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

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.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On December 8, 1994, the LaCrosse Education Association filed a motion to review implementation pursuant to ERC 33.10(6), a declaratory ruling petition pursuant to ERC 33.16(2) and Sec. 227.41, Stats., and a declaratory ruling petition pursuant to ERC 33.15 and Sec. 111.70(4)(b), Stats. Through the motion and petitions, the Association seeks resolution of various disputes which arose between the Association and the LaCrosse School District during the parties' effort to reach agreement on a 1994-1995 bargaining agreement.

On December 27, 1994, the District filed a written response to the motion and petitions.

By agreement of the parties, hearing was held on February 21, 1995, in LaCrosse,

Wisconsin, before Examiner Peter G. Davis. The parties then filed briefs, the last of which was received May 15, 1995.

On May 10, 1995, the Association filed a request that the record be reopened to receive additional exhibits. On June 7, 1995, the District responded to the Association's request. 1/

On July 5, 1995, the District filed supplemental argument.

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

FINDINGS OF FACT

1. The LaCrosse School District, herein the District, is a municipal employer having its principal offices at 807 East Avenue, South, LaCrosse, Wisconsin.

2. The LaCrosse Education Association, herein the Association, is a labor organization representing certain professional employes of the District for the purposes of collective bargaining. The Association has its principal offices at 2020 Caroline Street, P. O. Box 684, LaCrosse, Wisconsin.

3. The parties' July 1, 1991 - June 30, 1994 bargaining agreement contained the following provision:

> ARTICLE IX - TEACHING HOURS AND TEACHER LOAD
>
> 39. The workday for teachers in the School District of La Crosse is as follows:
>
> A. Senior High Schools
> 7:35 Teacher Workday Begins
> Duty-Free Lunch Periods
> 3:25 Teacher Workday Ends
>
> High School Day
>
> 1. No more than 250 minutes of instruction

1/ We are satisfied it is appropriate to receive the additional exhibits and hereby grant the Association's request.

daily.

2. No fewer than 96 minutes of preparation time daily.
3. No more than 50 minutes of supervision/ study hall daily.
4. No fewer than 30 consecutive minutes of duty-free lunch.

High School teachers are to report to work at 7:30 a.m. and will be dismissed at 3:25 p.m.

a. More than 250 minutes of instruction per day will require a wage adjustment.
b. Fewer than 96 minutes of preparation time a day will require a wage adjustment.
c. 240-250 minutes of instruction or any combination of 288-300 minutes of assignment will be considered full-time depending upon the length of the periods.

. . .

During collective bargaining for a July 1, 1994 - June 30, 1995 contract, the District proposed to modify the above-quoted language through addition of the underlined words:

39. The <u>normal</u> work day for teachers in the School District of La Crosse is as follows:

A. Senior High Schools

7:35 Teacher Workday Begins
Duty Free Lunch Periods
3:25 Teacher Workday Ends

High School Day

1. No more than 250 minutes of instruction <u>on an average</u> daily <u>basis</u>.
2. No fewer than 96 minutes of preparation time <u>on an average</u> daily <u>basis</u>.

3. No more than 50 minutes of supervision/study hall on an average daily basis.
4. No fewer than 30 consecutive minutes of duty-free lunch.

High School teachers are to report to work at 7:30 a.m. and will be dismissed at 3:25 p.m.

a. More than 250 minutes of instruction on an average daily basis will require a wage adjustment.
b. Fewer than 96 minutes of preparation time on an average daily basis will require a wage adjustment.
c. 240-250 minutes of instruction on an average daily basis or any combination of 288-300 minutes of assignment on an average daily basis will be considered full time depending upon the length of the periods.

3. Fewer than 96 minutes of preparation time on an average daily basis or fewer than 48 minutes of preparation time daily will result in a wage adjustment.

The District asserts that its proposed modification of paragraph 39 is not an economic issue within the meaning of Sec. 111.70(1)(dm), Stats., and that it is entitled to seek inclusion of its proposal in the 1994-1995 contract through the interest arbitration provisions of Sec. 111.70(4)(cm)6., Stats. The Association contends that the District proposal is an economic issue which cannot be pursued through interest arbitration.

The District proposal would have the effect of increasing the amount of scheduling flexibility the District can exercise without incurring additional salary costs.

4. The parties' July 1, 1991 - June 30, 1994 bargaining agreement contained the following provision:

> 54. No certified teacher will be dismissed for the purpose of replacement by a paraprofessional or teacher assistant.

During collective bargaining for the July 1, 1994 - June 30, 1995 contract, the District asserted that paragraph 54 was a permissive subject of bargaining which the District did not wish to include in

the new contract. The Association responded that paragraph 54 is a mandatory subject of bargaining and an economic issue/economic provision which the District cannot seek to modify through the interest arbitration provisions of Sec. 111.70(4)(cm)6., Stats.

Paragraph 54 prohibits the full or partial layoff, discharge or non-renewal of a certified teacher so that a paraprofessional or teacher assistant could perform duties such as student supervision presently performed by teachers.

5. The parties' July 1, 1991 - June 30, 1994 bargaining agreement contained the following provision:

> ARTICLE XIII - INSURANCE
>
> 79. Any change in the insurance coverages or services during the term of this Agreement shall be subject to collective bargaining between the parties and all the provisions of Wisconsin Statute 111.70 shall be available to the Board and the Association during the process.
>
> Group Health Insurance
>
> 80. Health insurance coverage will be provided for the period July 1, 1991 - June 30, 1994 as follows:
>
> The Board shall agree to pay a monthly premium of $177.19 for the 1991-92 contract year for a single plan, and $398.44 for the 1991-92 contract year for a family plan. This amount will be adjusted to represent a dollar amount equal to the same percentage of Board contribution of the total premium in 1992-93, 1993-94 as paid in 1991-92.

During collective bargaining for a July 1, 1994 - June 30, 1995 contract, the District made the following proposal:

> **QUALIFIED ECONOMIC OFFER**
>
> **LA CROSSE SCHOOL DISTRICT**
>
> 1. For any period of time after June 30, 1993, covered by the

proposed collective bargaining agreement, the La Crosse School District shall maintain all fringe benefits and its percentage contribution toward the cost thereof as required by s. 111.70(1)(nc), Stats.

2. For each 12 month period or portion thereof which commences July 1, 1993, and is covered by this agreement, the La Crosse School District shall provide the minimum increase in salary which s. 111.70(1)(nc)1, Stats., requires for the purposes of a qualified economic offer, or may provide the decrease in salary which s. 111.70(1)(nc)2, Stats., allows for the purposes of a qualified economic offer.

. . .

80. Health insurance coverage will be provided for the period June 1, 1994 - June 30, 1995, as follows:

In 1994-95, the Board will pay a dollar amount for health insurance equal to the same percentage of Board contribution of the total premium in 1993-94.

The District provides health insurance to employes represented by the Association on a self-insured basis. For the 1994-1995 contract year, the District elected to increase the health insurance premium amounts by 5% over 1993-1994 levels. The entities with whom the District consults prior to establishing rates had recommended that the District increase premiums by a larger percentage. Since at least the 1991-1992 contract year, the District has established health insurance premium increases at levels below those recommended by its consulting entities, although the amount of money in District health insurance reserves in these prior years was greater than the amount present when the 1994-1995 rate was established.

For the 1995-1996 contract year, the District increased health insurance premium levels 25% and estimates that premium levels will increase 20% for 1996-1997.

The Association contends that the health insurance premium levels established and implemented by the District are too low and that the District therefore has improperly implemented a portion of its qualified economic offer. The Association points out that the low premium increase for 1994-1995 had the anticipated effect of creating the need for the 25% premium increase for 1995-1996 which, in turn, produces a qualified economic offer salary obligation for the District for 1995-1996 which is well below 2.1%.

The District contends that it has met its obligations under Sec. 111.70(1)(nc), Stats., as to health insurance for 1994-1995.

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

CONCLUSIONS OF LAW

1. The District proposal set forth in Finding of Fact 5 is a qualified economic offer within the meaning of Sec. 111.70(1)(nc), Stats., and ERC 33.10(3)(a).

2. The District proposal set forth in Finding of Fact 3 is an economic issue within the meaning of Sec. 111.70(1)(dm), Stats.

3. The contract language set forth in Finding of Fact 4 is a mandatory subject of bargaining and an economic issue within the meaning of Sec. 111.70(1)(dm), Stats.

4. The Wisconsin Employment Relations Commission's statutory authority to establish the composition of a "qualified economic offer" does not include evaluating the propriety of the level of increase or decrease in health insurance premium costs.

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

DECLARATORY RULING 2/

1. Within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., the District has a duty to bargain with the Association over the contract provision set forth in Finding of Fact 4.

2. Because the District has made a qualified economic offer to the Association and because the proposals/provisions set forth in Findings of Fact 3 and 4 are economic issues, the District cannot utilize interest arbitration under Sec. 111.70(4)(cm)6., Stats., to seek inclusion of the proposal set forth in Finding of Fact 3 or exclusion of the provision set forth in Finding of Fact 4 as to a 1994-1995 contract.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of November, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

2/ See footnote on pages 8 and 9.

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

2/ 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 continued on page 9)

2/ (footnote continued from page 8)

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

. . .

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

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

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING

POSITIONS OF THE PARTIES

The Association

The Association asserts the District has failed to comply with applicable law regarding the composition and implementation of a qualified economic offer by: (1) establishing health insurance premium cost increases which understate the cost of maintaining self-insured health benefits; (2) proposing to arbitrate modification of an economic issue provision from the 1991-1994 contract; and (3) proposing to delete an economic issue provision from the successor to the 1991-1994 contract.

As to the insurance cost issue, the Association contends the District did not increase premiums sufficiently to meet estimated costs for 1994-1995 and thus has violated Sec. 111.70(1)(nc)1.a., Stats., by failing to maintain the District's percentage contribution toward those costs. The Association asserts the consequence of the District's conduct is the substantial premium increases of 25% for 1995-1996 and 20% for 1996-1997, which in turn allow the District to offer far less than a 2.1% salary increase as part of a 1995-1997 qualified economic offer. The Association admits that costs in a self-insured context are difficult to ascertain but argues that the risk of cost manipulation requires establishment of an objective measure of costs. The Association urges the Commission to require that the recommendations of the District's insurance consultants be utilized as the appropriate measure of premium cost increases. Therefore, the Association asks that the District be ordered to raise the level of increase for the 1994-1995 premium from 5% to between 14% and 22% of the 1993-1994 premium.

The Association disputes the District contention that the District was acting consistent with the parties' practice when it established the 1994-1995 premium levels. However, the Association argues that any pre-Act 16 practice is irrelevant to the requirements of a qualified economic offer. To the extent the District complains about being held to a different standard than a private carrier, the Association contends self-funded plans are radically different than private insurance and that, in any event, the District chose to be self-funded rather than to purchase private insurance.

Turning to the District's proposal to pursue modification of an overload pay provision through interest arbitration, the Association contends the overload provision is an "economic issue" within the meaning of Sec. 111.70(1)(dm), Stats., because the District incurs financial liability under the provision which would not be present if the overload provision did not exist.

Lastly, the Association asserts that paragraph 54 from the 1991-1994 contract is a mandatory subject of bargaining, an "economic issue" and an "economic provision" which the District therefore cannot "evaporate," modify or arbitrate. The Association argues the provision primarily relates to wages and job security, and asserts that not only is it a "job security" provision expressly identified in Sec. 111.70(1)(dm), Stats., as an "economic issue" but that, in addition, the District's economic liability under the provision is greater than if the provision did not exist.

Given the foregoing, the Association asks the Commission to order the District to modify its proposals to comply with applicable statutory provisions.

The District

The District asserts its final offer is a qualified economic offer and that none of the Association's objections are meritorious. However, should the Commission conclude otherwise, the District contends it will modify its offer to achieve qualified economic offer status.

As to the insurance cost issue, the District argues that its health insurance offer maintains both the same health benefits and the same District percentage contribution toward the premium cost. Thus, the District alleges it has met the statutory requirements of Sec. 111.70(1)(nc)1, Stats., for a qualified economic offer.

Responding to the Association concern regarding the level of premium increase, the District contends that the expired contract makes no reference to how premium increases are to be calculated or to the level of reserve which is to be maintained. To the extent the parties have a past practice, the District asserts it acted consistent with that practice and its own philosophy of using reserves to reduce premium costs and placing the "savings" on the salary schedule. The District contends the Association knew of and agreed to the historical use of excess reserves to reduce the level of premium increases. The District argues that it has consistently used its consultants' recommendations only as a guide in setting rates and has consistently set rates lower than the consultants' recommendations through use of reserve funds. While it is true that the premium increases in subsequent years could increase fringe benefit costs beyond 1.7% and thus allow the District to offer less than a 2.1% salary increase as part of a qualified economic offer, the District contends that this same impact could be present if health insurance benefits were provided through a private carrier. The District questions whether it is being held to a standard which would or could be applied to private carriers in terms of establishing appropriate premium levels.

The District asserts its proposal to modify the teacher work day is not an "economic issue" within the meaning of Sec. 111.70(1)(dm), Stats., because it will generate overload pay savings and thus does not create "a new or increased financial liability upon the municipal employer." Thus, the District contends its proposal is subject to interest arbitration as a non-economic issue.

