

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION,

Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT and THE
BOARD OF EDUCATION OF THE RACINE
UNIFIED SCHOOL DISTRICT,

Respondents.

Case 144

No. 54273 MP-3187

Decision No. 28859-A

Appearances:

Mr. Robert K. Weber, Weber & Cafferty, S.C., Attorneys at Law, 2932 Northwestern Avenue, Racine, Wisconsin 53404, for the Racine Education Association, referred to below as the Association.

Mr. Douglas E. Witte, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, for Racine Unified School District and The Board of Education of the Racine Unified School District, referred to below as the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 5, 1996, the Association filed a complaint of prohibited practices alleging that the District had violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by unilaterally changing the starting and ending times of the student day. On August 5, 1996, the Association filed an amendment to the complaint. After informal attempts to resolve the matter proved unsuccessful, the Wisconsin Employment Relations Commission, on September 25, 1996, designated Richard B. McLaughlin, a member of its staff, to act as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07, Stats. The District filed its answer to the amended complaint on October 9, 1996. Hearing on the matter was held on December 4, 1996, and on January 21, 1997, in Racine, Wisconsin. A transcript of each day of that hearing was provided to the Commission by February 6, 1997. The parties filed briefs and reply briefs by April 23, 1997.

No. 28859-A

FINDINGS OF FACT

1. The Association is a labor organization which, at the time of hearing, maintained its principal offices at 516 Wisconsin Avenue, Racine, Wisconsin 53403.

2. The District is a municipal employer which maintains its principal offices at 2220 Northwestern Avenue, Racine, Wisconsin 53404.

3. The Association has been certified by the Commission as the exclusive collective bargaining representative for certain District employees including all regular full-time and part-time certified teaching personnel employed by the District but excluding on call substitute teachers, interns, supervisors, administrators, and directors. The District and the Association have negotiated a series of collective bargaining agreements, the most recent of which was in effect, by its terms, from August 25, 1992 through August 24, 1993. Included among the provisions of the 1992-93 agreement are the following:

10.1.2 Preparation Time (Elem. Teachers)

In elementary schools, the principal, working with the teaching staff, shall determine the staffing pattern and staff utilization of the school within the Board's teacher-student ratio policy; so long as students receive the instructional time designated by the Board, the principal, working with the teaching staff, may utilize staffing patterns so as to provide a minimum of one hundred forty (140) minutes per week individual teacher preparation time and/or educational assistants to assist teachers in or to assume supervisory duties.

...

10.2 Teacher Starting and Ending Times

All teachers are expected to be in their respective rooms or assigned places at least fifteen (15) minutes before the time for the tardy signal. Teachers are expected to be present and performing their teaching duties during the time that pupils are required to be there according to the hours of school as presently established by the Board. Teachers in secondary schools shall be available for a period of at least (15) minutes after regular pupil dismissal. In elementary schools the teachers shall be available for a period of at least (10) minutes after regular pupil dismissal. In elementary schools the

principal, on an equitable basis, may assign a portion of the teaching staff responsibilities related to pupil dismissal for a fifteen (15) minute period immediately after regular pupil dismissal. Teachers not so assigned shall be free to leave the building for the day following the elapse of ten (10) minutes after regular pupil dismissal.

...

10.4 Assignment of Instructional/Preparation Periods

10.4.1 High School Teacher Assignments

Teachers in high school shall teach a maximum of five (5) instructional periods and have one (1) individual preparation period of equal length to an instructional period. In addition, teachers may be assigned to a study center/resource center limited to one (1) semester per school year. The remaining portion of the regularly scheduled day will include the teacher's lunch period, homeroom assignment and general supervisory duties.

10.4.2 Middle School Teacher Assignments

Teachers in middle school shall teach a maximum of five (5) instructional periods and have one (1) individual preparation period of equal length to an instructional period. In addition, teachers may be assigned a non-instructional period which could include instructional planning (team, department, group planning) and an advocacy responsibility (conference with students, parents, records updates, etc.). The remaining portion of the regularly scheduled day will include the teacher's lunch period, study center assignment and general supervisory duties.

...

10.5 Building/Departmental/Subject Area Meetings

Teachers, unless excused by the person calling the meeting, may be required without additional pay to attend the following meetings outside the regular teacher day: building staff meetings, departmental meetings and subject area meetings called by directors. Any teacher required to attend more than thirty (30) hours per school year in these required meetings will be paid seventeen cents (17¢) a minute

for any time spent beyond the thirty (30) hours.

...

17.1.2.1 Rescheduling Institute Day

*The Board or its designee may reschedule Institute Day to different dates or may reschedule it for segments of days after considering a recommendation from the Board's District Inservice Committee, so long as it exists.

4. The Association and the District have yet to agree on a successor to the 1992-93 labor agreement. They have collectively bargained regarding a successor, but that bargaining has not produced an agreement. For the 1994-1995 contract years, the District imposed a Qualified Economic Offer. Since at least 1995, the parties have been engaged in collective bargaining for a labor agreement to cover the 1995-97 contract years. That bargaining, as of the date of hearing on this complaint, had not produced an agreement, nor had the District acted to impose a Qualified Economic Offer.

5. In the Spring of 1995, the District, through a core planning group, began the process of developing a strategic plan for the District. The core group included, among others, District representatives, students, business leaders and the Association's Executive Director. The goal of this effort was to establish a five-year plan to guide the District's development from 1996-2001. The process was designed to function by consensus and was facilitated by a professional facilitator. Ultimately, a 1996-2001 Strategic Plan, referred to below as the Strategic Plan, was created, which included seven strategies broken into specific action plans to implement them. The third of these seven strategies concerned "STAFF DEVELOPMENT," and was broken into the following eight Action Plans: Director of Staff Development; Staff Development Allocated Time; Building Level Staff Development Committee; Network Teams; New Staff Induction Program; Communication Consultant; Communications Launch; and Technology Staff Development. The Strategic Plan sought the following "Specific Results" for "Staff Development Allocated Time" action plan: "Allocated time for ongoing, and regular staff development." This result was, in turn, broken into the following "Action Step(s):"

1. Communicate with and secure agreement from appropriate bargaining groups (REA, REAA, Local 152, etc.) regarding staff development within the workday.
2. Communicate with RAA regarding schedule.
3. Submit proposal to School Board.
4. Conduct parent information campaign of benefits to be gained from staff development early release days.

5. Implement staff development time schedule (e.g. 2 hour time period 12 times during year; half-day 6 times per year . . .)

Well before the Strategic Plan process began, the District had formed an Inservice Committee. That committee was, by the time the Strategic Plan was developed, moribund. The Strategic Plan established a committee structure designed to supplant the role of the Inservice Committee. From the perspective of District administration involved in the planning process, ongoing staff development was a significant priority which was to be changed from one-time inservice offerings to an ongoing, District-wide emphasis. John Pelej, the District's Director of Staff Development and Instructional Services, and a member of the core group for developing the Strategic Plan, characterized the change as from "one shot, sit and get" to "long-term sustained development."

6. The planning process sketched in Finding of Fact 5 ultimately produced a proposed Board of Education policy. At its October 7, 1996 meeting, the Board accepted a proposed Staff Development Policy. That proposed policy was then published for public review and comment. It was, for example, distributed to District Building Principals and posted on bulletin boards throughout the District's facilities. In November of 1997, the Board adopted the following policy:

Personnel

D. District Staff Development (4131.4)

Philosophy

The District believes that student learning can be improved through a staff development program that fosters continuous improvement, that is aligned with school effectiveness goals and the District Strategic Plan. The District recognizes that staff development is an innovation in itself that requires study of the change process.

The process of staff development is dynamic, yet the objectives of all District Staff Development activities must be clearly articulated and directly linked to the improvement of student learning.

Functions

- * Increases administrator and teacher understanding of how to provide school environments and instruction that are responsive to the needs of children.

- * Facilitates the development and implementation of school and classroom-based management which maximizes student learning.

- * Provides an awareness and training related to the knowledge, skills and behaviors needed to ensure that an equitable and quality education is provided all students.
- * Enables educators to provide challenging, developmentally appropriate curricula that engage students in integrative ways of thinking and learning.
- * Prepares teachers to use research-based teaching strategies appropriate to their instructional objectives and their students.
- * Prepares educators to demonstrate high expectations for student learning.
- * Facilitates staff collaboration with the support of families for improving student performance.
- * Prepares teachers to use various types of performance assessment in their classrooms. (National Staff Development Council, 1995)

1. Staff Development Committees

- a. A Staff Development Team will be informed at each building/site.
 - 1) Each Staff Development Team may include representative membership from work groups (e.g. professional staff, educational assistants, secretaries, custodians) within the building. The building principal, working with the building staff, will determine the size and membership of the Staff Development Team.
 - 2) The Staff Development Teacher, if one is assigned, will be a member of the Staff Development Team.
 - 3) A building administrator will be a member of the Staff Development Team.
 - 4) The Staff Development Team will design an annual staff development plan which outlines activities intended to address School Effectiveness and District goals.
 - 5) The staff development plan will allocate available resources (i.e. time allocations and budgeted funds for staff development).
 - 6) The staff development plan will be incorporated in the School Effectiveness Plan.

- 7) The staff development plan will include methods to monitor progress and evaluate the effectiveness of activities.
 - 8) Each Staff Development Team will select a representative to its appropriate District Staff Development Network Committee.
- b. Staff Development Network Committees
- 1) Staff Development Network Committees will be established for elementary, middle and high schools.
 - 2) Membership of Staff Development Network Committees:
 - a) Staff Development Team Representative from each building/site.
 - b) Director of Staff Development and Instructional Services.
 - c) Director of Exceptional Education.
 - d) A bargaining group member appointed by the Racine Education Association.
 - e) A bargaining group member appointed by the Racine Educational Assistants Association.
 - f) A bargaining group member appointed by Service Employees, Local 152.
 - g) A bargaining group member appointed by Secretarial/Clerical, Local 152.
 - h) Two Curriculum & Instruction Supervisors appointed by the Assistant Superintendent of Instructional Services.
 - 3) The Staff Development Network Committees will:
 - a) Share progress of building staff development plans.
 - b) Support Staff Development Teams.
 - c) Facilitate sharing between sites and support the melding of common activities.

- d) Assist in the design and implementation of district staff development activities (i.e. Institute Day, District inservice workshops, collaborative credit programs).
 - e) Invite community resources people to provide input (e.g. parents, business representatives, pre-service institutions, etc.).
- 4) Staff Development Network Committee Chairpersons
- a) Staff Development Network Committee Chairpersons will be elected annually by the committee membership.
 - b) Chairpersons will:
 - i. Call meetings
 - ii. Formulate the agenda for each meeting
 - iii. Preside at meetings using parliamentary procedure
- c. The Chairperson of each Staff Development Network Committee, the Director of Staff Development and a member of the teacher bargaining group, appointed by the Racine Education Association, will act as a Staff Development Liaison Committee to the Superintendent. The Staff Development Liaison Committee will apprise the Superintendent of ongoing staff development activities and make recommendations for future direction and initiatives.

...

To further implement the Strategic Plan, the Board, in June of 1996, forwarded a proposed Policy for Staff Development for "public review and comment." The policy was distributed to District administrators, posted on bulletin boards throughout the District and included in newsletters. The public review was meant to obtain the input of teachers, administrators and parents, among others. In July of 1996, after the review period, the Board adopted Policy Number 4131.5, which states:

e. Staff Development (4131.5)

1. Student Early Release/Late Start Days

- a. The length of the student day is set as provided in Board Policy 6112. Such will be done prior to the start of a given school year.
 - b. Prior to the start of each school year, the Board of Education may designate certain school days as Student Early Release Days (or Late Start Days) and on those days the students' day may be shortened by two (2) hours. The number of these days shall not exceed fourteen (14) in a given school year.
 - c. In such event, the length of all student school days will be increased by the amount of time necessary so that the total time provided for student attendance during the school year will not be less than the time provided students in the 1995-96 school year.
 - d. Staff development programs will be scheduled for teachers after school on Student Early Release Days or before school on Late Start Days (not to exceed two hours).
 - e. All teachers will be required to participate in these staff development programs by their principal or supervisor unless excused in writing by their principal or supervisor for good cause.
2. Staff Development Offerings
- a. Building teachers are encouraged to develop staff development offerings relevant and specific to their particular buildings. The offerings will be developed in accordance with District policy 4134.4.
 - b. Building teachers may provide programs for at least one-third (1/3) of the available Staff Development Days provided they develop enough programs to fill the available time.
 - c. The Administration will provide a sufficient number of staff development offerings relevant to all teaching staff to fill all Student Early Release Day or Late Start staff development time not provided by

building teachers. These offerings will be developed in accordance with District policy 4134.4.

3. In the event a staff development program is not available on Student Early Release Days or Late Start Days, teachers may leave school or arrive at school at the time designated in Section 10.2 of the collective bargaining agreement.
4. All hours a teacher spends attending after school or before school staff development programs will be credited toward the thirty (30) hour after-school meeting limit as set out in Section 10.5 of the collective bargaining agreement.
5. Nothing in this policy shall preclude the District from providing staff development programs at other times.

Pelej assumed the primary responsibility for implementing these policies. Ultimately, at a meeting among various administrators, it was decided to use the schedule already in place for inclement weather days for staff development. This became the basis for the changes in the school calendar for the 1996-97 school year to accommodate periodic staff development days. In late July and early August of 1996, Pelej advised local police and day-care providers of the anticipated changes to the school calendar caused by staff development days.

7. The District scheduled six two hour blocks of staff development for teachers at its traditional year schools during the 1996-97 school year. The six days were November 14 and December 12 of 1996, as well as January 30, March 13, April 17 and May 15 of 1997. On these days, students reported for school two hours later than normal. For the remaining student contact days, students reported to school two minutes earlier and left school two minutes later than in the 1995-96 school year. This schedule required the District to shorten six of the eight periods of the student day in its Middle and High Schools. The two periods during which lunch is served, fourth and fifth period, remained the same length. Between the 1992-93 and the 1996-97 school years, the District's schools have used the same start and end times, with one exception. That exception involved the Janes Elementary School which, in the 1994-95 school year made the reporting time for pupils five minutes earlier at the start and the close of the school day. Prior to the 1992-93 school year, District changes to the start and end times to the school day were more common. For the District's Year-Round Education Schools, late start days for staff development were scheduled for September 19 and November 14 of 1996, as well as on January 30, March 13, May 15 and June 19 of 1997.

8. In August of 1995, the Association and the District agreed to a school calendar for the 1996-97 school year. That calendar provided for an Institute Day on February 21, 1997.

Institute Day for that date was designed as a District-wide inservice day, as it had been in prior school years. The 1996-97 school calendar, as agreed upon in August of 1995, did not include any of the staff development days noted in Finding of Fact 7.

9. The Association and the District had, prior to the Board's adoption of Policy 4131.5, discussed the proposed changes to the school calendar traceable to staff development beyond Institute Day. Some of this discussion occurred in conjunction with their collective bargaining concerning a successor to the 1992-93 labor agreement, and some occurred in informal discussions outside of the formal collective bargaining process. In a letter dated May 18, 1995, the District made its first proposal to the Association regarding staff development for the 1995-96 school year. That letter states:

As you are aware from discussions with various central office personnel, the District believes it would be beneficial to the educational program if more time was provided for staff development of our teaching staff. In the past, when we have discussed this possibility, the Association has asked for corresponding compensation in relationship to the time involved. Because of the District's difficult financial situation, this has always been a stumbling block.

Dennis McGoldrick has indicated that you are receptive to teachers providing staff development time without the District being required to pay extra money. With this in mind, the District would like to propose the following:

- (1) School for students would end two hours early, approximately one day out of every ten. These two hour blocks (24 hours a school year) would be used for the staff development of all persons in the teacher group. In order to assure that students would receive the correct number of state mandated instructional minutes, all teaching days would be increased by approximately 8 minutes. This could be in the form of an early start, late dismissal or a combination of both.
- (2) In exchange for the extra 24 hours a school year, the District would agree to reduce the 30 hours of mandatory after school meeting by 20 hours. This would leave 10 hours for regular staff meetings, etc. The other four hours could possibly be achieved by

shortening some other day such as Returning Teachers Report days or Records Days.

Also, the District would allow teachers themselves to determine the type of inservice they would receive for at least part of the 24 hours. Although this would be subject to District approval, approval would not be withheld as long as the program was reasonably related to improving instruction.

Please give this some thought and get back to me as soon as possible. Time is important because if we are able to work something out, it is imperative that parents be notified of the time change for next year's schedule as soon as possible.

The Association responded with a proposal headed "Inservice" and dated June 22, 1995. That proposal includes, among its provisions, the following:

1.4.1 Mandatory Inservice

- 1.1 The agreements that follow will become a part of the 1995-97 Teacher Labor Agreement between the Board and the Association - Including the scheduling and placement of the former Institute Day as "Break" Day.
- 1.2 It is understood that the 1995-96 and the 1996-97 Calendar (Section 17) shall be a part of this agreement.
- 1.3 It is understood that Section 10.2 of the Teacher Labor Agreement shall be revised to include the 1995-97 School starting and ending times and to include language that includes the inservice days.
- 1.4 For the purpose of this agreement the following definitions of inservice will become a part of 1995-97 Teacher Labor Agreement

1.4.1 Mandatory Inservice

1.4.1.1 Mandatory Inservice is those hours scheduled in the calendar as inservice days (Wednesdays) as stated in Section 17 of the Teacher Labor Agreement . . .

1.4.1.3 All Inservice offerings on Mandatory Inservice days, prior to presentation shall be submitted to the Superintendent/Association Inservice Committee and

shall have the approval of the S/AIC.

1.4.1.4 There shall be no other mandatory Inservice scheduled during the duration of the 1995-97 Teacher Labor Agreement without written agreement from the Association.

1.4.1.5 Inservice including but not limited to P-5, Title, Standards, Eisenhower and Perkins shall not be scheduled during Mandatory Inservice days or any other day without agreed to date, length, location and compensation and written agreement between the Board and Association.

1.4.2 Voluntary Inservice:

1.4.2.1 Voluntary Inservice is those offerings that the District may from time to time offer to teachers for skill and knowledge improvement and where attendance/participation is at the sole discretion of the teacher(s) . . .

1.4.2.3 All Voluntary inservice offerings prior to presentation shall be presented to the S/AIC for review and approval.

1.4.3 Division of Mandatory Inservice Days

It is understood as a part of this Agreement that Mandatory Inservice days for the 1995-96 and 1996-97 years shall be divided as follows:

1.4.3.1 One-third (1/3rd) of the available days in each calendar shall be District Inservice Days and content shall be determined by the Superintendent or his designee.

1.4.3.2 One-third (1/3rd) of the available days in each calendar shall be C and I's or Principal Inservice Days and shall be determined by either the C and I or principal.

1.4.3.3 One-third (1/3rd) of the available days in each calendar shall be Building (Teacher) Inservice Days and shall be determined by vote of the REA members in the building or work group.

- 1.5 It is understood the Superintendent/Association Inservice Committee as described in this section shall be for the purpose of insuring high quality inservice that is useful to teachers, approval and distribution of all inservice funds and/or grants authorized or received by the Board, and to insure equitable distribution basis for schools and working groups.

1.5.1 Superintendent/Association Inservice Committee:

...

The District rejected this offer and made a counter proposal dated June 27, 1995. The Association rejected this offer. In a proposal dated August 14, 1995, the Association made a proposal which established the school day, compensated work performed outside of the school day as overtime and set various requirements concerning "Inservice Meetings." The District rejected this proposal as well as a subsequent Association proposal, dated January 8, 1996, to define the school day and to compensate work outside of the defined school day as overtime. Section 102.3 of the January 8, 1996 proposal states:

All work assignments (including mandatory M-Team meetings) scheduled for performance outside the regular teacher workday shall be considered overtime assignments with the exception of thirty (30) hours of meetings of which five (5) hours will be for inservice and the remaining twenty-five (25) hours for administrative meetings. The District will make every reasonable effort to schedule on Tuesdays immediately before or after the regular teacher workday. Unless compensation for such overtime assignments is provided for elsewhere in this Agreement, teachers assigned shall be compensated at his/her hourly rate of pay, with a one (1) hour minimum payment per assignment.

Informal discussions between Association representatives and District administration concerning staff development continued. By April of 1996, Association proposals made through those informal discussions were formally considered and rejected by the District's collective bargaining team.

10. The Board determined that it would implement a revised Staff Development strategy without regard to whether it could obtain the prior agreement of the Association. The Association became aware of this fact, and in a letter dated June 12, 1996, to Frank Johnson, the

District's Director of Employee Relations, James Ennis, the Association's Executive Director, stated:

On May 30, 1996, the Journal Times reported . . . that the school board would be voting on July 1, 1996, on a "proposal" to periodically change the starting and ending times of District students in order to provide for more inservice time.

On June 10, 1996, the District presented the Association with proposals for the 1995-97 collective bargaining agreement. Proposal number 9 would increase the unpaid before or after school meeting time from 30 to 50 hours. It is difficult to say, without your clarification, whether this increase is intended for the purpose of providing additional inservice, because your contract proposals do not explicitly refer to inservice.

I am writing to remind you that the parties have specifically addressed the issue of staff development (inservice) in a series of proposal exchanges over the last year . . . and have not reached agreement.

The Association has, and continues to oppose, a unilateral change in the length of the teacher workday. It is clearly a mandatory subject of bargaining. Moreover, it would violate the status quo of the "presently established" hours of school set by the board. See Section 10.2 of the labor agreement. Finally, on those days that the Board contemplates (according to the newspaper) having students report two hours late, I would note that teachers -- again, pursuant to sec. 10.2 -- do not have to report until 15 minutes before the students do.

I am therefore demanding that the District refrain from any unilateral implementation, and to bargain in good faith.

Johnson responded in a letter dated June 19, 1996, which states:

. . .

You ask to bargain teacher starting and ending times as well as other items. I am confused by the various proposals you have sent since one covers hours for 1993-95 and another covers hours for 1995-96. Hours and other items in your proposals obviously cannot be

changed for 1993-96 since that period of time has elapsed. The minimum salary required by law has also been paid teachers, therefore, other economic items as set out in your proposal cannot retroactively be achieved through arbitration. Please clarify the purpose of your 1993-95 proposal which is significantly different from your 1995-96 proposal.

You also sent a proposal on inservice that you originally made in June of 1995. Since most of that proposal consisted of non-mandatory items of bargaining, the District, at that time, counter proposed on June 26, 1995 with a more appropriate proposal. The Association rejected that proposal on the same day and did not counter propose on any item. In fact, until today, the district has not officially heard from you since June of 1995 regarding that subject.

You raise an objection to the Board of Education policy on staff development. Please be assured that the proposed policy conforms to hours of work previously bargained and as presently contained in the collective bargaining agreement. Section 10.2 sets out those hours. You also indicate that teachers under this section do not have to report until 15 minutes before the students do on student late start days. You are correct, however, Section 10.5 allows the District to require teachers to attend meetings "outside the regular teacher day." A two hour staff development meeting prior to the start of school could be called by the principal under this section.

The District is agreeable to meet with you to discuss your various proposals as such may relate to the 1996-97 school year but I should caution you that the District has rejected your hours proposal many times in the past and without some sort of major incentive, the District is likely to stick to the current contract language. Your proposal as presented does not contain such incentive. Please consider this when we meet.

Please advise when and where you would like to meet for this discussion.

The Association's counsel, Robert K. Weber, responded in a letter dated June 28, 1996, which states:

...

The Association's position is that sec. 10.2 of the expired agreement establishes a status quo regarding the hours that were published by the school board during the term of that agreement The Association would consider any change in the hours to be a mandatory subject of bargaining which could only be legally accomplished by mutual agreement or a successor contract. . . .

Johnson responded in a letter dated July 11, 1996, which states:

. . .

First, I requested clarification of the bargaining proposals and asked the Association when and where it wanted to meet on this subject. Your letter did not address either of those matters. Please advise.

Second, you raised a concern about a change in teachers' hours. There will be no change in the teachers' hours when the staff development plan is put into effect. The hours teachers are required to be at school will stay the same. The only change will be the actual starting and ending times which the labor agreement allows to be changed as the student day is adjusted. For example, under the staff development proposal, the student day may be expanded by three or four minutes on either end and then every so often the student day would start two hours later or end two hours earlier. The end result would be for a teacher spending no more or no less time with kids than they have in the past therefore maintaining the status quo that you wrote about.

. . .

Weber responded in a letter dated July 22, 1996, which states:

. . .

Even after the year-round school case, it is still the Association's belief that the scheduling of inservice days is a mandatory subject of bargaining.

Also, with respect to the change in starting and ending times, the Association takes the position that the 1992-93 and subsequent

unchanged hiatus period times published by the District set the "currently established" status quo until a successor agreement is reached.

As you know, the Association has filed a prohibited practice complaint regarding the change. The Association would still prefer to bargain a change or conciliate the matter if you have any ideas on it.

Johnson responded in a letter dated August 7, 1996, which states:

...

Please be assured that the District understands the Association's position with respect to this matter, but does not necessarily agree with it. Nevertheless, the District would also like to see the differences worked out.

I would be available August 15 and 16, 1996 to meet and discuss this matter . . .

The Association did not make any proposals concerning the impact of the District's decision to unilaterally implement the Strategic Plan regarding Staff Development.

11. The agreement provisions set forth in Finding of Fact 3 and their predecessor provisions from earlier labor agreements have been interpreted in a series of grievance arbitration awards. For example, Arbitrator William W. Petrie in Racine Unified School District, A/P M-80-77 (6/81) determined that the District had not violated the labor agreement by moving the scheduled starting time for the Red Apple Elementary School from 8:00 a.m. to 7:45 a.m. Arbitrator Richard U. Miller in Racine Unified School District, A/P M-81-27 (2/82) determined that the District had not violated the predecessor to Section 10.2 by "its decision to change the starting and ending times of the various schools in its district during 1980-81." Miller, in Racine Unified School District, A/P M-85-115 (5/87), noted:

The record reveals that the length of the work day was changed 110 times from 1972 through 1985 in the various schools comprising the Racine Unified School District. By the Arbitrator's own count, in the first two school years of the Agreement, work length changes were

made in three schools in 1982-83 and nine similar changes were made in 1983-84.

In that case, Miller denied a grievance challenging the District's decision to "add ten minutes to the workday" of the teachers at Walden III, an experimental school within the District. Arbitrator George Fleischli, in Racine Unified School District, A/P M-90-133 (9/90), determined that the District did not violate the agreement, including Section 10.5, by holding "the inservice meeting for kindergarten teachers on October 12, 1989." Fleischli rejected the contention that the labor agreement restricted inservice activities to Institute Day, and the contention that the agreement contained "a specific contractual limitation . . . on the types of subject matters which can be presented in the meetings provided for in Section 10.5." He noted, however, that "there undoubtedly exists some common sense limitation" on the subject matter permissible in a Section 10.5 meeting. Arbitrator Robert J. Mueller, in Racine Unified School District, A/P M-92-437 (8/93), determined that the District had not violated Section 10.5, among other agreement provisions, by scheduling "a make-up chemical hygiene session to be held after regular school hours for those teachers who had not attended such session during the Institute Day." Mueller also noted:

The evidence fairly shows that inservice matters have been taken up during after school meetings in the past. The labor agreement does not limit the type or scope of matters that can be taken up at such meetings. The union would read the identification of matters referred to in section 10.5 as being limited to those referred to. There is no language in such section to indicate in any way that such references were intended to be limitations.

Grievance arbitrators have sustained Association grievances challenging District conduct which resulted in teacher loss of preparation time. Racine Unified School District, A/P M-94-423 (Baron, 11/96); Racine Unified School District, A/P M-92-365 (Flaten, 4/93); and Racine Unified School District, A/P M-91-114 (McAlpin, 8/91), exemplify this. Grievance Arbitrators have also denied Association grievances challenging District conduct which resulted in teacher loss of preparation time. Racine Unified School District, A/P M-92-362 (Fogelberg, 6/93); Racine Unified School District, A/P M-85-153 (Petrie, 3/87); Racine Unified School District, A/P M-88-262 (Gallagher, 3/89); Racine Unified School District, A/P M-92-16 (Petrie, 3/93); and Racine Unified School District, A/P M-86-151 (Petrie, 7/89) exemplify this.

12. During several rounds of collective bargaining with the District, the Association has attempted to establish, in the labor agreement, the specific hours teachers will work. The District has rejected such proposals. Specific District actions having the effect of extending the teacher work day established in specific school calendars have, however, been challenged through the

grievance procedure.

13. The District has sent teachers to staff development programs which have taken a full teaching day. Such teachers do not receive additional prep time to compensate for any prep time lost due to the staff development program. Periods within the teaching day may be altered, at individual schools, for such contingencies as student assemblies, competency testing or inclement weather. Such alterations affect periods designated as prep periods. Such alterations have not been compensated with additional prep time to compensate for the alterations.

14. The District did not alter the student day in the 1996-97 school year or schedule the staff development days noted in Finding of Fact 7 motivated in part by hostility toward lawful, concerted activity by its employes. Rather, the District did so to implement its Strategic Plan. The Association has not yet made proposals to address the impact of the changes made by the District to implement the staff development days noted in Finding of Fact 7.

CONCLUSIONS OF LAW

1. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.
2. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.
3. The District did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats., by altering the 1996-97 calendar to permit the scheduling of the staff development days noted in Finding of Fact 7.

ORDER 1/

The complaint, as amended, is dismissed.

Dated at Madison, Wisconsin, this 8th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/

1/ See footnote on Page 21.

Richard B. McLaughlin, Examiner

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

RACINE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Association's Initial Brief

The Association contends that the District violated its statutory duty to maintain the status quo when, without any Association waiver and under no necessity, it unilaterally extended the teacher workday and shortened teacher planning time. Well established Commission case law imposes a duty to bargain work days, the distribution of those work days and the length of inservice. The school calendar governing the 1996-97 school year was bargained and "included only one inservice day." The six, two hour inservice sessions set unilaterally by the District added "one and one-half extra days of inservice" to the bargained calendar.

Section 10.5 does not authorize this extension of the inservice requirement. It does not, according to the Association, apply to inservice training, does not shield other contract violations traceable to the District's actions and applies only to meetings "outside the regular teaching day."

That many teachers lose contractually set Prep time each Staff Development Day establishes both contractual and statutory violations. Asserting that "every middle school and high school teacher . . . who does not have a 4th or 5th period planning period, loses approximately 21 minutes of contractually guaranteed planning time . . .," the Association concludes that a finding of a statutory or contractual violation must follow. Although the situation regarding elementary school teachers "is slightly more complex," the Association argues that "someone -- either teachers with first or second hour planning periods, or all teachers, depending on the day's structure -- will lose planning time." Whether the planning requirement is viewed on a contractual basis or as a function of the statutory duty to maintain the status quo, the District's unilateral diminution of Prep time constitutes a prohibited practice.

Since the "hours of work of every teacher in the district under the traditional school year calendar are extended by 4 minutes per day and 12 hours per school year," and since teachers in the year round program "miss one or more staff development days," the Association concludes that the District's policy "discriminates against traditional-calendar teachers." That certain Section 10.5 meetings may be reduced in length to address this change is speculative, improperly assumes that inservice meetings fall within its scope, and would condone an

"arbitrary exercise of management rights." That teachers have not been required to increase their instructional load ignores that teachers must be at their work site "more in any given school year under the new board policy" and that such a change must be bargained.

The Association concludes that "the District has violated" Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., and that the Commission should

. . . grant cease and desist relief and restore the status quo; and order compensation to all teachers who have lost preparation time as a result of the District's action.

The District's Initial Brief

The District argues that its Staff Development Plan is primarily related to educational policy no less than the beginning, ending and length of the school day. Sections 10.2 and 10.5 of the expired labor agreement do not restrict the District's authority over these points of educational policy. The Association has failed, according to the District, to establish that "any impacts the change in starting and ending times may have on teachers' wages, hours, and conditions of employment outweigh the educational policy benefits" of its Staff Development Plan. To the extent the complaint directly or indirectly challenges "the District's ability to establish the students' day," the District contends that established case law and the labor agreement address that challenge.

Sections 10.2 and 10.5 fully address each aspect of the Association's complaint. Under Section 10.2, "the teachers are working exactly the same number of minutes in 1996-97 as they did in 1995-96." Under Section 10.5, the parties have addressed any impact of "increased meeting time." The only remaining point to the Association's complaint concerns the educational policy ramifications of spreading staff development throughout the school year. Although this specific point has not been addressed by the Commission, the District asserts that litigation of comparable issues indicates the policy ramifications of spreading staff development throughout the school year predominate over any impact on wages and hours. The District adds that the labor agreement underscores this conclusion. The salary schedule presumes a better educated teacher has higher value to the District. Section 10.4.1 and 10.4.2 grant flexibility to adjust prep time, in a number of ways, to condensed instructional periods. Any concern that the delayed start schedule adversely impacts work study students is speculative at best. No view of the record, according to the District, can support the assertion that the wage and hour impact of the delayed start schedule outweigh the impact of that schedule on educational policy.

To conclude otherwise would reward the Association's unwillingness to participate in the planning process by which the District implemented the changes relating to the Staff Development Plan. This underscores, at a minimum, "why issues such as staff development

should not be found to be a mandatory subject of bargaining." To permit the Association a "veto power" over the type of change posed here fundamentally contradicts the policies underlying Commission and judicial case law.

Even if the changes can be considered mandatory subjects of bargaining, the Association has failed to demonstrate the changes violate the District's duty to maintain the status quo. Since the labor agreement permits the District to "establish the school day" and to "call mandatory meetings for various purposes," the changes implemented by the District comply with its duty to maintain the status quo. Staff development has been routinely included in meetings called under Section 10.5. Arbitration awards have confirmed the District's authority to bring staff development within the scope of meetings called under Section 10.5. Since its actions do not increase the "amount of teaching time," and do not split up the existing inservice requirement, those actions cannot be considered violative of its duty to maintain the status quo.

Past Commission case law concerning these parties establishes that the Association has waived its right to bargain the impact of the changes implemented by the District. From the commencement of the process which led to the implementation of the Staff Development Plan, the Association has failed to "make any impact proposal regarding staff development." Rather, the Association sought to block the changes first with a court action and then through this complaint. The reasons underlying the Association's failure to make such proposals are irrelevant to the determination of waiver, since the Association "had an obligation to make a proposal . . . regardless of whether the decision is mandatory or permissive."

Viewing the record as a whole, the District concludes "it has committed no prohibited practice as alleged in the complaint."

The Association's Reply Brief

Case law establishes that "the number of inservice days and the days of the week on which they fall are mandatory subjects of bargaining" and Section 17.2.1 of the labor agreement governs the extension of the school year. The District's attempt to "evade its responsibility" by "rationing the twelve hours out over the course of the school year" violates law and contract. Beyond this, it is a "fallacy" to conclude "inservice" is a "meeting" governed by Section 10.5. In any event, an extension of the workday impacts more significantly on wages than on educational policy. A contrary conclusion violates case law.

Threshold to any view of educational policy is the fact, according to the Association, that Sections 10.1, 10.4.1 and 10.4.2 preclude the reduction in prep time traceable to the District's unilateral implementation of its Staff Development Plan. Shortened periods of instruction demand more prep time, but the District's actions reduce it. It follows that the District's Staff Development Plan "violates the contract and the existing status quo."

The Association then contends it has not waived any portion of its right to demand collective bargaining. The Staff Development Plan and its impact are both bargainable and the Association has demanded to bargain each.

The District's Reply Brief

The District emphasizes that its conduct is consistent with its obligation to maintain the status quo. It has not lengthened the "teachers' work day," but even if it had, the labor agreement permits it to do so. This authority has been confirmed through several grievance arbitration awards. Beyond this, Section 10.5 authorizes "staff development activities as part of the 30 hour meeting requirement." This authority has also been confirmed in arbitration.

Nor can the Staff Development Plan be considered to violate the Prep time provisions of the expired labor agreement. Those provisions are, under Commission case law, permissive subjects of bargaining. Even if this was not the case, the contract does not guarantee a set number of minutes for Prep time. Rather, the labor agreement refers to periods as the measure of Prep time. That the parties mutually accept alteration of prep time on days involving school assemblies, competency testing or inclement weather underscores that the labor agreement permits the flexibility to alter a prep period with any alteration of an instructional period. That different schools have different lengths of instructional periods further underscores this point. The Association's assertion that the Staff Development Plan violates the rights of Elementary School teachers misreads the contract and relevant arbitral authority.

That the Association has alleged District violations of Sec. 111.70(3)(a)5, Stats., cannot obscure that no such violation can be found on this record. The parties have not consensually extended the 1992-93 labor agreement, and thus "there can be no contract violation unless that contract has been extended by agreement of the parties." Beyond this, the Association failed to allege any violation of the Planning Time provisions of the labor agreement, thus no violation of Sec. 111.70(3)(a)5, Stats., can be rooted on those provisions. That the Association failed to file a grievance concerning the planning time provisions of the agreement similarly dooms its complaint on that point.

The District has not extended the school year or school year work day beyond its contractual authority to implement its Staff Development Plan. That plan, in any event, impacts educational policy far more than wages, hours and conditions of employment. Any impact on Prep time is speculative. To assert a shortened period requires more prep time presumes prep time serves as nothing more than a review of an already existing lesson plan. The assertion that year-round teachers need not attend as many staff development days as traditional year teachers is unproven and unprovable. That California law considers certain aspects of inservice training mandatory subjects of bargaining sheds no light on Wisconsin law.

The District concludes that the complaint "should be dismissed."

DISCUSSION

The Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)1, Stats., protects municipal employes from employer interference, restraint or coercion involving rights stated by Sec. 111.70(2), Stats. Violations of Sec. 111.70(3)(a)1, Stats., can either be independent or derived from other prohibited practices. Monroe Water Department et. al., Dec. No. 27015-B (WERC, 4/93).

The Association does not contend District conduct poses anything other than a derivative violation of Secs. 111.70(3)(a)3, 4 or 5, Stats. Thus, examination of the alleged violation of Sec. 111.70(3)(a)1, Stats., is subsumed in the discussion of those subsections.

The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

Sec. 111.70(3)(a)3, Stats., generally makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment."

On a more specific level, the elements to establish a violation of Sec. 111.70(3)(a)3, Stats., are well established. To prove such a violation, the Association, by a clear and satisfactory preponderance of the evidence, 2/ must establish (1) employe exercise of activity protected by Sec. 111.70(2), Stats.; (2) employer awareness and hostility to that activity; and (3) employer action, based at least in part, upon hostility to employe exercise of protected activity. 3/

Viewed either on a general or on a specific level, there is no persuasive evidence concerning a District violation of this subsection. The concerns posed by the Association are unit-wide, focusing on bargaining and contractual rights. There is no evidence of concerted activity by an individual employe or group of employes beyond the bargaining process itself. Nor is there evidence of a reprisal against any concerted activity by an individual teacher or Association members generally. Nor is there evidence the District has been motivated by anything other than a desire to implement its Strategic Plan. Communication with the Association concerning the

2/ Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.

3/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

Strategic Plan has been, if unsuccessful, continuous. Against this background, the Association's concerns must be focused on Secs. 111.70(3)(a)4 and 5, Stats. There is no persuasive basis to ground a violation of Sec. 111.70(3)(a)3, Stats.

The Alleged Violation of Sec. 111.70(3)(a)4, Stats.

The parties have not reached a successor to their 1992-93 labor agreement. Thus, all of the District conduct questioned by the Association arises in the hiatus between labor agreements. The Commission has stated the legal obligation underlying the Association's contentions thus:

It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act . . . (S)uch an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 4/

The Commission's definition of the status quo turns on its consideration of "relevant language from the expired contract as historically applied or as clarified by bargaining history, if any." 5/

The status quo doctrine does not, however, preclude a municipal employer from acting "unilaterally as to permissive subjects of bargaining." 6/ Thus, threshold to an analysis of the Association's allegations concerning Sec. 111.70(3)(a)4, Stats., is a determination whether the District's unilateral action regarding the implementation of the six staff development days in the 1996-97 school year concerns permissive subjects of bargaining.

For purposes of addressing the Association's allegations, the relevant District decisions can be viewed as two-fold. The first is the decision to lengthen the student day by four minutes. The second is the decision to alter six work days to provide a delayed start to the student day to permit the conduct of two hour inservice sessions for teachers. The first decision, on the facts posed here, is permissive. 7/ Union proposals to define an unalterable student contact day have been found

4/ Village of Saukville, Dec. No. 28032-B (WERC, 3/96) at 15, citations omitted.

5/ Ibid.

6/ Racine Unified School District, Dec. No. 25283-B (WERC, 5/89) at 7.

7/ Even if viewed as mandatory, the District acted within the scope of its authority under the Commission's status quo doctrine. See, for example, Finding of Fact 3, 11 and 12.

permissive, Oak Creek - Franklin Joint City School District No. 1, Dec. No. 11827-D (WERC, 9/74) and Blackhawk Vocational, Technical and Adult Education District, Dec. No. 16640-A (WERC, 9/80). Union proposals to define the school day in a fashion which "has no effect in the District's prerogative to schedule school at times and for lengths of time which it deems educationally appropriate" are mandatory, School District of Janesville, Dec. 21466 (WERC, 3/84) at 81. The complaint seeks, through the restoration of the status quo, to make the length of the student day unalterable in the absence of prior Association agreement. For that reason, the District's decision to extend the student day to assure sufficient contact time to meet state requirements must be viewed as permissive. The issue of compensation for the lengthened day is an impact which, under the cases cited above, is mandatory.

The District assertion that spreading inservice through the school year primarily impacts on educational policy has, standing alone, persuasive force. The District asserts that ongoing inservice more effectively keeps teachers up to date than one-time "sit and get" inservice can. Against this, the demonstrated impact on teachers can appear minimal. For secondary grades, homeroom is longer on all days and instructional classes are typically shorter on inservice days. All teachers who have prep time during shortened periods give up some prep time, and all teachers face an earlier start and a later end to the work day. That change amounts, however, to two minutes at the beginning and the end of the student day. The delayed start may also impact on student behavior on delayed start days.

The District's assertions do not, however, stand alone. They focus on arguable, but unprovable benefits of spreading inservice through the school year, and seek to minimize the actual impact of the decision. Whatever can be said of this weighing process, the fact remains that the District's decision expanded the number of inservice offerings and determined their placement on the calendar. These points have been addressed in prior cases. In Janesville, the Commission summarized the law governing calendar proposals, including inservice days, thus:

Following the 1971 adoption of Secs. 111.70(1)(d) and (3)(a)4, Stats., the Commission in Beloit, supra, was confronted with the issue of the scope of the municipal employer's duty to bargain over a school calendar which established the length of the school year, teaching days, inservice days, vacation periods, holidays and convention dates. The Commission held:

"We conclude that the school calendar is a mandatory subject of bargaining, since it establishes the number of teaching days, inservice days, vacation periods, convention dates, and the length of the school year directly affecting 'hours and conditions of employment'.

With respect to the Associations's proposal pertaining to In-Service Days, we determine that the number of such days and the day of the week on which such days will fall are mandatory subjects of bargaining because, with the teaching days, they comprise the teachers' work days. However, we conclude that the type of programs to be held on such days, and the participants therein are not subjects of mandatory bargaining, since we are satisfied that such programs and the participants therein have only a minor impact on working conditions, as compared to the impact on educational policy."

The Supreme Court in Beloit, supra, affirmed the Commission's ruling in its entirety. However, the Court framed its holdings in terms more narrowly drawn than the "all aspects of the school calendar" designation that appeared at one point in the statement of the issue for the Commission. Specifically, the Court expressed its hold as follows: The Board ... is required to ... bargain as to any calendaring proposal that is primarily related to wages, hours and conditions of employment.

As the Court did not overturn any of the Commission's conclusions as to the calendar provision before it in Beloit, supra, we view the Court as having determined that there is a duty to bargain as to school calendar proposals which establish the length of the school year, the number of teaching days, vacation periods, holidays, convention days, and inservice days. We believe that Beloit reflects a determination by the Commission and the Courts that when the relationship of the educational policy determinations involved in the various elements of the school calendar provision referred to by the Commission in its decision are balanced against their relationship to employ concerns as to hours and conditions of employment, the latter relationship predominates in each instance. Thus, the calendaring provision before the Commission was found by the Commission and the Courts to be mandatory in all respects . . . (Dec. No. 21466 at 116-117)

The District accurately notes that the Commission reads Beloit thus:

(S)chool calendaring issues beyond those involved in the specific proposal held mandatory by the Commission and Court in Beloit must be analyzed case-by-case to determine whether they are primarily related to wages, hours and conditions of employment

or, instead, primarily related to the formulation or management of educational policy. Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83). at 6.

I do not read Milwaukee to make a case-by-case weighing approach applicable to the inservice sessions posed here. The majority opinion in Janesville rejected this approach:

The Commission decision in Beloit emphasized at the outset of its discussion that "our determination of each of the proposals involved herein is based on the specific proposal presented for inclusion in the collective bargaining agreement which was being negotiated by the parties." The Commission physically included the school calendar provision under consideration therein as a part of its decision, along with the language of the various proposals in dispute. The Commission commented specifically on the various elements it found in that provision, to wit, "number of teaching days, inservice days, vacation periods, convention dates, and length of the school year", finding each of those elements, and hence the provision in its entirety, subject to mandatory bargaining based on the balancing test articulated and applied by the Commission in that case. Dec. No. 21466 at 117. 8/

The District notes that the expansion of inservice in this case involves only a portion of the work day and has not produced an increase in the total number of work days in the school year. This obscures that Institute Day remained a feature of the calendar and thus that the inservice requirement was not simply spread through the year, but was substantially increased. To distinguish between this case and the cases set forth above effectively overturns Beloit and Janesville. This result may, in the District's estimation, be possible before the Commission. It is not, however, possible here. The Board's decision to spread staff development into six, two-hour sessions involved a mandatory subject of bargaining.

The issue thus becomes whether the Board's unilateral change in the calendar violated its obligation to maintain the status quo. The contract provisions governing this point are Sections 10.2 and 10.5. As noted above, the District's decision to extend the student day by four minutes is permissive in nature. This undercuts the significance of the status quo issue posed by the

8/ My conclusion may not be reconcilable to Racine Unified School District, Dec. No. 27972-C (WERC, 3/96) at 15.

Association regarding Section 10.2. The section cannot be read, under the status quo doctrine, to tie the District's authority to determine the "hours of school." As a matter of the status quo, that section fixes the start and end points of the teacher work day at fifteen minutes prior to and following the student day, which is set by the District. There is, then, no persuasive basis to conclude the District's decisions violated the status quo set by Section 10.2. 9/

The more troublesome issue focuses on Section 10.5. Standing alone, the Association's contention that this section does not contemplate inservice meetings is persuasive. The listed types of meetings do not expressly include inservice or staff development meetings. Beyond this, the meetings covered in Section 10.5 are called by a "person," while the six, two hour staff development meetings are a unit-wide function called for by Board policy.

The Association's contention does not, however, stand alone. The parties have developed an extensive litigation history and relevant portions of that litigation establish that inservice meetings fall within the bounds of Section 10.5. Whether considered part of the "historical application" or the "bargaining history" of Section 10.5, the grievance arbitration awards noted in Finding of Fact 11 establish, for the purposes of defining the status quo, what is permissible under Section 10.5. Those awards have, since 1990, recognized that inservice meetings are permissible under that section. Mueller's award states the scope of meetings permissible under Section 10.5 more broadly than Fleischli's. Both, however, permit inservice meetings to be called under Section 10.5. Those awards define Section 10.5 for the purposes of applying the Commission's status quo doctrine. The Association's potentially persuasive line of argument cannot read those awards out of existence, and it follows that the District's use of Section 10.5 to permit inservice meetings cannot be considered to violate the status quo.

That the 1992-93 labor agreement governs prep time at Sections 10.1.2, 10.4.1 and 10.4.2 does not alter the conclusion stated above. Grievance arbitrators such as Baron and Flaten have sanctioned District conduct which reduced contractually set prep time. Unlike this case, those awards involved an increase of instructional duties which adversely impacted prep time. The evidence does not demonstrate an increase of instructional duties here. Other arbitration awards establish that not every alteration of daily prep time violates the labor agreement. That teachers can lose prep time on days devoted to school assemblies, competency testing or inclement weather underscores this point. The adverse impact on prep time posed here is not sufficiently distinguishable from these instances to warrant a conclusion that Sections 10.1.2, 10.4.1 and 10.4.2 require defining the status quo in a more restrictive fashion than Section 10.5 would indicate.

The conclusion stated above should not obscure that the District altered the 1996-97 calendar in an arguably fundamental fashion. Since this fundamental change was not specifically

9/ The assertion that an extension of the student day poses a separate issue from the attendant extension of the instructional day for teachers is addressed in Decision No. 27972-C.

secured in bargaining, the Association's concern that District actions undercut its role in that process cannot be ignored. However, the persuasive force of that concern does not govern the facts posed here. The Commission, in Saukville, characterized its status quo doctrine thus:

The status quo doctrine does no more than continue the allocation of rights and opportunities reflected by the terms of the expired contract while the parties bargain a successor agreement . . . The dynamic status quo allows parties to exercise rights which they have acquired through the collective bargaining process. (Dec. No. 28032-B at 18)

The Commission thus focuses its doctrine not on the nature of the changes made by an employer, but on whether those changes are among previously bargained rights. Although the parties did not specifically negotiate the additional inservice moved into the 1996-97 calendar, the authority to do so is rooted in Sections 10.2 and 10.5.

That the expansion of the student day and the compensation for the added inservice have impacts which are mandatorily bargainable has already been noted. The record establishes however, that the Association did not make any specific proposals concerning the impact of the 1996-97 changes. Against this background, it is impossible to find any violation of Sec. 111.70(3)(a)4, Stats., on the facts posed by the amended complaint. This should not be read to state an Association waiver of bargaining concerning future calendars.

The Alleged Violation of Sec. 111.70(3)(a)5, Stats.

The parties acknowledged, at hearing, that each understood their contract would be interpreted "as necessary to address their respective positions." Neither party took the position that "any portion of this dispute . . . should be deferred to the . . . grievance arbitration procedure." (Transcript, Volume I at 13). The Commission's status quo doctrine requires the parties' labor agreement to be considered as a fundamental feature of the duty to bargain. It is not clear, in light of the parties' post-hearing briefs, if the parties mutually desire a specific determination of the contract provisions cited above. Beyond this, the line between applying the Commission's status quo doctrine and contract interpretation is fine. See School District of Plum City, Dec. No. 22264-A (McLaughlin, 10/85) aff'd Dec. No. 22264-B (WERC, 6/87).

In my opinion, the fundamental thrust of the amended complaint focuses on whether the Association can, as a function of the status quo doctrine, undo the changes implemented by the District in the 1996-97 calendar. A separate determination, under Sec. 111.70(3)(a)5, Stats., of the contract provisions examined above under Sec. 111.70(3)(a)4, Stats., would not add anything meaningful to the analysis of the amended complaint. The Order stated above

addresses this point by dismissing the Sec. 111.70(3)(a)5, Stats., claim. This preserves whatever rights, if any, the Association may have to grievance arbitration while avoiding the implication of an agreement to arbitrate where none may exist. 10/

Dated at Madison, Wisconsin, this 8th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

10/ Parties can agree to submit issues of contract interpretation under MERA even if the dispute is subject to grievance arbitration. City of Madison (Fire Department), Dec. No. 27757-B (WERC, 10/94).