STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WAUKESHA COUNTY TECHNICAL COLLEGE

Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and

WAUKESHA COUNTY TECHNICAL EDUCATORS ASSOCIATION

Case 97
No. 53891 DR(M)-575
Decision No. 28952

Appearances:

Michael Best & Friedrich, Attorneys at Law, by Mr. Robert W. Mulcahy, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin, 53202, for the College.

Ms. Melissa A. Cherney, Staff Counsel, and Ms. Kira L. Zaporski, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin, 53708-8003, for the Association.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On February 28, 1996, the Waukesha County Technical College filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling regarding the College's duty to bargain with the Waukesha County Technical Educators Association over certain matters. Hearing on the petition was held in Pewaukee, Wisconsin, on June 20, 1996, before Examiner Peter G. Davis. The parties thereafter filed written argument, the last which was received August 15, 1996.

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

FINDINGS OF FACT

1. The Waukesha County Technical College, herein the College, is a municipal employer providing educational services to certain citizens of the State of Wisconsin.

2. The Waukesha County Technical Educators Association, herein the Association, is a labor organization functioning as the collective bargaining representative of certain College employes. The 1993-95 collective bargaining agreement between the College and the Association described the bargaining unit represented by the Association as follows:

> . . . all REGULAR FULL-TIME TEACHING PERSONNEL, INCLUDING DEPARTMENT CHAIRPERSONS AND GUIDANCE COUNSELORS, ALL REGULAR PART-TIME TEACHING PERSONNEL WHO TEACH DAYTIME CREDIT CLASSES AND ALL REGULAR PART-TIME TEACHING PERSONNEL WHO TEACH DAYTIME ADULT BASIC EDUCATION CLASSES.

3. At the present time, employes represented by the Association volunteer for teaching and curriculum assignments outside their scheduled contractual work day. The College accepts or rejects the volunteers at its discretion. During collective bargaining for a successor to the 1993-95 agreement, the Association made the following bargaining proposal:

> Bargaining unit members will be given the first opportunity to volunteer for teaching and/or curriculum assignments for which they qualify which occur outside the educator's scheduled work day. If there are insufficient volunteers, the Administration can fill such positions at its discretion.

If this proposal were to become part of the parties' collective bargaining agreement, the College would be obligated to use qualified volunteers for the assignments. The College contends that the Association's bargaining proposal is a permissive subject to bargaining.

4. The proposal set forth in Finding of Fact 3 primarily relates to the management and direction of the College and to the formulation of educational policy.

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

CONCLUSION OF LAW

The Association bargaining proposal set forth in Finding of Fact 3 is a permissive subject of bargaining.

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

DECLARATORY RULING 1/

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(footnote 1 continues on page 4)

(b) The petition shall state the nature of the petitioner's interest, the facts showing

Within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., the College does not have a duty to bargain with the Association over the proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of December 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

(footnote 1 continued from page 3)

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that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

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

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission. No. 28952

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

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

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

> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employes in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employe to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employes under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employes in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employes by the constitutions of this state and of the United States and by this subchapter.

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

> Sec. 111.70(1)(d) sets forth the legislative delineation between mandatory and non-mandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, sec. 111.70(1)(a), to bargain "with respect to wages, hours and conditions of employment." At the same time it provides that a municipal employer "shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes." Furthermore, sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.
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> Sec. 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 259 N.W.2d 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.
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> In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d) as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to

> "educational policy and school management and operation," to "'management and direction' of the school system" or to "formulation or management of public policy." Unified School District No. 1 of Racine County v WERC, 81 Wis. 2d 89, 95-96, 102, 259 N.W.2d 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," Beloit Education Assn. v. WERC, 73 Wis. 2d 43, 54, 242 N.W.2d 231 (1976).
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> As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contract, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. Unified School District No. 1 of Racine Co. v. WERC, supra, 81 Wis. 2d at 102; Beloit Education Assn., supra, 73 Wis. 2d at 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them. (footnotes omitted)

The disputed proposal states:

> Bargaining unit members will be given the first opportunity to volunteer for teaching and/or curriculum assignments for which they qualify which occur outside the educators' scheduled work day. If there are insufficient volunteers, the Administration can fill such positions at its discretion.

At present, although bargaining unit members volunteer for and receive the teaching/curriculum assignments covered by this proposal, the College is free to accept or reject unit volunteers. The proposal obligates the College to use qualified unit member volunteers.

For the purposes of our analysis, we will separately consider teaching assignments and curriculum assignments.

Teaching Assignments

The Association contends that its proposal should be viewed as an effort to protect unit work from assignment to non-unit employes. The Association correctly argues that under our Supreme Court's analysis in Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977), protection of unit work is typically found to be a mandatory subject of bargaining. 2/ While acknowledging that unit members are not the exclusive performers of the work in question, the Association contends that the assignments in question are nonetheless "unit work" because they are fairly within the scope of responsibilities applicable to the kind of work performed by bargaining unit employees." Because many unit employes already currently perform the work in question (i.e., teaching assignments outside their scheduled work day), and because the work in question is also the same type of work performed by unit members during their regular work day, the Association contends the assignments are "unit work" it has a right to seek to protect at the bargaining table.

It is evident from the foregoing paragraph that the Association's theory of this case rises or falls upon the question of whether the teaching assignments are "unit work." Because we find the assignments are not "unit work," we find the Association's position in this litigation to be unpersuasive.

We find the assignments are not "unit work" for several reasons. First, with limited contractual exceptions not relevant herein, to the extent these assignments are performed at all by unit employes, it is on a volunteer basis. Put another way, unit employes cannot be compelled to perform any of this work and, absent the presence of volunteers, would perform none of it. Second, although the record presented by parties is less than definitive, the Association does not and could not persuasively argue to us that unit member volunteers perform even a majority of the teaching assignments in question. At best, the Association can argue that half the 160 full-time unit faculty and three-quarters of the 45 "part-time II" unit faculty perform extra assignments. However, even these numbers pale by comparison to the fact that the College employs 550-600 non-unit "adjunct faculty members" each year to cover the teaching assignments in question. Thus, although we have held that where the employer has historically utilized unit employes to fill the vast majority of

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2/ Brown County v. WERC, 86-0731, unpublished, (CtApp III, 3/87); City of Oconomowoc Dec. No. 18724 (WERC, 6/81); Northland Pines School District, Dec. No. 20140 (WERC, 12/82); School District of Marinette, Dec. No. 20406 (WERC, 3/83); City of Green Bay, Dec. No. 18731-B (WERC, 6/38); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC 2/83) and Dec. No. 20093-B (WERC, 8/83); Milwaukee Metropolitan Sewerage District, Dec. No. 21268 (WERC, 12/83); Racine Unified School District, Dec. Nos. 20652-A and 20653-A (WERC, 1/84); School District of Janesville, Dec. No. 21466 (WERC, 3/84); School District of Franklin, Dec. No. 21846 (WERC, 7/84); and Milwaukee Board of School Directors, Dec. No. 21893-B (WERC, 10/86).

positions, those positions thereby become unit work which the union can seek to protect from assignment to non-unit personnel, Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83), this record does not establish that unit members perform even a majority of the work.

Because this is not "unit work," the cases relied upon by the Association are simply inapplicable. City of River Falls, Dec. No. 28384 (WERC, 5/95) upheld the union's right to bargain protection of "bargaining unit work" from assignment to non-unit personnel. The work in question in River Falls was the regularly scheduled shifts of full-time law enforcement employes. Racine Unified School District, Dec. Nos. 20652-A, 20653-A (WERC, 1/84) involved a proposal which allocated work assignments which unit employes could be compelled to perform. In effect, that decision held that if the employer has the right to compel unit employes to perform certain extra work assignments as a matter of educational policy, then the union has the right to bargain protection against having non-unit employes perform the work.

We note that even if this proposal cannot be persuasively viewed as a mandatorily bargainable effort to protect "unit work," the proposal nonetheless advances employe interests in acquiring additional work and thus additional income. This employe interest is certainly a substantial one. However, this employe interest must be balanced against what we have previously referred to as the "critically important policy interest" of not obligating an employer to bargain with two different bargaining units over the same work. The work assignments in question are the work performed by the "adjunct faculty." These individuals are "municipal employes" under the Municipal Employment Relations Act, and potentially constitute another bargaining unit with a claim to the same work sought by the Association herein. In Milwaukee Board of School Directors, Dec. No. 20399-A (WERC, 9/83), we found that the potential for the employer to face "mutually incompatible" obligations under contracts covering the same work to be a policy interest which predominated over substantial employe interests, and thus that the union proposal was a permissive subject of bargaining. The potential for "mutually incompatible" obligation is present here and, on balance, also warrants a determination the proposal is permissive.

Curriculum Assignments

Examining the "curriculum assignment" ramifications of the Association proposal, we find the "unit work" analysis to be as applicable here as it was for the "teaching assignments" aspect of the proposal. On that basis alone, the curriculum assignment segment of the proposal would be permissive. However, it is important to note that even without the "unit work" analysis, the curriculum aspect of this proposal would nonetheless be permissive. The development of curriculum is an essential part of the educational policy judgements made by the College as to how it wishes to educate its students. Thus, we have historically held that even where bargaining unit employes have performed curriculum work in the past, a municipal employer cannot be required to continue that involvement because it thereby loses control of a critical educational policy determination. School District #5, Franklin, Dec. No. 21846 (WERC, 7/84); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83). Therefore, the educational policy intrusion represented by this curriculum assignment proposal provides an independent basis upon which that

aspect of the proposal is a permissive subject to bargaining.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of December 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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