Turning to the existing paragraph 54 contract language, the District argues the provision is a permissive subject of bargaining. The District contends the decision of whether to use non-unit employes for student supervision primarily relates to the management and direction of the school system. The District further asserts that the proposal to eliminate this provision is not "economic" because the proposal will save the District money.

Given the foregoing, the District contends its positions and proposals are consistent with the requirements of a qualified economic offer.

DISCUSSION

Health Insurance

Section 111.70(1)(nc)1.a., Stats., provides that one component of a "qualified economic offer" is:

> **a.** A proposal to maintain the percentage contribution by the municipal employer to the municipal employes' existing fringe benefit costs as determined under sub. (4)(cm)8s, and to maintain all fringe benefits provided to the municipal employes in a collective bargaining unit, as such contributions and benefits existed on the 90th day prior to expiration of any previous collective bargaining agreement between the parties, or the 90th day prior to commencement of negotiations if there is no previous collective bargaining agreement between the parties.

It is undisputed that the District's offer for the 1994-1995 contract maintains the appropriate percentage premium contribution by the District and does not change the health insurance benefits provided. The parties' dispute is limited to the question of whether the District has improperly established the "cost" of the health insurance benefit itself.

As a general matter, we are persuaded that neither Sec. 111.70(1)(nc)1.a., Stats., nor Sec. 111.70(4)(cm)8s, Stats., envision that the Commission would evaluate whether the level of

health insurance premium cost increase or decrease (as opposed to the employer's percentage contribution toward said cost) was appropriate when determining the composition of a qualified economic offer. Thus, neither the text nor calculation forms of our administrative rules adopted pursuant to Sec. 111.70(4)(cm)8s, Stats., make any reference to such an inquiry. Therefore, we generally conclude that, for instance, when health insurance benefits are obtained through a private provider and that provider raises premiums by a certain percentage, we have no role to play in evaluating the propriety of that level of premium increase.

The Association does not necessarily disagree with the foregoing as it relates to private providers but argues that where the employer itself is the entity that establishes the premium levels, the risk of inappropriate premium level manipulation is so great that the Commission should evaluate the level of premium increase against some objective standards. We concede the potential for abuse argued by the Association, although we believe this potential exists in both the private carrier and self-insurance arenas. However, as noted above, we do not believe the Legislature intended to empower us to evaluate the propriety of premium levels and in effect establish premium levels ourselves for the purposes of a qualified economic offer. Instead, we believe it was the Legislature's intent that collective bargaining over the identity of the insurance provider, the benefits to be received and the employe cost of those benefits would serve as a sufficient check on any abuses which might occur.

Given the foregoing, we conclude that we will not evaluate the propriety of the premium level increases herein and further conclude that the District has met its obligations under Sec. 111.70(1)(nc)1.a. as to health insurance contributions and benefits in its 1994-1995 offer.

Teaching Hours and Teacher Load

The parties' 1991-1994 contract provided in pertinent part:

> ARTICLE IX - TEACHING HOURS AND TEACHER LOAD
>
> . . .
>
> 39. The workday for teachers in the School District of La Crosse is as follows:
>
> A. Senior High Schools
> 7:35 Teacher Workday Begins
> Duty-Free Lunch Periods
> 3:25 Teacher Workday Ends

High School Day

1. No more than 250 minutes of instruction daily.
2. No fewer than 96 minutes of preparation time daily.
3. No more than 50 minutes of supervision/ study hall daily.
4. No fewer than 30 consecutive minutes of duty-free lunch.

   High School teachers are to report to work at 7:35 a.m. and will be dismissed at 3:25 p.m.

   a. More than 250 minutes of instruction per day will require a wage adjustment.
   b. Fewer than 96 minutes of preparation time a day will require a wage adjustment.
   c. 240-250 minutes of instruction or any combination of 288-300 minutes of assignment will be considered full-time depending upon the length of the periods.

The District proposes to modify this provision in the 1994-1995 contract through the addition of the underlined language:

39. The <u>normal</u> work day for teachers in the School District of La Crosse is as follows:

A. Senior High Schools

7:35 Teacher Workday Begins
Duty Free Lunch Periods
3:25 Teacher Workday Ends

High School Day

1. No more than 250 minutes of instruction <u>on an average</u> daily <u>basis</u>.
2. No fewer than 96 minutes of preparation time <u>on an</u>

average daily basis.

3. No more than 50 minutes of supervision/study hall on an average daily basis.
4. No fewer than 30 consecutive minutes of duty-free lunch.

High School teachers are to report to work at 7:30 a.m. and will be dismissed at 3:25 p.m.

a. More than 250 minutes of instruction on an average daily basis will require a wage adjustment.
b. Fewer than 96 minutes of preparation time on an average daily basis will require a wage adjustment.
c. 240-250 minutes of instruction on an average daily basis or any combination of 288-300 minutes of assignment on an average daily basis will be considered full time depending upon the length of the periods.

3. Fewer than 96 minutes of preparation time on an average daily basis or fewer than 48 minutes of preparation time daily will result in a wage adjustment.

The parties agree that if the District's proposal is an "economic issue," the District cannot use interest arbitration to obtain the proposed modification.

Section 111.70(1)(dm), Stats., defines an "economic issue" as:

> **(dm)** "Economic issue" means any issue that creates a new or increased financial liability upon the municipal employer, including salaries, overtime pay, sick leave, payments in lieu of sick leave usage, vacations, clothing allowances in excess of the actual cost of clothing, length of service credit, continuing education credit, shift premium pay, longevity pay, extra duty pay, performance bonuses, health insurance, life insurance, vacation pay, holiday pay, lead worker pay, temporary assignment pay, retirement contributions, severance or other separation pay, hazardous duty pay, certification or license payment, job security provisions, limitations on layoffs and contracting or subcontracting of work that would otherwise be performed by municipal employes in the collective

bargaining unit with which there is a labor dispute.

In Darlington Community School District, Dec. No. 28456 (WERC, 7/95), we stated the following as to how Sec. 111.70(1)(dm), Stats., would be interpreted:

> Having reviewed the statutory language of Sec. 111.70(1)(dm), Stats., which was created as part of 1993 Act 16, it is evident the legislature intended the definition of "economic issues" to include any specifically listed subjects. . . . 2/
>
> ---
>
> 2/ We are generally persuaded that the legislature intended the 1993 Act 16 restrictions on access to interest arbitration to prevent either party from arbitrating changes in existing contract provisions as to any of the various enumerated issues listed in Sec. 111.70(1)(dm), Stats., where a qualified economic offer has been made.
>
> To conclude otherwise would be to conclude the legislature intended Act 16 to prevent union arbitrated gains in the enumerated "economic issue" subject areas but to allow employer arbitrated "take aways" as to existing contractual "economic issue" protections and benefits. Such an interpretation would be at odds with the whole concept of a "qualified economic offer" (which mandates maintenance of existing "fringe benefits", some of which are listed in Sec. 111.70(1)(dm), Stats.).

Applying the foregoing to the District proposal, we find it is an "economic issue" within the meaning of Sec. 111.70(1)(dm), Stats. Under the 1991-1994 contract, the District has the flexibility to schedule the teacher work day as it sees fit but must give teachers additional salary if the District's scheduling decisions do not meet the compensation standards set forth in Article IX. The District's proposal lowers the existing standards for additional salary. As such, we are satisfied the proposal implicates the "salaries," "extra duty pay" and "temporary assignment pay" components of the definition of an "economic issue" set forth in Sec. 111.70(1)(dm), Stats. Therefore, Sec. 111.70(4)(cm)5s, Stats., does not allow the District to arbitrate its proposal where, as here, the District has also submitted a qualified economic offer.

Certified Teacher Dismissal

Article X - TEACHING POSITIONS in the 1991-1994 contract states in pertinent part:

> 54. No certified teacher will be dismissed for the purpose of replacement by a paraprofessional or teacher assistant.

The District asserts the existing language is a permissive subject of bargaining.

Before considering the specific proposal at issue herein, it is useful to set out the general legal framework within which we determine whether a proposal is a mandatory or permissive subject of bargaining.

Section 111.70(1)(a), Stats., provides:

> 111.70(1)(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 questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employe to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employes under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The 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 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 or permissive:

> 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 forth 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 contract, 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)

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.

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), the unit employes' "wage" and "conditions of employment" interests predominate.

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.

Turning to the question of whether the existing contract provision is an "economic issue" which the District could not seek to delete from the successor contract through interest arbitration if it makes a qualified economic offer, we note that "salaries," "limitations of layoff," "job security provisions" and "subcontracting" are all identified in Sec. 111.70(1)(dm), Stats., as "economic issues." Because this contract provision relates to all of these statutorily identified examples of "economic issues," the provision is an "economic issue."

Dated at Madison, Wisconsin, this 7th day of November, 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