STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Motion and Petitions of

LaCROSSE EDUCATION ASSOCIATION

Requesting a Motion to Review Implementation and Declaratory Rulings Pursuant to Secs. 111.70(4)(b) and 227.41, Stats., Involving a Dispute Between Said Petitioner and

LaCROSSE SCHOOL DISTRICT

Case 60
No. 52083 DR(M)-553
Decision No. 28462-A

Appearances:

Mr. Anthony L. Sheehan, Staff Counsel, and Ms. Chris Galinat, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, for the Association.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen L. Weld and Ms. Victoria L. Seltun, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the District.

ORDER DENYING PETITION FOR REHEARING

On November 7, 1995, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Declaratory Ruling in the above matter. On November 27, 1995, the Commission received a Petition for Rehearing from the LaCrosse School District pursuant to Sec. 227.49, Stats. In its Petition, the District asserts the Commission committed a material error of law when it concluded that a contract provision stating "No certified teacher will be dismissed for the purpose of replacement by a paraprofessional or teacher assistant." was a mandatory subject of bargaining.

On December 11, 1995, the LaCrosse Education Association filed a written statement with the Commission expressing opposition to the District's Petition for Rehearing.

Having considered the matter and being satisfied that it did not commit a material error of

law, the Commission makes and issues the following

ORDER 1/

The Petition for Rehearing is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties 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.

227.53 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 therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, 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
(footnote 1 continued on page 3)

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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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING
ORDER DENYING PETITION FOR REHEARING

The District

The District contends the Commission erred when it failed to conclude that a contract provision stating "No certified teacher will be dismissed for the purpose of replacement by a paraprofessional or teacher assistant." was a permissive subject of bargaining. Citing Rhinelander School District, Dec. 19761 (WERC, 7/82), the District asserts the Commission's decision impermissably interferes with the District's right to determine the qualifications necessary to perform study hall and hallway supervision. The District argues that as a matter of policy or for economic reasons, it may choose to require law enforcement certification, teacher certification, or may choose to use aides to perform said tasks. The District asserts that the impact on employes is "hypothetical" and thus far less direct than the impact confronting the Wisconsin Supreme Court in Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977), the case upon which the Commission so heavily relied when finding the provision to be a mandatory subject of bargaining. The District argues that a possible change in the minimum qualifications to perform study hall and hallway supervision has only a "theoretical" effect on teachers' conditions of employment.

The District asserts that it is experiencing problems with overcrowding in its schools and that assignment of supervision tasks to non-unit workers gives the District a greater range of flexibility in making teacher assignments. The District argues that having teachers perform more tasks for which certification is required (rather than tasks which do not require certification) is one method by which the District may choose to address the overcrowding problem. Thus, the District contends that the disputed contract provision does not merely prevent substitution of non-unit workers for unit employes but also deprives the District of flexibility to better utilize teachers at a time when the efficient use of resources and personnel is of preeminent importance to the District.

Given the foregoing, the District requests that the Commission grant its Petition for Rehearing as a necessary and proper means to evaluate the material error of law committed by the Commission.

The Association

In response to the District's Petition for Rehearing, the Association asserts that the Commission's decision is consistent with a long line of cases holding that the replacement of bargaining unit workers with non-bargaining unit workers is a mandatory subject of bargaining. Under this Commission precedent, the Association contends that the Commission correctly

concluded that the disputed contract provision herein was a mandatory subject of bargaining.

Citing the protection against job loss provided by the contract provision, the Association disputes the District's contention that the impact of the provision on teachers is "hypothetical". The Association further argues that there is nothing in the contract provision which prohibits the District from reassigning teachers in response to overcrowding. Rather, the provision protects teachers against job loss as a result of any such reassignment.

Given the foregoing, the Association asks the Commission to deny the Petition for Rehearing.

DISCUSSION

In our decision, we stated the following as to the contract provision cited by the District in its Petition for Rehearing.

