. In the negotiations which resulted in the 1989-92 collective bargaining agreement, the Association made the following proposal:

> Article XI Daily Class Load
> 11.02 (New)
> This section will deal with designating and guaranteeing periods of time during the school day that will be used for teacher preparation, planning, parent conferences, and any other activities deemed necessary by the teacher.

This provision was intended by the Association to guarantee a certain amount of preparation time for teachers. The Association was not successful in inserting its proposed new Sec. 11.02 into the 1989-92 collective bargaining agreement.

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

CONCLUSION OF LAW

The impact of the District's decision to increase student contact time is addressed in the parties' 1989-92 collective bargaining agreement. The District does not have a statutory duty to bargain with the Association over those matters which are addressed in the parties' collective bargaining agreement or have been waived in bargaining by the collective bargaining agreement. Accordingly, the District did not violate Sec. 111.70(3)(a)4, Stats., by its conduct herein.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

The Association's complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 6th day of April, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

1/ See footnote of page 7.

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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, the Association alleged that the District violated Sec. 111.70(3)(a)4, Stats., when it unilaterally increased the number of student contact minutes for certain teachers by essentially implementing a new definition of full time and then refused to bargain over the corresponding impact. The District denied it committed any prohibited practice by its conduct herein.

POSITIONS OF THE PARTIES

Complainant Association

The Association's position is that the District did not meet its legal obligation to bargain with the Association over the District's decision to implement a new definition of full time. The Association acknowledges that although the District did not have to bargain over its decision to increase the student contact time, it submits that the impact thereof is a mandatory subject of bargaining. Thus, the Association contends that the District had an obligation to bargain over the impact of its decision. According to the Association, there was such a request to bargain. In support thereof, it cites Falkenthal's letter of January 3, 1992, which it interprets as requesting that the District bargain over its redefining of a teacher's daily class load.

The Association also contends that there are several impact items/ conditions involved here that are not covered by the parties' labor agreement and therefore should have been bargained. It cites the following to support this premise: the fact that teacher Lay now has to travel between schools; the fact that Lay now teachers a new course; the fact that teacher Spies now has to spend considerable time beyond the end of the school day completing her lesson plans; and the fact that Spies now has to sing more with her students with this having an adverse effect on her voice. In the Association's view, all these conditions are not covered by the parties' collective bargaining agreement and therefore should have been bargained.

Finally, the Association contends that after it made its request to bargain, the District refused to do so. In support of this premise, it cites the Board's January 17, 1992 letter to Falkenthal. According to the Association, this action constituted a prohibited practice under MERA. As a remedy for this alleged prohibited practice, the Association asks that the District be ordered to bargain with the Association over the impact of its new standard regarding student contact minutes for the special teachers.

Respondent District

It is the District's position that it did not commit a prohibited practice by its conduct here. In its opinion, it has satisfied its bargaining obligation on all matters related to the Board's decision to assign more student contact minutes. The District contends that even if it were required to bargain over the impact items, it had the right to implement its decision to assign additional student contact time before it bargained over the impact items.

The District notes at the outset that in its view, the Association never requested that the District bargain over the impact of its decision to assign

teachers a specific number or amount of student contact minutes. It argues that as a result, the Association waived its right to require the District to bargain over those impact items prior to May 6, 1992. With regard to its conduct after that date, the District notes that the Association stipulated that the Board did not refuse to bargain over the Association's impact proposals after it made them (in May, 1992).

Next, the District asserts that even if the Association's January 3, 1992 letter can be considered a request to bargain over the impact items, it believes that the District had already previously satisfied any bargaining obligation over these impact items and had either incorporated the results of these previous negotiations into the parties' current collective bargaining agreement or the Union had waived further bargaining on them. If the Association's letter of January 3, 1992, is construed as a request to bargain over impact items, the District believes the request must be limited to bargaining over the layoff of four special teachers. In the District's view, layoffs are addressed in the parties' labor agreement, specifically in Secs. 3.01(b) and Article XXXI. The District asserts that since the parties had previously negotiated over layoff issues and had incorporated provisions relating thereto into their 1989-1992 collective bargaining agreement, the District had no further obligation to bargain with the Association over layoff issues during the term of that agreement.

The District contends that if Falkenthal's January 3, 1992 letter is construed as a request to bargain over impact items other than layoff, it has previously satisfied its bargaining obligation concerning those items. First, with regard to Lay's teaching a new course, the District submits that this is not a new situation; instead it happens often. As the District sees it, this is part of the daily class load/preparation time issue. Second, with regard to Spies being required to sing more, the District also sees this as part of the daily class load/preparation time issue. According to the District, the subject of daily class load and preparation time was addressed in previous negotiations with the outcome being the language incorporated into Sec. 11.01 of the 1989-1992 labor agreement. Third, with regard to the travel time matter, the District submits that this issue was likewise addressed by the parties in negotiations and provisions related thereto were incorporated in the 1989-1992 contract in Article 23.01 (Travel Time). The District therefore asserts that it had previously bargained over impact items other than layoff that would result from the Board's decision to assign teachers additional contact time.

In summary, the District argues it cannot be held to have violated Sec. 111.70(3)(a)4, Stats., by refusing to bargain over the impact of the Board's November, 1991 decision. The District therefore requests that the complaint be dismissed. It also seeks attorneys' fees.

DISCUSSION

The record establishes that in November, 1991, the School Board responded to concerns that certain "special" teachers (i.e. those in art, music and physical education) were not assigned enough student contact time by deciding that those teachers were to have 250 to 300 minutes of student contact time per day. The Board unilaterally formulated a new policy/guideline to that effect and had it implemented. The implementation of this new policy/guideline resulted in the least senior teacher(s) in each area not having enough classes to warrant full-time employment. As a consequence, four special teachers were either laid off or had their contracts reduced. The special teachers who remained had an increase in their number of student contact minutes per day.

The Association argues that the District violated its duty to bargain in this instance. A municipal employer has a duty to bargain collectively with

the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matter which are covered by the agreement, or where bargaining on such matters has been clearly and unmistakenly waived. 2/

In this case, the parties are in agreement that the decision to increase the student contact time is a permissive subject of bargaining. That being the case, the District's decision to assign additional student contact time to full-time special teachers is not subject to the duty to bargain. Nevertheless, this decision had an impact on the working conditions of the elementary special teachers which was bargainable. Thus, the impact of the District's decision is a mandatory subject of bargaining. The crux of this case is, in the Association's words, whether the District refused to bargain "over the corresponding impact" of the District's decision to implement "a new definition of full time."

A condition precedent for finding a refusal to bargain is that the Union must make a request for bargaining. 3/ Inasmuch as the District asserts that never happened here, it follows that this must be the first line of inquiry. The record indicates that on January 3, 1992, two months after the Board had made its decision to assign additional student contact minutes to full-time special teachers and two weeks after the Board had given the four special teachers their layoff/reduction notices, Falkenthal wrote the Board a letter concerning the (Board's) decision to cut back or lay off the four special teachers. Falkenthal's letter stated:

> These layoffs and cutbacks were achieved by defining a teacher's daily class load based solely on student-contact minutes.
>
> This is a change in the contractual definition of Daily Class Load . . . and must be bargained and agreed to by both the School Board and the Hartford Elementary Education Association (H.E.E.A.). Refusal to bargain this change will result in the filing of a prohibitive practice suit against the School Board. . . .

The Examiner reads the foregoing as demanding that the Board bargain over its decision to assign additional student contact time to full-time special teachers. On its face, this letter says nothing about bargaining over the impact of the (Board's) decision to assign additional student contact time to full-time special teachers and therefore increase their daily class load.

Board President Schultz responded to Falkenthal's letter as follows:

> It is the School Board's position that the School Board has acted in full compliance with its contractual and statutory obligations in this matter and that it has no further legal obligation to bargain with you on any matter related to these layoffs or to the establishment of daily class loads.
>
> . . .
>
> Although the School Board's position is that it has no legal obligation to bargain with you on the issues raised in your January 3, 1992 letter, representatives of the School Board are always willing . . . to discuss these matters . . .

2/ City of Richland Center, Dec. No. 22912-A (Schiavoni, 1/86), aff'd, Dec. No. 22912-B (WERC, 8/86); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

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

This letter, like the Association's, says nothing about bargaining over the impact of the Board's decision.

If the Association wanted to bargain the impact of the Board's decision, it was incumbent upon them to make such a proposal regarding the matter. 4/ Put conversely, the District was not responsible for presenting proposals on the impact of its own policy decision. 5/ For several months, the Association did not make any such proposals. Ultimately, though, the Association did make some impact proposals in May, 1992, when it submitted its initial proposals for a successor to the parties' 1989-92 agreement. Contained therein were several proposals which related to the impact of the Board's decision to assign additional student contact time to special teachers. The parties stipulated that after these impact proposals were submitted, the Board never refused to bargain over them. It was also stipulated that the Association later withdrew its impact proposals. What happened here then is that the Association made its impact bargaining proposals, albeit four months after its initial request to bargain, and the District bargained over them until they were withdrawn by the Association. 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 assign additional student contact time to full-time special teachers.

Even if the Association's January 3, 1992 letter to the Board constitutes a request to bargain impact, the District had no obligation to bargain over same. The only impact item cited in the Association's January 3, 1992 letter is the layoff/reduction of the four special teachers. At the time this letter was written, the parties were subject to a collective bargaining agreement. A review of that collective bargaining agreement leads to the conclusion that it addresses layoff. The contractual management rights clause provides in Sec. 3.01(b) that the District has the right to lay off employes. The contractual layoff clause (Article XXXI) sets out extensive procedures to be followed in the event it happens (i.e. the School Board decides to lay off an employe). Specifically, that Article identifies who is to be laid off, when notices of layoff are to be given, recall rights, work while on layoff, and a payment at the time of layoff. Given this language, it is clear that the parties had previously negotiated over layoff issues and had incorporated provisions relating thereto into their 1989-92 contract. Next, in their brief the Association also raised the following impact items which, in their view, are not covered by the collective bargaining agreement. Specifically, it cited the following: travel between schools, an increase in the amount of preparation needed together with a reduction in the amount of preparation time allowed during the regular school day, teaching a new course and being required to sing more. First, with regard to travel between schools, it is apparent from Sec. 23.01 of the agreement, which is entitled "Travel Time," that this subject has been addressed by the parties in negotiations, and provisions related thereto have been incorporated into the 1989-92 agreement. That being the case, the District's bargaining obligation on this matter has already been satisfied. Second, the same is true of the daily class load/preparation time issue since the agreement contains a provision relating to daily class loads, namely, Article XI. That provision contains no definition of daily class loads. The contractual management rights clause provides in Sec. 3.01(d) that the District has the right to determine "the allocation and assignment of work to employes." When these clauses are read together, it is implicit that the District has the right to establish and change daily class loads subject to the limitations in Article XI. Finally, with regard to the remaining two impact concerns cited

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4/ Ibid.

5/ Racine Unified School District No. 1, Dec. No. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78) at 45.

by the Association (i.e. teaching a new course and being required to sing more), the Examiner finds that although the contractual language does not specifically and expressly address those concerns, they are subsumed into the daily class load/preparation language. The fact that these additional items were not included in the agreement is not a basis for finding that these items were not waived. 6/ For all intents and purposes, the language of the agreement encompasses these impact items so renegotiation is not permitted. It is therefore concluded that since the collective bargaining agreement deals with the impact items cited by the Association, the District had no statutory obligation to bargain with the Association over those matters during the term of the agreement.

The bargaining history supports this conclusion. In the negotiations for the 1987-89 agreement, the Association tried to add language to the agreement to retain the then-current amount of preparation time. It ultimately dropped this proposal. The same thing happened in the negotiations for the 1989-92 agreement. There, the Association tried to add language to the agreement which would have guaranteed a certain amount of preparation time for teachers. Once again, it dropped this proposal. This means that in past negotiations the Association dropped the very item (i.e. preparation time) which it now claims is an impact item over which the District must bargain. By doing so, it has waived its right to require further bargaining on same during the term of the 1989-92 agreement. Thus, the bargaining history supports the conclusion that the Association has waived in-term bargaining on the impact of the Board's decision to assign additional student contact time to full-time special teachers.

In summary then, it has been held that the District had no duty to bargain with the Association over the impact items cited by the Association because those matters are already addressed in the parties' 1989-92 agreement. Therefore, the Association waived its right to require the District to bargain over them during the term of the 1989-92 agreement. Additionally, the parties stipulated that after the Association made its impact proposals in May, 1992, the District bargained with the Association over them until the Association withdrew them from the bargaining table. Given the foregoing, the District did not violate Sec. 111.70(3)(a)4, Stats., and the complaint has been dismissed in its entirety.

The District has requested that it be awarded legal fees. The Commission has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 7/ The instant complaint has not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of attorneys' fees. As a result, the District's request for same is hereby denied.

Dated at Madison, Wisconsin, this 6th day of April, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

6/ City of Stevens Point, Dec. No. 21646-B (WERC, 8/85); Green Lake County, Dec. Nos. 23075-B, 27076-B (Roberts, 6/86) aff'd by operation of law, Dec. Nos. 23075-C, 23076-C (WERC, 7/86).

7/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).