STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| MADISON TEACHERS, INC.,<br><br>Complainant,<br><br>vs.<br><br>MADISON METROPOLITAN SCHOOL DISTRICT,<br><br>Respondent. | Case 262<br>No. 53234 MP-3091<br>Decision No. 28671-A |

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Richard Thal, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of Madison Teachers, Inc.

Ms. Anne L. Weiland, Attorney at Law, W182 N9052 Amy Lane, Menomonee Falls, Wisconsin 53051, appearing on behalf of the Madison Metropolitan School District.

## FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Madison Teachers, Inc. filed a complaint with the Wisconsin Employment Relations Commission on October 25, 1995, alleging that the Madison Metropolitan School District had committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 4, Stats., by directing "core teachers" to make telephone contact with "core parents" and not providing sufficient time to do this as well as their previously assigned duties and failing to bargain the impact of said directive. 1/ On March 13, 1996, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on April 24, 1996, in Madison,

1/ At the hearing, MTI stipulated that the District had the right to assign teachers to make the phone calls and that the issue before the Examiner is the duty of the District to bargain the impact of that assignment. Tr. 89-91.

Wisconsin. The parties filed post-hearing briefs and reply briefs, the last of which was received on June 10, 1996. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

## FINDINGS OF FACT

1. Madison Teachers, Inc., hereinafter referred to as MTI, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its offices are located at 821 Williamson Street, Madison, Wisconsin 53703.

2. Madison Metropolitan School District, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 545 West Dayton Street, Madison, Wisconsin 53703-1967.

3. In the 1992-93 school year, Memorial High School established a pilot program for freshmen called the Core program with a goal of increasing the percentage of ninth grade students who after the first year would have enough credits to be promoted. The pilot program involved only two Cores. Each Core consisted of about 80 students and had an English, Social Studies and Science teacher in common. In 1992-93, each Core teacher was given an extra period each day for planning and discussing strategies to meet the needs of students. In 1993-94, the Core program was implemented for the entire ninth grade and consisted of five Cores with about 80 students each and each Core teacher was given 2 1/2 periods per week for planning and discussing strategies for meeting students' needs. In addition to meeting with each other, the Core teachers met with the guidance counselor as well as the social worker, school psychologist, principal, reading specialists and parents of the students.

4. In August, 1994, it was suggested by the Memorial High School administrators that over the first month of school each Core be divided up and each Core teacher contact the parents or guardians of their share of Core students. In September, 1994, the assistant principals at Memorial sent a memo to all Core teachers stating that now was an excellent time to make phone calls to parents/guardians. The MTI building representative, by a memo dated October 5, 1994, informed Core teachers that the phone calls would take considerable time and effort and was an additional burden and the District could not unilaterally impose it. This dispute was not resolved and the Core teachers were not required to make the calls.

5. On September 6, 1995, Memorial High School Principal Carolyn Taylor sent a memo to all Core teachers which stated, in part, as follows:

> Using some of the time provided by our Core arrangements (or any other time you deem appropriate to substitute), please make telephone contact with one parent of each student in your Core.

The memo provided that the Core students be divided into fourths and it was anticipated that each teacher would have fewer than 20 contacts with each contact taking about five minutes and the memo stated that the contacts should be completed by September 20, 1995. MTI thereupon filed the instant complaint.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

## CONCLUSION OF LAW

1. The District's Memorial High School Principal's directive dated September 6, 1995, to make telephone contact with Core parents had no impact on wages, hours or conditions of employment so the District had no duty to bargain over said directive and the District did not commit any violation of Sec. 111.70(3)(a)1 or 4, Stats.

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

## ORDER 2/

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

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition

IT IS ORDERED that the complaint, as amended, be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 8th day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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is filed within 20 days from the date that a copy of the findings
(footnote continued on Page 4)

2/ (footnote continued from page 3)

> or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

**This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).**

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, MTI alleged that the District violated Secs. 111.70(3)(a)1 and 4, Stats., by failing to bargain over the impact of the District's requirement that Core teachers make telephone contact with Core parents. The District answered the complaint denying that it was under any obligation to bargain with MTI over the requirement.

MTI'S POSITION

MTI contends that the District failed to bargain over the impact of its directive to Core teachers to make telephone contacts with Core parents. It submits that this was an assignment of additional work to teachers and the District must bargain over the effect of this. It argues, contrary to the District's assertion, that this additional work is not de minimis as the calls to parents cannot be done in an insubstantial or de minimis amount of time. It cites case law that under the federal wage and hour regulations, ten minutes a day is not a de minimis amount of time. It calculates that teachers would spend at least ten minutes a day of additional work and considerable time would be spent trying to reach parents not readily available. It maintains that the average time spent per day contacting parents would be considerably more than a de minimis amount of time. MTI claims that the District is mistaken in contending that Core teachers have time both to perform their previously assigned duties and to make the newly assigned telephone contacts. It alleges that a key component of the Core program is Core planning time so teachers can meet the objectives of the Core program. MTI observes that Core teachers already have no free time during their normal work days to call parents and making these calls during normal hours will result in teachers' performing their other duties outside the normal day or eliminating these essential responsibilities. It argues that this demonstrates the need for meaningful bargaining over the impact of the directive to make the telephone calls. In conclusion, it maintains that the District is obligated to bargain over the impact of the directive and its failure to do so is a prohibited practice under Secs. 11.70(3)(a)1 and 4, Stats.

DISTRICT'S POSITION

The District contends that MTI has not sustained its burden of proof that the District violated Secs. 111.70(3)(a)1 and 4 by failing to bargain the impact of the requirement to make a phone call to parents. It asserts that MTI must make a timely request for bargaining and there was no evidence of any request to bargain the impact, so the District was not required to bargain. It alleges that MTI objected to the District's right to impose the duty and that was the only objection until well into the hearing when it changed its position to a failure to bargain the impact. It cites

Hartford Joint School District No. 1, 3/ in support of its contention that MTI was required to request bargaining and the District was not responsible for presenting proposals over its own policy decisions. It insists that the District cannot be found to have refused to bargain the impact absent a request by MTI to do so.

The District claims that the impact of the requirement to make phone contact with parents on the work load of Core teachers is de minimis. It submits that the work load of a teacher is dependent on a number of variables such as the number of students taught, subjects taught and the number of classes. It points out that the normal load is five classes and two preparation periods and as periods are 51 minutes, this extrapolates to 1,275 minutes of student contact time and 760 minutes of prep/planning time per week. Core teachers are assigned 4.5 classes per day and so have additional time for planning than other high school teachers. It submits that the entire responsibility would take fewer than two hours and given that Core teachers have 532.5 hours of prep and planning time per year, this responsibility is clearly de minimis. The District refers to Gordon Perkins' testimony that during the pilot year, he contacted all parents and there was no evidence that this effort impacted his work load and he testified that Core teachers make telephone calls to parents "all the time." It submits that the evidence demonstrates that the impact on working conditions is non-existent and there was no violation of Sec. 111.70(3)(a)4, Stats. The District seeks attorneys' fees because MTI had no desire to bargain the impact, rather it wanted to delay the implementation of the District's policy decision. It argues that this litigation could have been avoided had MTI acknowledged earlier what it stipulated and simply made a request to bargain the impact. It states that this type of conduct should be discouraged by the imposition of attorneys' fees and costs. It requests that the complaint be dismissed in its entirety.

MTI'S REPLY

MTI contends that the District does not dispute that it failed to bargain over the impact of requiring Core teachers to make phone contacts; rather, the District claims it should be excused because MTI never requested bargaining. MTI alleges that it had no reason to request bargaining because the parties reached an understanding that the memo would not be implemented until the Commission issued a decision in this case. MTI distinguishes Hartford Joint School District No. 1, supra, on the grounds that the impact items were addressed in the parties' collective bargaining agreement and the parties had bargained to impasse over the impact proposals before the filing of the complaint. In contrast here, according to MTI, the contract does not cover the issues nor was there any bargaining to impasse.

MTI reiterates its argument that phoning the parents would require more than a de minimis

3/ Dec. No. 27411-A (Jones, 4/93).

amount of time. It points out the District cited no cases to support its position and averaging the time over the year makes no sense because the calls had to be made in a two or three week period.

As to attorneys' fees and costs, MTI asserts none should be awarded because MTI streamlined the hearing by eliminating an issue and the District failed to meet the Commission's deadline for filing an answer to the complaint and if there is an imposition of costs and attorneys' fees, it should be against the District.

MTI concludes that for these reasons as well as those stated in its original brief, the District has a duty to bargain the impact of the requirement that Core teachers call parents of Core students.

DISTRICT'S REPLY

The District observes that MTI's reference to the minimum wage and overtime provisions under the Fair Labor Standards Act are not applicable to professional employes such as teachers and what constitutes de minimis work for hourly workers under the Fair Labor Standards Act has no application to high paying professional jobs where such employes exercise a significant amount of judgment as to how and when they perform their responsibilities. The District references a Commission decision wherein it concluded that 5 percent of work time spent on confidential duties was de minimis. In the instant case, the time for phone calls, according to the District, is de minimis compared to the time available to perform the discretionary duties in the Core program.

The District argues that the directive to call parents is not a directive to perform an "additional duty"; rather, it is a directive to re-prioritize the discretionary duties involved in supporting Core students. It refers to the testimony that a teacher didn't believe he could eliminate duties without harm to the program but implicit in this is that he could replace them with phone calls that the Principal believed in her professional judgment to be more essential. It submits that other duties could be postponed or eliminated and replaced by the phone calls. The District asserts that it is a matter of determining priorities for the discretionary work of teachers and the Principal could make the determination that the calls were a first priority. The District maintains that the duty did not require any additional work; rather, it required a shifting of the discretionary responsibilities within the work year and such has little or no impact on the wages, hours and working conditions of the teachers involved. It concludes that the directive did not give rise to a legal duty to bargain the impact thereof.

DISCUSSION

With respect to the legal background, a matter which is primarily related to wages, hours and conditions of employment is a mandatory subject of bargaining, while a matter which is primarily related to the formation and choice of public policy is a permissive subject of

bargaining. 4/ In applying the "primary relationship test," the Wisconsin Supreme Court concluded that bargaining is not required with regard to "educational policy and school management and operation" or the "management and direction of the school system." 5/

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

5/ Beloit, supra, at 52, 56.

With regard to the assignment of duties, the Commission has held that if a particular duty is fairly within the scope of responsibilities applicable to the kind of work ordinarily performed by the employes involved, the employer may unilaterally impose such assignment. If the particular duty is not fairly within the scope, the decision to assign that duty is a mandatory subject of bargaining. 6/ In the instant case, the parties do not dispute that making phone calls to parents by teachers is fairly within their normal duties. Although the District does not have an obligation to bargain the assignment of teacher's making phone calls, it may have a duty to bargain the impact of the change on the wages, hours and working conditions of employes. 7/

The sole issue to be determined in this matter is whether the District had an obligation to bargain the impact of the Principal's memo of September 6, 1995, requiring Core teachers to make telephone contact with Core parents. The undersigned concludes there was no impact and thus the District had no obligation to bargain over the requirement to make phone contacts. It was conceded that making telephone calls to parents is fairly within the scope of a teacher's regular job duties. The obligation to bargain is on the impact of the assigned duty. In the instant case, the wages did not change nor were they argued to be affected and no change in hours were argued to have occurred. The only assertion was that there was a change in working conditions in that additional work was assigned. The Core teachers are given 2 1/2 hours a week to do Core related duties. Most of this time is spent by the Core teachers meeting to talk about the students in the Core and discuss common strategies with each other. 8/ Core teacher, James A. Skaggs, testified as follows:

> I think it was always anticipated, is always anticipated that we will have contact with parents, whether in core or out of core. But I think

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6/ City of Wauwatosa (Fire Department), Dec. No. 15917 (WERC, 11/77) at page 13. See also, Sewerage Commission of the City of Milwaukee, Dec. No. 17302 (WERC, 9/79); City of Wauwatosa, Dec. No. 13109-A (WERC, 6/75); City of Milwaukee (Police Department), Dec. No. 16602-A (Greco, 5/79), aff'd Dec. No. 16602-B (WERC, 1/80).

7/ Racine Unified School District, Dec. Nos. 20652-A, 20653-A (WERC, 1/84).

8/ Tr. 23-28, 35.

that in the first few years of core, there was probably some discussion in the meeting that the principals had with the core teachers at the beginning of the year with the desirability of contacting parents. 9/

9/ Tr. 28-29, 42.

The Principal decided that it would be more successful and beneficial for the program if teachers contacted Core parents early in the school year. 10/ It is apparent that teachers did not agree with this assessment. The Principal directed Core teachers to make the calls and told teachers to use the time provided by the Core arrangements to make the calls. 11/ Clearly, instead of meeting and discussing students, the Core teachers and guidance counselor would make telephone contacts. This is not an additional duty as argued by MTI. Rather, it simply substituted phone contacts for discussion about Core students. The discussion on students could occur at a later time. MTI contends that Core planning time is a key component in the program. Which is more important, first calling Core parents or Core planning at the start of the school year in the 2 1/2 hours each week set aside for this is a judgment call and although there is a difference of opinion, the Principal has the right to determine which is more important as educational policy concerns control. The Core teachers were not asked to do the phone calls in addition to their Core assignment but in lieu thereof as part of the Core assignment. Thus, there was no new duty but simply which responsibility should be done when and this has no impact on wages, hours or conditions of employment. Inasmuch as there is no impact, there is no duty to bargain and no violation of Sec. 111.70(3)(a)1 or 4, Stats.

Both sides have asked for attorneys' fees and costs. The Commission has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 12/ The allegations and defenses have not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of costs and attorneys' fees and the parties' requests for same are denied.

Dated at Madison, Wisconsin, this 8th day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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10/ Ex. 1, Tr. 117-118.

11/ Id.

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