> The parties agree that the existing contract language protects teachers from being dismissed or laid off (fully or partially) because the District wishes to use non-unit employes to do work performed by the teacher.
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> The District correctly asserts that when determining whether the contract provision is mandatory or permissive, we must balance the District's interest in having work such as student supervision performed in "the most efficient and cost effective manner" against the wage and job security interests of the employes. However, unlike the District, when we balance these competing interests, we think it clear that under the Wisconsin Supreme Court's holding in Unified S.D. No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1972) (sic), the unit employes' "wage" and "conditions of employment" interests predominate.
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> In Racine, the Court held that where the decision to replace unit employes with other individuals does not represent a choice among "alternative social or political goals or values," the decision is a mandatory subject of bargaining because of the substantial impact on wages and conditions of employment. Here, the District seeks the freedom to replace unit employes because it would be more efficient and cost effective to do so. In our view, cost and efficiency interests do not represent a choice among "alternative social or political goals

> or values." Like the employer in Racine, the District is simply seeking to have one lesser paid group of employes (non-unit) replace another more highly paid group of employes (unit) to perform the same work in the same place in the same manner. In such circumstances, we think it clear that the employe interests predominate and that the provision is a mandatory subject of bargaining.

We remain persuaded that we correctly concluded the disputed contract provision is a mandatory subject of bargaining. As argued by the Association herein, the impact on employes could hardly be stronger inasmuch as the provision protects them from job and wage loss. As argued by the Association, it is also important to acknowledge that the provision in question does not prohibit the District from using non-unit employes to perform the supervision in question. The District is free to determine who performs the work so long as no unit employe suffers loss of a job. Thus, the provision does not intrude on any existing District right to establish the qualifications for the supervisory duties. 1/

1/ To the extent the District relies on our decision in School District of Rhinelander, Dec. No. 19761 (WERC, 7/82) as to its "minimum qualifications" argument, we note that the analysis in Rhinelander was refined in Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83). In Milwaukee, we held:

> It follows, therefore, that the Association is entitled to mandatorily bargain about provisions that would limit the minimum qualifications imposable by the District to job performance related qualifications primarily related to the formulation or management of education policy. Moreover, as among coaching applicants from within and outside the bargaining unit, the Assocation (sic) is entitled to mandatory bargaining about whether bargaining unit members meeting the minimum qualifications shall be given preference and how the District shall be required to select from among more than one bargaining unit member applying for the position (e.g., preference for opportunities in the employe's building, seniority, etc.). The District can of course attempt at the bargaining table to secure or maintain the right to fill all the positions with the most qualified applicant.
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> We also think it appropriate to clarify the

application of the Rhinelander holding to the instant dispute. Where, as here, the District has historically utilized unit teachers to fill the vast

(quoted material footnote 2/ continues on page 7)
(quoted material footnote 2/ continued from page 6)
majority of coaching positions, the positions become unit work which the MTEA can seek to protect from assignments thereof to non-unit personnel. As the Supreme Court indicated in Racine, absent evidence that the decision represents a choice among alternative social or political goals or values, the decision to substitute non-unit for unit personnel is a mandatory subject of bargaining. While, as stated in Rhinelander, it is theoretically possible that a district could show that use of non-unit personnel represented a choice among goals or values, such a showing remains a burden which must be met by the record before the Commission. Here, the District has not shown that any value choice is at stake, other than its expressed desire to have the "best qualified" person in the job. Especially in view of the court's (sic) holdings in Beloit and Glendale, 4/ we do not believe that the foregoing District desire is sufficient to overcome the MTEA's legitimate interest in protecting what has historically been essentially unit work if qualified unit employes are interested in filling the position. If no qualified unit applicant timely applies for a given assignment, as the parties have interpreted the language, the District would be free to use non-unit personnel.

4/ In Beloit the Court found mandatory a layoff proposal which utilized seniority as a basis for determining order of layoff and recall. The Court rejected the claim that such a proposal interfered with the right of the District to detrmine (sic) needed staff qualifications. In Glendale Professional Policeman's Association v. City of Glendale,

83 Wis. 2d 90 (1978) the Court upheld the Union's right to bargain over the selection criteria to be applied when choosing among qualified applicants.

To the extent the District cites the Wisconsin Supreme Court decision in Brookfield v. WERC, 87 Wis. 2d 819 (1978) as support for its position herein, we note that Brookfield involved a situation where the municipal employer determined that it wished to reduce the level of service it provided to citizens. Here, the District is not asserting that it wishes to reduce the amount of supervision provided to students. Thus, in our view, the Wisconsin Supreme Court's decision in Racine remains the more persuasive precedent for us to consider. Given all of the foregoing, we remain persuaded that under Racine, the contract provision is a mandatory subject of bargaining. We would note that our decision does not prevent the District from going to the bargaining table and seeking unfettered discretion to reassign teachers even if job loss is produced.

Given the foregoing, we have denied the Petition for Rehearing.

Dated at Madison, Wisconsin, this 27th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner