STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case 131 No. 50462 MP-2853 Decision No. 27972-C

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., by Mr. Robert K. Weber, and Mr. Brian Wright, 514 Wisconsin Avenue, Racine, Wisconsin 53403, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, and Mr. Douglas E. Witte, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the District.

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

On September 15, 1994, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he dismissed a complaint filed by the Complainant Racine Education Association alleging that the Respondent Racine Unified School District had violated its duty to bargain as to a year-round education program implemented by the District.

On September 29, 1994, the Association filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received on November 16, 1994.

Having considered the matter and being fully advised in the premises, the Commission

makes and issues the following

ORDER 1/

A. Examiner Findings of Fact 1-12 are affirmed.

B. Examiner Finding of Fact 13 is set aside and the following Finding of Fact is made:

> 13. The Racine Unified School District's 1994-1995 school year modification of the work schedule for certain employes represented by the Racine Education Association by requiring that they work three cycles of 60 consecutive weekdays taught/20 consecutive weekdays vacation primarily related to educational policy rather than to wages, hours and conditions of employment.

C. Examiner Conclusions of Law 1 and 2 are set aside and the following Conclusions of Law are made:

> 1. The modification of employe work schedules set forth in Finding of Fact 13 is a permissive subject of bargaining and the Racine Unified School District therefore did not violate its duty to bargain with the Racine Education Association when it unilaterally implemented the work schedule set forth in Finding of Fact 13. Thus, the District did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4 or 1, Stats.
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> 2. The Racine Unified School District has not refused to bargain with the Racine Education Association over the impacts of the work schedule change which primarily relate to wages, hours and conditions of employment and thus has not thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 or 1, Stats.

D. The Examiner's Order dismissing the complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate.

(footnote 1 begins on page 3)
(footnote 1 referred to on page 2 begins)

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 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.

(footnote 1 continues on page 4)

(footnote 1 continued from page 3)

(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.

RACINE UNIFIED SCHOOL DISTRICT

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

THE PLEADINGS

In its complaint, the Association alleged that by implementing a year-round school calendar, the District unilaterally modified employe work schedules during a contract hiatus and thereby violated Secs. 111.70(3)(a)4 and 1, Stats. The District denied that its actions violated its duty to bargain.

THE EXAMINER'S DECISION

The Examiner dismissed the complaint based upon his determinations that: (1) the year-round education program implemented by the Respondent District primarily related to educational policy rather than wages, hours and conditions of employment; (2) because the year-round education program was not a mandatory subject of bargaining, the Respondent did not violate Sec. 111.70(3)(a)4 or 1, Stats., by failure to bargain over its decision to "institute" and implement the program; and (3) the Respondent had not violated its duty to bargain over the impact of the year-round education program on employe wages, hours and conditions of employment and thus had not violated Sec. 111.70(3)(a)4 or 1, Stats.

In reaching his conclusions, the Examiner determined that the duty to bargain/school calendar decisions in Beloit Education Association v. WERC, 73 Wis. 2d 743 (1976) and School District of Janesville, Dec. No. 21466 (WERC, 3/84) did not control because both decisions involved traditional school calendars, not a year-round education program. Proceeding to balance the relationship of a year-round education program to educational policy against the program's relationship to wages, hours and conditions of employment, the Examiner concluded the educational policy relationship predominated. He found the decision to establish the year-round program was based primarily on: (1) a policy choice that student achievement would improve by eliminating the two and one half-month learning gap in the traditional calendar (i.e., summer vacation) and replacing it with shorter breaks during which remediation or enrichment could occur; and, secondarily, (2) the potential for financial savings resulting from year-round use of school buildings. Balancing the educational policy and the potential for financial savings against the "concededly substantial" impact on employe hours and conditions of employment (particularly the

change in vacation schedules), the Examiner concluded the former predominated.

The Examiner rejected an argument that Respondent was estopped from asserting the permissive nature of the year-round education program because Respondent's chief negotiator had initially advised Complainant that the topic was a mandatory subject of bargaining. He concluded Respondent had given Complainant ample notice that the matter was ultimately considered to be a permissive subject by Respondent.

The Examiner also rejected an argument that Respondent had violated an agreement between the parties by implementing the year-round school program. He determined that no violation of contract claim was properly before him but that, in any event, the parties' agreement had no implications for year-round school because it only obligated Respondent to maintain the *status quo* as to mandatory subjects of bargaining.

Lastly, the Examiner concluded that Respondent had met its obligation to bargain over the impact of the year-round school on employe wages, hours and conditions of employment. The Examiner found that Respondent had offered to bargain impact issues on several occasions prior to implementation and noted that the Complainant continued to be able to bargain impact issues as part of the parties' negotiations for a successor master contract.

POSITIONS OF THE PARTIES

Complainant's Initial Brief

Complainant asserts the Examiner erred by concluding that Respondent's implementation of a year-round school calendar did not violate Sec. 111.70(3)(a)4, Stats. Thus, Complainant asks the Commission to reverse the Examiner's Order dismissing the complaint.

Complainant contends the Examiner did not persuasively distinguish the school calendar in this case from those at issue in Beloit Education Association v. WERC, 73 Wis. 2d 743 (1976) and School District of Janesville, Dec. No. 21466 (WERC, 3/84). It argues that all school calendars reflect educational policy choices and that it is therefore artificial to find that traditional calendars are mandatory but non-traditional calendars are permissive. The Complainant further alleges that the Examiner's rationale "has no bounds and knows no limits" and yields a scenario in which a significant change in an existing calendar is permissive while minor changes are mandatory.

Complainant also asserts the Examiner improperly concluded Respondent had met its obligation to bargain over the impact of the year-round calendar. Complainant argues that it did not have a fair opportunity to bargain impact prior to implementation because the mandatory/permissive status of the year-round calendar had not been decided by the

Examiner/Commission before implementation occurred. Complainant contends that Respondent's offers to bargain impact should have but did not reflect a willingness to bargain impact issues in the context of negotiations for a successor agreement.

Irrespective of the mandatory/permissive status of the year-round calendar, Complainant argues the Examiner should have found Respondent to be bound by its original representations to Complainant that year-round calendar was a mandatory subject of bargaining. Respondent's repeated assurances that the subject was a mandatory subject of bargaining reasonably led Complainant to believe that no year-round program would be implemented until agreement was reached with the Complainant. Notice of the District's change in position only came after Respondent had decided to implement a year-round program and too late for the Complainant to obtain a ruling on the mandatory/permissive issue prior to implementation. Thus, Complainant asserts it is clear that the three essential elements of equitable estoppel are present inasmuch as (1) Respondent's initial position on its duty to bargain with the Association (2) was relied on by the Association (3) to its detriment. Complainant further contends that the estoppel doctrine can appropriately be applied to Respondent as a governmental unit because teachers have suffered a serious injustice which, if remedied, would not unduly harm the public interest.

Respondent's Responsive Brief

Respondent urges the Commission to affirm the Examiner's dismissal of the complaint.

Respondent contends the Examiner properly rejected Complainant's argument that certain calendar issues are mandatory as a "matter of law" and properly found the year-round calendar permissive based on the evidence and argument before him. Respondent further alleges the Examiner properly concluded the Respondent had not violated its obligation to bargain over the impact of the year-round calendar on employe wages, hours and conditions of employment. Respondent argues Complainant is improperly seeking to avoid the consequences of a failed bargaining strategy. Respondent alleges Complainant was and is free to make impact proposals and that the parties have indeed engaged in impact bargaining.

The Respondent also asserts the Examiner properly rejected Complainant's estoppel argument. It contends that the Municipal Employment Relations Act specifically contemplates the right of parties to change their bargaining positions; that Complainant knew well before March, 1994 that Respondent would be implementing year-round schools; that even if the Complainant did not have advance knowledge, the parties still had four months in which to bargain; and that delaying implementation would have had a substantial negative effect on students.

Given the foregoing, Respondent urges affirmance of the Examiner's Conclusions of Law and Order.

Complainant's Reply Brief

The Association asserts that its appeal has three bases. First, the Association argues that the Commission has previously held that there are six aspects of a school calendar which are so intrinsically related to teacher wages, hours and conditions of employment that a municipal employer may not make changes in any of them without first reaching agreement with their collective bargaining representative. The Association contends that these six calendar components are: (1) length of school year; (2) number of school days; (3) vacation periods; (4) holidays; (5) convention days; and (6) in-service days. The Association argues that a change from a conventional 9-month school calendar to a year-round 12-month school calendar significantly alters four of these six components: (1) length of school year; (2) vacation periods; (3) convention days; and (4) in-service days.

The second basis cited by the Association is that the District violated its duty to bargain by failing to obtain a Commission determination as to the mandatory or permissive nature of a year-round calendar before implementation. The Association asserts that the District's conduct herein precluded the Association from bargaining even the impact on teacher hours and conditions of employment prior to implementation of the year-round calendar. The Association asserts that even if it is concluded that the year-round calendar is a permissive subject of bargaining, the District's obligation to bargain impact as reasonable times warrants a conclusion in this case that such bargaining should have but did not occur prior to implementation.

As the third basis for its appeal, the Association contends that the District should be estopped from implementing the program because the District had previously assured the Association that agreement with the Association was a necessary prerequisite before a year-round calendar could be implemented.

While the Association accepts the Examiner's general analysis of the mandatory nature of school calendars, the Association urges the Commission to reject the Examiner's "educational concept" rationale for concluding that a year-round calendar is primarily related to educational policy. The Association contends that such a rationale is overboard in that adherence to the standard will virtually remove any obligation school districts have to bargain with employes before making changes in their hours or conditions of employment so long as it can be argued that the change is part of an "educational concept".

The Association asserts that the Examiner's rationale produces the absurd result of employers being prohibited from making minor changes in school calendars but being able to make major changes without bargaining with the union. The Association also argues that the "education concept" rationale inappropriately subsumes the "primarily related" test and replaces it with a standard which is so skewed in favor of school districts that any change in employe hours or conditions of employment will become a permissive subject of bargaining. Thus, the Association urges the Commission to reject this type of analysis.

Contrary to the District, the Association urges the Commission to examine the components of the year-round calendar separately when an analysis of the mandatory or permissive nature of these components is undertaken. The Association argues that it is inappropriate to lump all of the components together as part of an "educational concept". The Association notes the District appears to agree with this type of analysis when the District concedes that certain aspects of a year-round calendar could be mandatory subjects of bargaining, such as in-service days. As argued earlier herein, the Association would expand the mandatory components to include length of the school year, vacation periods and convention days, and would further note that components such as snow make-up days, continuing teacher education days and the payroll ramifications of a year-round calendar are also mandatory subjects of bargaining.

The Association urges the Commission to reject the District's suggestions that the Association wants to hold the year-round school program hostage as part of its strategy on reaching a successor labor contract. The Association asserts that the record establishes its neutral position on the subject of year-round schools. The Association contends that it only wants the District to meet its obligation to bargain over the mandatory components of a year-round calendar. The Association alleges that the decision to bring year-round schools to Racine has been made. The Association contends that within the confines of that decision, it only wishes to bargain over teacher concerns and issues related to the mandatory aspects of the year-round calendar before the District implements the year-round program.

As to the District's "necessity" defense, the Association argues that because the District has taken certain additional action as to the year-round program since the hearing before the Examiner, the "necessity" defense cannot be fully analyzed because of the changed factual circumstances.

Turning to the District's contention that the Association had ample opportunity to bargain impact issues before the year-round program was implemented, the Association asserts that the record does not support the District's position in this regard. The Association contends that the District did not formally notify the Association of the District's intent to implement a year-round program until March 9, 1994. By that time, the Association asserts that it had already filed the instant prohibited practice complaint seeking to prevent the District from unilaterally implementing the program. The District then proceeded to implement prior to the Examiner's decision. Thus, the Association contends that it had no opportunity to bargain over the year-round school program prior to a determination of its bargaining rights. Because the year-round program was implemented long before the Association could obtain a decision from the Commission regarding the mandatory/permissive status of the calendar changes, the Association contends that the District violated its duty to bargain in good faith.

Lastly, the Association asserts that it is not seeking the sympathy or pity of the Commission but rather is seeking an order requiring the District to abide by its duty to bargain in good faith. However, the Association notes that the injustice of the District's action herein is an appropriate consideration for the Commission when determining whether the Association's estoppel argument

is meritorious.

Given all the foregoing, the Association asks the Commission to reverse the Examiner.

DISCUSSION

At the outset of our consideration of the issues in this case, it is important to make several general observations. To some extent, the Complainant Association concedes that it may be appropriate for Respondent District to unilaterally determine as a matter of educational policy that it wishes to have some students attend school on a year-round basis. Complainant then argues that it only wishes to bargain about how year-round school will be implemented, vis-a-vis employe work schedules, etc. Another way of framing this analytical perspective would be to say that the Respondent District can unilaterally decide which days students will be present but Respondent District must bargain over which days teachers will be present to teach those students. Because of the obvious and essential need to have students and teachers present at the same time if any education is to occur, this approach to the issues before us is not a valid one.

Instead, any analysis of school calendar issues must acknowledge the reality that determinations of when students will be in school also determine when teachers will work. Acknowledging this reality, we proceed to decide whether the change in student schedule/employe work schedule unilaterally implemented herein did or did not violate the Respondent District's duty to bargain with Complaint Association.

It is well settled that during a contractual hiatus, a municipal employer is obligated to maintain the status quo as to all mandatory subjects of bargaining and that, absent a valid defense, a unilateral change in said status quo violates the municipal employer's duty to bargain under the Municipal Employment Relations Act. 2/

Here, the unilateral implementation occurred during a contractual hiatus. Thus, the initial question becomes one of determining whether the change in employe work schedule constituted a change in a mandatory subject of bargaining.

The general legal framework within which we determine whether a matter is a mandatory subject of bargaining matter begins with the text of Sec. 111.70(1)(a), Stats.

Section 111.70(1)(a), Stats., provides in pertinent part:

> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employes in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve

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2/ Mayville School District v. WERC, 192 Wis. 2d 379 (1995); Jefferson County v. WERC, 187 Wis. 2d 647 (1994); St. Croix Falls School District v. WERC, 186 Wis. 2d 671 (1994).

> questions arising under such an agreement, with respect to wages, hours and conditions of employment, ... 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 municipal employes in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, 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 municipal employes by the constitutions of this state and of the United States and by this subchapter.

In West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 7-9 (1984), the Wisconsin Supreme Court concluded the following as to how Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d), Stats.) should be interpreted when determining whether a subject of bargaining is mandatory:

> Sec. 111.70(1)(d) sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, sec. 111.70(1)(a), to bargain "with respect to wages, hours and conditions of employment." At the same time it provides that a municipal 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." Furthermore, sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.

Sec. 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 259 N.W.2d 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.

In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d) as setting for a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "'management and direction' of the school system" or to "formulation or management of public policy." Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 95-96, 102, 259 N.W.2d 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," Beloit Education Asso. v. WERC, 73 Wis. 2d 43, 54, 242 N.W.2d 231 (1976).

As applied on a case-by-case basis, this

> primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. Unified School District No. 1 of Racine Co. v. WERC, supra, 81 Wis. 2d at 102; Beloit Education Asso., supra, 73 Wis. 2d at 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them. (footnotes omitted)

Hearing on the complaint was completed two months prior to actual implementation of a year-round school pilot program on July 1, 1994. Thus, the precise details of the implementation are not definitively established in the record. However, it appears reasonably well established from the record that the year-round program did not increase the number of teacher work days but did change the distribution pattern of those work days. Thus, although the number of school/work days did not change, there was a change in the length of the school year and the timing and length of vacation periods. Put another way, the amount of scheduled work time and non-work time did not change but the timing of work time/time off during the calendar year did change.

Complainant correctly argues that in School District of Janesville, Dec. No. 21466 (WERC, 3/84), the Commission reviewed its prior holding in School District of Beloit, Dec. No. 11831-C (WERC, 9/74) and the Wisconsin Supreme Court's affirmance thereof in Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976) and concluded that there was a duty to bargain over: (1) the length of the school year; (2) the number of teaching days; (3) in-service days; (4) convention days; and (5) vacation periods. However, Commission duty to bargain decisions are always based upon the record presented by the parties. Thus in Janesville, the Commission

majority commented: "We see no basis in this record for overturning those prior determinations."

Here, we are presented with the record these parties have created. We proceed to decide this case based on this record.

As recited by the Examiner in Finding of Fact 11, 3/ the redistribution of work time/time off was based upon educational policy judgments by the District that learning opportunities would improve. 4/ Thus, the year-round school program had a direct and substantial relationship to educational policy. As also recited by the Examiner, the change to a year-round school calendar had a direct and substantial impact on the timing of employe vacations and thus on employe hours and conditions of employment. When the Examiner balanced these impacts and relationships, he concluded the relationship of the year-round school program to educational policy predominated over the relationship to employe wages, hours and conditions of employment. In the context of this record, we agree with the Examiner. Thus, we affirm his conclusion that the District alteration of the timing of the pre-existing work/vacation schedule for teachers who would staff the newly created year-round schools did not alter the status quo as to a mandatory subject of bargaining and

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3/ Examiner Finding 11 stated:

> 11. On March 7, 1994, the District's Board voted to approve a single-track year-round education program at Janes Elementary School and no less than two sections of year-round school at Gilmore Middle School, effective July 1, 1994. This calendar consisted of three periods of 60 consecutive weekdays of school followed by 20 consecutive weekdays of no school, to be done on a single track basis and to be voluntary for all students and teachers. The Board's decision was based on its conclusion that the system would substantially improve the quality of education for three reasons. First, it would eliminate the substantial loss of learning, particularly for disadvantaged students, which takes place during the traditional two and a half month summer vacation. Second, it would provide three 20-day periods available for remedial work for students needing additional assistance, rather than the single two and a half month summer session available under the traditional system. Third, these same three 20-day periods would be available to provide additional learning opportunities for gifted students.

4/ To some extent, the Complainant Association questions whether the year-round schools will have the positive impacts on education cited by the Respondent. However, the wisdom or lack thereof of any educational policy judgment is irrelevant to a mandatory/permissive duty to bargain analysis so long as the expressed policy rationale represents the true basis for the decision.

thus did not constitute a violation of the District's duty to bargain with Complainant.

Complainant argues that because all school calendars presumably reflect some educational policy judgments, the result reached by the Examiner (and now affirmed by the Commission) has the effect of making all school calendar issues permissive subjects of bargaining and overturning prior Commission precedent. We disagree. The Commission has not previously had occasion to consider duty to bargain issues surrounding a shift from a traditional school calendar to a year-round calendar. As we are always obligated to do, we decided this case based upon the facts and argument presented. Respondent persuasively established that the redistribution of an existing schedule of work/time off created by a year-round school program primarily related to educational policy. Our decision stands for no more than that.

As previously noted, the record does not definitively tell us the extent to which the year-round calendar implemented by the Respondent altered the schedule of in-service days, convention days, holidays, pay days, snow makeup days, etc. Suffice it to say that these aspects of "school calendar" have historically been found to be mandatory subjects of bargaining and that any change by Respondent in these areas would be subject to the same "primarily related" analysis we have applied to the redistribution of work/vacation time. If the "educational policy" dimensions of when paychecks are distributed, when snow days are made up, when in-service is conducted, whether employes can attend union conventions, or whether employes would have to work "holidays" predominated over the impact on employe wages, hours and conditions of employment, then the Respondent would not be obligated to bargain over such matter(s). If the wage, hour and condition of employment relationship predominated, then these matters would be mandatory subjects of bargaining.

We reject the Complainant Association's argument that even if Respondent District did not have a duty to bargain, Respondent should be estopped from unilaterally implementing year-round school because Respondent had previously advised Complainant that implementation could not occur without Complainant's agreement. Assuming arguendo that application of equitable estoppel principles is otherwise appropriate, we decline to apply that doctrine herein. In March, 1994, roughly four months prior to implementation, Respondent District put Complainant on notice that it was committed to implementation to year-round school and thereby effectively rescinded its previously communicated position that Association consent to implementation was required. Following this change in Respondent's position, Complainant had ample time to respond as it saw fit, including pursuit of the instant litigation or reaching agreement on all implementation issues as to which Respondent District was willing to/obligated to bargain.

On a related point, we also reject Complainant's assertion that Respondent was obligated to wait for Examiner/Commission resolution of the duty to bargain dispute before implementing, or that Complainant was entitled to receive a declaration of its rights before it had to decide how to respond to Respondent's declared intention to implement. The Municipal Employment Relations Act does not impose any such requirement/entitlement in the instant circumstances and both parties

were entitled to proceed as they saw fit.

Turning to the issue of impact bargaining, the Examiner stated the following in his Memorandum:

> Commencing March 5, 1991, the District informed the Association it was considering year round education and sought negotiations. Again on August 4, 1993, the District offered to bargain on the year-round education program. It requested impact items on October 1, 1993 and later indicated it was willing to meet solely on this subject. The Association made one proposal on February 3, 1994, but no agreement was reached. On March 9, 1994, the District again offered to meet and bargain the subject of its year-round school program but nothing further was done. It is concluded from the record that the District satisfied its obligation to bargain impact before implementation.

We concur with the Examiner's resolution of this issue and have affirmed him in that regard.

Given all of the foregoing, we have also affirmed the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin, this 18th day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate.