STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT, Respondent.

Case 269
No. 54130
MP-3174

Decision No. 29100-A

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by **Ms. Linda L. Harfst**, 20 North Carroll Street, Madison, Wisconsin 53703, on behalf of the Complainant.

Lathrop & Clark, Attorneys at Law, by **Ms. Malina R.P. Fischer**, P.O. Box 1507, Madison, Wisconsin 53701-1507, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 20, 1996, Madison Teachers, Inc., hereinafter the Complainant, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that Madison Metropolitan School District, hereinafter the Respondent, refused to bargain with the Complainant regarding benefits or compensation for teachers attending a retreat and workshop in violation of Secs. 111.70(3)(a)1 and 4, Stats. The parties subsequently attempted to resolve the matter, but were unsuccessful. On July 18, 1997, the Respondent filed its answer wherein it denied it had committed the alleged prohibited practices and asserted as affirmative defenses that the complaint failed to state a claim upon which relief may be granted, that the matter in issue is not a mandatory subject of bargaining, that the Complainant had waived its right to bargain with respect to the subject matter by its conduct and by the express language of an existing collective bargaining agreement, that the subject matter was voluntary and not within the scope of Complainant

No. 29100-A

members' duties and therefore Respondent had no duty to bargain in that regard, that there was insufficient time to bargain and that, therefore, by necessity Respondent had no duty to bargain.

The Commission appointed David E. Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order. Hearing was held before the Examiner on August 12, 1997, in Madison, Wisconsin and a stenographic transcript was made of the hearing. The parties completed filing post-hearing briefs by October 24, 1997.

Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following

FINDINGS OF FACT

1. Madison Teachers, Inc., hereinafter the Complainant, is a labor organization with its offices located at 821 Williamson Street, Madison, Wisconsin. At all times material herein, John A. Matthews has been Complainant's Executive Director and Edward Sadlowski its Executive Assistant for Labor Relations. At all times material herein, Complainant has been the exclusive collective bargaining representative of all regular full-time and regular part-time certificated teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by the Madison Metropolitan School District including psychologists, psychometrists, social workers, school nurses, attendants and visitation workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, guidance counselor, project assistant, principal investigators, researchers, photographer technician, teachers on leave of absence, and teachers under temporary contract, but excluding supervisor – cataloging and processing, on-call substitute teachers, interns and all other employees, principals, supervisors and administrators.

2. Madison Metropolitan School District, hereinafter the Respondent, or District, is a municipal employer having its main offices at 545 West Dayton Street, Madison, Wisconsin. At all times material herein, Timothy Jeffrey has held the position of Director of Human Resources, Susan Hawley held the position of Labor Contract Manager, and Elizabeth Burmaster has been the Principal at Respondent's West High School.

3. The Complainant and Respondent were parties to a 1993-1995 collective bargaining agreement covering the period October 16, 1993 to October 15, 1995. Said 1993-1995 Agreement contained the following provisions:

EFFECTIVE DATES

This document entitled Collective Bargaining Agreement (Master Contract) – Madison Board of Education – Madison Teachers Incorporated, October 16, 1993 – October 15, 1995 is effective as of October 16, 1993 and shall continue in force until changed by later agreement. If new agreements are reached, a new master agreement shall be published which shall contain all present agreements published herein and such changes, additions or deletions as shall be mutually agreed to.

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I- Recognition – A

A. MANAGEMENT RIGHTS CLAUSE

1. The Board of Education on its own behalf hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including, (but without limitation because of enumeration), the right:

   a. To the executive management and administrative control of the school system and its properties, programs and facilities.

   b. To employ all personnel and, subject to the provisions of law of State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion and their work assignment.

   c. To establish and supervise the program of instruction and to establish and provide supervision under agreed upon rules for such programs of an extracurricular nature as the Board of Education feels are of benefit to students.

   d. To determine means and methods of instructions, selection of textbooks, and other teaching materials, the use of teaching aids, class schedules, hours of instruction, length of school year, and terms and conditions of employment.

2. The exercise of the foregoing powers, right, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited by the terms of this agreement and Wisconsin Municipal Employment Relations Act.

3. The Board further recognizes the unique value of the teaching staff and the administrative officers of the Board of Education to advise the Board on matters of policies relating to pupils, the building construction and maintenance of schools, and especially the instruction of pupils; and instructs the Superintendent to seek the advice and counsel of the teaching staff and the administrative staff whenever the Superintendent deems the advice and counsel pertinent.

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III - Salary - H

H. PROFESSIONAL ADVANCEMENT CREDIT

. . .

2. A Professional Advancement Credit experience must occur after the school's last regularly scheduled class and does not require release of a teacher from his/her teaching duties and without any financial support from the Madison Metropolitan School District. Inservice classes, committee work, professional writing and conferences for credit must be scheduled after the teacher's contractual work day. Professional Advancement Credits may be earned in accordance with the following schedule:

a. Organized class

. . .

1) School-related committee work such as curriculum or textbook committees, or any other committee of this nature whose work and study entails a minimum of 15 hours of meetings per contract year during noncontract time shall qualify for credit.

2) Fifteen hours of school-related committee work are equal to one credit. Fractional credits will not be granted.

3) Committee chairpersons are responsible for submitting, in writing, to the Department of Human Resources the names of teachers who have performed satisfactorily on the committee and are requesting credit.

. . .

d. Conferences and Convention

1) Professional meetings as the NEA Classroom Teachers Association of the NEA's annual convention, a subject matter area meeting of one day or more, or any other such professional meetings.

2) No credit is granted for the subject area meetings that take place at WEAC and SWEIO during their fall and spring conventions.

3) Attendance at professional workshops, institutes, seminars, conferences and conventions of one day's duration or more (exclusive of WEAC, SWEIO and MTI) is equal to one-half credit if attendance is on noncontract time and no financial support has been received from the Madison Metropolitan School District.

4) It will be necessary for a teacher to submit two experiences in this category to receive one credit within one contract year. Fractional credits cannot be carried from one contract year to another contract year.

5) Written certification of attendance by an appropriate convention or conference officer must accompany any request for credit.

. . .

VIII - Other Board and MTI Agreements - B

B. ADOPTION OF BOARD POLICIES

1. All policies of the Board of Education affecting teachers' wages, hours and conditions of employment shall remain in effect unless changed by mutual agreement by the Board of Education and Madison Teachers. This agreement shall be binding on each of the parties for the period October 16, 1993 to October 15, 1995, the duration of this Collective Bargaining Agreement.

The parties were unable to reach a voluntary agreement on a 1995-1997 Agreement and their 1993-1995 Agreement continued in force until they received the interest-arbitration award establishing the terms of the successor agreement in June of 1996. The above-cited provisions of the 1993-1995 Agreement were not changed in the 1995-1997 Agreement.

4. Since 1980, and at all times relevant herein, Respondent's Board Policies have contained the following policy:

REGULATION **2612**
Administration

POLICY

District Expenditures for Food and/or Beverages

Since the inception of the Area design, a practice has evolved whereby the School District purchases food and/or some beverages for staff members who participate in meetings that relate to the instructional program. These meetings are most often conducted after school hours with staff members volunteering their time to participate. Food in the form of snacks or a dinner has been provided in lieu of paying the teacher for extended employment or paying the cost of a substitute and holding the meeting during the day.

1. Money can be expended when staff members volunteer to attend a meeting regarding the planning, development, implementation, and/or evaluation of the instructional program that is outside the regular working day.

2. Food or beverages provided during the regular working day will be provided at the participant's own expense.

3. Money cannot be expended to defray the costs of any recreational activity.

4. Money cannot be expended for the purchase of alcoholic beverages.

5. The Respondent provides "mini-grants" for which Respondent's professional instructional staff may apply for the purpose of meeting to explore instructional strategies to enhance student learning. In the spring of 1995, a subcommittee of teachers at Respondent's West High School (a subcommittee of West High's School Improvement Plan (SIP) Committee), Teacher Study Group – Staff Development Instructional Strategy Curriculum Committee, came to Burmaster and asked if she thought it would be possible to obtain a mini-grant to hold a retreat for West High teachers focusing on enhancing academic achievement among students of color at West High. Burmaster indicated it was and encouraged them to apply. That subcommittee formed a subcommittee to write the grant application and once completed, Burmaster had her secretary type the application and submitted it for approval. The application was approved in August of 1995 for $5,000 to be used over the 1995-96 school year.

A retreat was held in September, 1995 at St. Benedict's Center in Middleton, Wisconsin with a dinner the evening before and overnight accommodations at the Center for those who chose to attend both that part of the retreat and the discussion/meeting portion of the retreat held the next day, which was an in-service day for the entire West High faculty.

Early in 1996, a number of teachers at West High on the Teacher Study Group subcommittee approached Burmaster regarding holding another retreat at St. Benedict's for West High's Ninth Grade teachers with money remaining in the mini-grant Burmaster had procured earlier. Those teachers planned the retreat and scheduled it for April 16 and 17, 1996 at St. Benedict's with Burmaster's approval.

The agenda for the March 11, 1996 West High Faculty Meeting included the following announcement:

> **DOL Retreat**
> On Tuesday, April 16, there will be an overnight retreat at St. Benedict's followed by a workshop from 8:00 – 3:00 with Michael Dickman facilitating. We will work together on the West High SIP and study group initiatives. The mini-grant secured by the faculty study group committee will fund the project for the first 30 teachers who sign up. Meals, overnight and sub will be provided. Sign up will be later this month.

The following sign-up sheet for the retreat was distributed to West High faculty members to be completed and returned to Burmaster if they were interested in attending:

SIP WORKSHOP

When: April 16, 1998 (Tues.) 6:00 p.m. -
April 17, 1998 (Wed.) 8:30 – 3:00 p.m.

Where: Saint Benedict Center

Who: Faculty interested in working on school climate, 9th grade, DOL and other SIP issues. There are mini grant funds available for 30 faculty.

RESPOND BY MARCH 28, 1996 TO LIBBY

NAME: _____

Please check:

__ I would like to attend the 6:30 p.m. dinner and the overnight retreat on Tuesday, April 16, and the workshop on Wednesday, April 17.

__ I would like to attend dinner on Tuesday, April 16 only

__ I would like to attend the Tuesday, April 16 overnight (no dinner) and workshop on Wednesday, April 17.

__ I would like to attend the workshop on Wednesday, April 17 only.

6. By the following letter of March 13, 1996 to Hawley, Complainant's Executive Director demanded to bargain regarding the retreat:

Dear Susan:

Please find enclosed herewith a copy of an agenda for a West High School Faculty Meeting upon which it is stated that the District would provide meals, overnight accommodations, and substitute teachers, if [sic] for those who would attend a workshop at St. Benedict's.

As you are well aware, all matters having to do with wages, hours, and conditions of employment are mandatory subjects of bargaining. Meals and accommodations are an economic benefit. We ask that the District stop the proposed April 16 meeting until such time as the parties are able to reach agreement on this matter. Please consider this MTI's demand to bargain.

Very truly yours,

John A. Matthews /s/
John A. Matthews
Executive Director

By the following letter of March 19, 1996, Hawley responded to Matthews' March 13th demand to bargain:

RE: West High School Faculty Meeting Agenda

Dear John:

This is in response to your letter of March 13, 1996. The District has a longstanding past practice of providing meals, overnight accommodations and offering substitute teachers for attendance at voluntary workshops. We have never negotiated this issue in the past, and it has been an open and common practice throughout the District for many years. Unless you can show how this is unusual from other meetings in which we have offered the same, I do not believe that there is any need to negotiate this matter.

Very truly yours,

Susan Hawley /s/
Susan Hawley
Labor Contract Manager

By the following letter of March 26, 1996, Matthews responded to Hawley's letter:

Dear Susan:

This will acknowledge receipt of your letter dated March 19, as regards the above-referenced. Be advised that the past practice is hereby severed. Should the District wish to proceed with such meetings, they must negotiate same with the Union.

Very truly yours,

John A. Matthews /s/
John A. Matthews
Executive Director

The arrangements to hold the retreat on April 16 and 17, 1996 had already been made with St. Benedict's and the speaker by the time the Respondent received Complainant's March 13, 1996 demand to bargain.

7. The Respondent held the retreat as scheduled at St. Benedict's Center after work hours on April 16 and from 8:30 a.m. to 3:00 p.m. on April 17. Those attending the retreat on April 16th were responsible for their own transportation to the retreat, but Respondent provided the evening meal and overnight accommodations and breakfast and lunch on April 17th and the substitutes for those teachers on April 17th. Those teachers atttending only on April 17th were offered bus transportation from West High to St. Benedict's or reimbursement for their own transportation, and Respondent provided them with lunch and provided substitutes for them on April 17th.

Attendance at the retreat on April 16 and 17, 1996 was voluntary on the part of the teachers, and those who chose not to attend were expected to perform their teaching functions in the classroom for the full contract day on April 17, 1996.

8. The Respondent refused to bargain any facet of the April 16-17, 1997 retreat at the St. Benedict Center with Complainant.

9. The decision to hold an overnight retreat and workshop on April 16 and 17, 1996 for West High teaching staff on a voluntary basis for the purpose of discussing and working on the West High "School Improvement Plan" primarily relates to the management and direction of the District and the formulation of educational policy.

10. The employes' attendance and participation at the April 16 and 17, 1996 retreat and workshop was related to their functions as teachers for the Respondent.

11. Compensation for teachers attending the overnight retreat and workshop on April 16 and 17, 1996 primarily relates to the wages, hours and conditions of employment of those employes who attended the retreat and workshop.

12. There was not a consistent practice with regard to the compensation to be provided to employes who voluntarily attend overnight retreats and workshops held during the employes' work day sponsored by the Respondent.

13. The Respondent's Board policy, Regulation 2612, does not address the matter of compensation to be received by employes who voluntarily attend overnight retreats and who attend workshops occurring during the employes' regular contract hours, but does provide for meals for teachers voluntarily attending meetings after school hours in lieu of paying for them for extended employment.

14. Complainant raised the issue of the District's duty to bargain the establishment of the "mini-grants" for the first time in this proceeding in its initial post-hearing brief.

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

CONCLUSIONS OF LAW

1. The terms and conditions of the 1993-1995 Collective Bargaining Agreement between Respondent Madison Metropolitan School District's Board of Education and Complainant Madison Teachers Incorporated continued in effect until the parties received the interest-arbitration award for their successor agreement in June of 1996. The terms of the 1993-1995 Agreement did not constitute a contractual waiver of Complainant's right to bargain collectively with the Respondent regarding the compensation to be received by employes who voluntarily attend overnight retreats and workshops occurring during the employes' regular contract hours.

2. The matter of the decision to hold an overnight retreat and a workshop during employes' regular contract hours on a voluntary basis for the purpose of having the Respondent's teaching staff discuss facets of West High's School Improvement Plan is a permissive subject of bargaining and, therefore, the Respondent Madison Metropolitan School District, its officers and agents, did not violate Secs. 111.70(3)(a)1 and 4, Stats., by refusing to cancel the retreat and workshop.

3. Compensation for those employes who attended the overnight retreat on April 16, 1996 and/or the workshop on April 17, 1996, is a mandatory subject of bargaining. Therefore, the Respondent Madison Metropolitan School District, its officers and agents, by unilaterally offering to provide overnight accommodations at no cost to those employes who attended the overnight retreat on April 16, 1996, and substitute teachers and breakfast and lunch at no cost to those employes who attended the workshop during their regular contract hours on April 17, 1996, and by refusing to bargain with Complainant in those regards, violated Secs. 111.70(3)(a)1 and 4, Stats.

4. The issue of whether Respondent District had a duty to bargain the establishment of its "mini-grants" was not timely raised in this proceeding and is not appropriately before the Examiner.

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

ORDER

The Respondent Madison Metropolitan School District, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain with Complainant regarding the compensation to be provided to employes who attended the April 16, 1996 overnight retreat and/or the April 17, 1996 workshop at St. Benedict's Center.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

   (a) Upon request, bargain collectively with Complainant regarding the compensation to be provided to those employes who attended the April 16, 1996 overnight retreat and/or the April 17, 1996 workshop at the St. Benedict's Center.

   (b) Post the Notice attached hereto as Appendix "A" in conspicuous places in Respondent's buildings where notices to employes are posted. The Notice shall be signed by the representative for the Respondent and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the Respondent has taken to comply with this Order.

Dated at the City of Madison, Wisconsin this 31st day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT violate Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by unilaterally establishing the compensation to be received by employes voluntarily attending overnight retreats and/or workshops held outside of the workplace during employes' regular contract hours and by refusing to bargain regarding such matters, if requested, by Madison Teachers, Inc.

WE WILL, if requested, bargain in good faith with Madison Teachers, Inc. regarding the compensation to be received by employes it represents for voluntarily attending overnight retreats and/or workshops held outside of the workplace during the employes' regular contract hours.

Dated this day of , 1998.

MADISON METROPOLITAN SCHOOL DISTRICT

By

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

Complainant first asserts that providing compensation for attending the retreat at St. Benedict's constitutes a mandatory subject of bargaining. In SCHOOL DISTRICT NO. 5, FRANKLIN, DEC. NO. 21846 (WERC, 1984), the Commission held that compensation for out-of classroom activities is a mandatory subject of bargaining. That case involved a contract clause permitting teachers to attend professional conferences with expenses to be paid by the District, given approval of the administration. It would also have required the District to provide substitute teachers during the teacher's absence at conferences. The Commission found that the proposal was an attempt to gain an additional economic benefit for teachers as it enabled them to be released from work without loss of pay and because the District would pay for their expenses. The Commission also held in that case that the District was obligated to bargain over a proposal to grant teachers one day each year for visiting other schools without loss of pay and a substitute provided by the District. Again, this provided an economic benefit and the Commission analogized this to a proposal for personal leave or vacation time in that the number of teaching days worked in exchange for salary is a mandatory subject of bargaining. In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 1983), the Commission held that the establishment of a fund for teachers to use for education or professional development is a mandatory subject of bargaining. That case involved a proposal that a fund be established for certain teachers to use for expenses while attending inservices to promote professional development. The Commission reasoned that the establishment of such a fund provided an economic benefit to teachers. The retreat in this case is directly analogous to the activities involved in these cases. Here, the District provided teachers with paid expenses by paying for their room and board at St. Benedict's, allowed the teachers to forego a day of teaching without loss of pay, and provided substitute teachers to replace those teachers attending the workshop. As in FRANKLIN, supra, the number of teaching days required in exchange for one's salary is also a mandatory subject of bargaining. Further, the use of the mini-grant from the District is a mandatory subject of bargaining. Similar to the funding issue in MILWAUKEE SCHOOL BOARD, supra, it is a method to defray teacher's costs for engaging in such activities.

Evidence that the retreat had been proposed and planned by bargaining unit members is irrelevant. A municipal employer is prohibited from negotiating directly with individual employes regarding wages, hours or conditions of employment. MADISON JOINT SCHOOL DISTRICT NO. 8 V. WERC, 69 Wis. 2d, 200 (1974), reversed on other grounds, 429 U.S. 167 (1967). Agreeing with

some of the attending teachers to provide their room and board, as well as allowing them to attend a workshop with pay constitutes negotiating directly with those teachers regarding compensation for attending a retreat. While it was appropriate for teachers to propose such a retreat, the District was still required to discuss their compensation for participating in the retreat with Complainant before proceeding to provide such compensation. It is irrelevant that the District may have funded similar retreats in the past without negotiating with Complainant, as the fact that one has previously broken the law without being caught, does not immunize one from being penalized for subsequent violations.

Complainant asserts it has not acquiesced to the District's failure to bargain. This is the first such retreat that Complainant was made aware of in advance, and whenever it had become aware of similar issues in the past, it insisted upon bargaining. When counselors at East High School volunteered to staff the career center in the evenings and on weekends, Complainant negotiated with the District over their compensation. Also, when teachers participated in "Ready, Set, Go" conferences outside their ordinary working hours, Complainant negotiated their compensation. As in this case, those incidents involved teachers voluntarily working after hours for the District's benefit. Hence, Complainant has not waived its right to bargain by its conduct.

Complainant also asserts that it has not already reached agreement with the District regarding compensation for retreats through the provisions of their collective bargaining agreement. The provisions cited by the District do not apply to this retreat. Section VIII(B), of the Agreement incorporates Board policies, however, policy 2612, relied upon by the District, provides that the District will provide food and beverage for voluntary meetings to discuss instructional issues held after school. That policy is meant to deal with voluntary meetings which would otherwise be held during the school day. By implication, such meetings would likely be held on school property and are logically an extension of the school day. The policy also only covers food and drink and not lodging or days off from teaching with pay. Thus, even if the policy is found to apply as far as meals, the remainder of the compensation provided has not been addressed by the policy. Further, policy 2612 explicitly provides that provision of foods is to be used to avoid holding meetings during the school day, and thus having to pay for substitute teachers. As that policy does not apply to the compensation for this retreat and because there are no other applicable Agreement provisions, the compensation at issue in this situation has not previously been negotiated.

In its reply brief, Complainant asserts that the District misstates the issue in arguing that it was not obligated to bargain over the decision to hold the retreat itself. The issue in this case is whether providing overnight accommodations, meals and substitute teachers for teachers attending retreat violated Sections 111.70(3)(a)1 and 4, Stats. Complainant has never requested to bargain over the decision to hold the retreat, and has only asked to bargain over the compensation. Thus, the District's arguments in that regard are irrelevant. Similarly, the assertion that the District had no duty to bargain the impact of the retreat is irrelevant, as impact relates to permissive subjects of bargaining and the issue here is compensation, a mandatory subject of bargaining.

The assertion that the compensation received by the teachers was *de minimis* and that thus the District had no duty to bargain, is inaccurate. The cost of providing substitutes for 41 teachers for the day, an economic benefit to the teachers as it allows them to be paid for a day of work without having to be in the classroom, in combination with the cost of food and lodging, cannot be termed *de minimis*. The Commission precedent cited by the District to support its arguments are wholly inapplicable. Those cases dealt with voluntary work, whereas the retreat was neither voluntary nor simply an alternative work assignment. Even assuming *arguendo* that the retreat was only voluntary, those cases did not involve compensation for voluntary activity.

Complainant asserts that the retreat was not purely voluntary because teachers were required to be either in the classroom or at the retreat. That placed an obligation on the teachers in that the only way they could get out of the classroom was to attend the retreat. The assertion that the retreat falls "within the sphere of volunteerism in which teachers operate" is ludicrous. Teachers expect to be paid for their work. Further, the retreat was not merely an alternative work assignment. The teachers who attended the retreat were offered a substitute. If the retreat were an alternative work assignment, there would have been no need to replace the teacher in the classroom. Further, as the retreat continued beyond the normal school day, it required an extra commitment of time in the evening and early morning before the retreat. Those who participated in the retreat were also compensated differently from the colleagues who stayed in the classroom in that they did not have to teach, were paid, and had a substitute, as well as meals, snacks and lodging provided by the District.

The Complainant also asserts that the cases cited by the District for the proposition that all aspects of voluntary work are always a permissive subject of bargaining do not stand for that proposition. WAUKESHA COUNTY TECHNICAL COLLEGE, DEC. NO. 28952 (WERC, 12/96), merely held that a contract clause giving bargaining unit members first opportunity to volunteer for non-bargaining unit work is a permissive subject of bargaining. That is not the issue in this case. In CITY OF RIVER FALLS, DEC. NO. 29009-D (WERC, 2/97), a proposal that on-duty police officers could use their work hours to transport other officers for court appearances and training, was held to be a permissive subject of bargaining because it involved a policy choice as to whether officers would spend their work time transporting other officers or engaging in other police work. This case does not merely involve allocating teacher's work hours, i.e. either holding class or attending the retreat, as the District wished to continue its ordinary activity of teaching and allow teachers to attend the retreat, thus requiring a release from duty, and not a policy choice between duties. The cases cited by the District dealing with whether a cessation of voluntary activities constitutes a strike, have no bearing on the issue of whether compensation for the attendance at a retreat is a mandatory subject of bargaining.

The District's assertion that Complainant has waived its right to bargain because the subject has already been addressed by the parties' Agreement, is not supported by the clauses cited. The

District's citation of its management rights clause amounts to the assertion that if a right is not covered anywhere else in the Agreement, it is reserved to management. That clause explicitly states at I(A), 2, that the exercise of the Board's powers and use of discretion under that provision "shall be limited by the terms of this Agreement and Wisconsin Municipal Employment Relations Act." As MERA requires bargaining over the compensation for this retreat, the District cannot rely on its management rights clause to avoid its duty to bargain. Section III(H) relates only to professional advancement credit, which is not an issue in this case. Sections III(H)(2)(b) and (d), provide for credit for attendance at committee meetings, conferences and conventions, activities for which teachers are generally not paid. As the retreat in this case is none of those things, it is not covered by that clause. While the District relies on an arbitration decision for the proposition that Article VIII(B) requires all existing Board policies to remain in effect, no existing Board policy covers this situation. There being no clear and unmistakable contractual language covering this retreat, a waiver of a statutory duty to bargain should not be found.

As to an alleged past practice, Complainant again asserts that there is no past practice regarding compensation for participation in extra-contractual programs like the retreat. Whenever Complainant has become aware of such an extra-contractual program, it has insisted on bargaining over compensation. The evidence demonstrates there is no regular pattern of acquiescence to the District. The assertion that the memoranda of understanding are non-precedential or have occurred after the retreat, misses the point. They demonstrate Complainant's vigilance at enforcing its rights. Further, those MOU's deal with compensation of teachers in exchange for their agreement to do work not covered by the contract. The District's attempt to distinguish the Career Center MOU's because it "obtains actual services from the staff", ignores the fact that the District would not fund retreats like this one, if it did not expect to receive some benefit in exchange. The District also attempts to distinguish a number of MOU's on the basis that the duties at issue in those instances were assignable. That those duties could have been assigned is immaterial, since the teachers apparently volunteered to take them on. Another class of MOU's offered dealt with duties that were actually assigned, even though they were not covered by the contract. They are applicable as the retreat in this case was not entirely voluntary. Further, even if was found that the retreat was voluntary, the distinction is immaterial. The issue is compensation for work done outside the contract, not the reason the work was performed. The existence of the MOU's demonstrates that Complainant has not waived its right to bargain over compensation for extra-contractual activities. Even though it may not have bargained on every such occasion, Complainant has bargained frequently enough to prevent the establishment of a past practice.

Finally, Complainant disputes the application of a necessity defense in this case. The District budgeted for the retreat in June, 1995 and the retreat occurred in April of 1996. Thus, the District had plenty of time to approach Complainant regarding bargaining the issue. Further, there was no compelling business reason to hold the retreat. West High School would have continued functioning without the retreat, and the record is silent as to whether the District would have

incurred any expense by canceling the retreat. Even if it had lost the $761.75 in grant funds, that is a minimal amount, given the District's multi-million dollar budget. Also, had the retreat been canceled, the cost of providing a substitute would not have been incurred.

For all of the foregoing reasons, Complainant requests that the District be found to have committed a prohibited practice by unilaterally imposing compensation for attendance at the retreat.

District

The District first notes that the Complainant has the burden of proving its allegations by a "clear and satisfactory preponderance of the evidence." The District contends that the Complainant has failed to meet its burden.

The District first contends that the evidence clearly shows that it has not made unilateral changes in compensation received by bargaining unit members. A municipal employer has a duty to bargain collectively with the representative of its employes, with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or where bargaining in such matters has been clearly and unmistakably waived. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82); CITY OF RICHLAND CENTER, DEC. NO. 22912-A, B (WERC, 8/86). In that regard, the District asserts that the decision to hold the retreat and the subject matter of the retreat primarily relate to educational policy, and therefore are permissive subjects of bargaining. The retreat was a vehicle by which to facilitate participation by teachers in the development of educational and management policy relating to the West High curriculum, particularly to the transition of ninth graders. Attendance at the retreat was purely voluntary, and to require the District to bargain over wage proposals for voluntary meetings would unduly interfere with educational policy and school management and operation. As both the reason for conducting the retreat and the subject matter of the retreat are primarily related to educational policy, the retreat itself must be considered a permissive subject of bargaining over which the District had no duty to bargain. Further, the Commission has held in the past that where there is no impact, there is no duty to bargain and no violations of Sections 3(a)1 or 4, Stats. MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28671-A (Crowley, 1996). There is no evidence there was any impact of the decision to conduct the retreat, as the employes' wages did not change as a result of the retreat, teachers were not affected by their choice to attend or not to attend, nor did they gather information by attending the retreat that they would not have gathered had they not attended, as all information was later shared with West High faculty, and there were no changes in hours as the result of voluntary attendance at the April 17 portion of the retreat, as it was scheduled for the same hours as the regular-contracted teaching day. Even if some impact were found, it would have to be considered *de minimis*. More importantly, the evidence establishes the activity was entirely voluntary.

This case is analogous to the circumstances in WAUKESHA COUNTY TECHNICAL EDUCATORS' ASSOCIATION, DEC. NO. 28952 (WERC, 12/96) where the Commission found that the assignments in question were not bargaining unit work and to the extent that the assignments were performed at all by unit employes, it was on a voluntary basis. The Commission distinguished such circumstances from those where an employer has the right to compel unit employes to perform certain extra work assignments as a matter of educational policy, wherein the union would then have the right to bargain protection against having non-unit employes perform the work. In this case, the subject of the retreat was discussion of instructional strategies primarily related to educational policy and was also voluntary work over which the District is not obligated to bargain with Complainant. Similarly, in CITY OF RIVER FALLS, DEC. NO. 29009-D (WERC, 2/97), the Commission found a proposal to be a permissive subject of bargaining where it related to the assignment of work during a regular work day. The Commission noted in its decision that it had consistently held that "an employer is not obligated to bargain over how the workday is allocated because of the policy and management ramifications of that choice."

While the Commission has held that proposals which set forth rates of compensation for required attendance at meetings or events outside the school day are mandatory subjects of bargaining, because required meetings or events have a direct impact on the hours of a teacher, in this case, there was no required attendance. Hence, there was no direct impact upon their wages, hours or conditions of employment. Distinctions between voluntary and mandatory assignments were made by the Commission in its decisions in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 23204-A (Greco, 4/87); RACINE EDUCATION ASSOCIATION V. WERC, DEC. NO. 14308-D, 14389-D, 14390-D (Dane County Circuit Court, 5/30/1978).

The District next asserts that the Complainant has waived any right to bargain by the express terms of the agreement. The issue in this case is addressed within both the parties' 1993-95 Agreement and their 1995-97 Agreement. The 1993-1995 Agreement provides that "this document. . .is effective as of October 16, 1993, and shall continue in force until changed by later agreement. Since the dispute arose in April of 1996, prior to the issuance of an arbitration award as to the terms of the parties' 1995-97 Agreement, the 1993-95 Agreement applies. That Agreement contains several clauses which address the instant dispute. Under Article I(A), the District reserves the right to the executive management and administrative control of the school system and program. That language encompasses a "program" such as the retreat. The clause also reserves to the District the right to establish and supervise the program of instruction, which also relates to this dispute. Under Article I(A)(1)(b), the District reserves the right to determine the means and methods of instruction, the use of teaching aids, and "terms and conditions of employment." That language clearly leaves to the District the discretion to hold a retreat relating to curriculum and instructional strategies and to permit attendance by teachers on a voluntary basis as a condition of employment. Under I(1)(b), the District also reserves the right to employ all personnel and to determine their conditions of employment. Under Article I(A)(2), the exercise of

that right is limited only by the specific terms of the agreement. Further, Article I(A)(3) of the Agreement, recognizes the "unique value of the teaching staff to advise the Board on matters and policies relating to pupils, and especially the instruction of pupils." The parties have instructed the Superintendent to "seek the advice and counsel of the teaching staff . . .whenever the Superintendent deems the advice and counsel pertinent" as to matters of policy relating to the instruction of pupils. How that is done is left to the Superintendent's discretion as long as no specific provision of the Agreement is violated. The application process for the mini-grant procured by the West High teachers is such a means by which the Superintendent may seek such "advice and counsel" of teaching staff.

Article III(H)(2)(d), of the Agreement provides that teachers will receive credit for attendance at professional workshops, institutes, seminars, conferences, and convention on the condition that attendance is on non-contract time and there is no financial support from the District. Since financial support has been provided from the District for the retreat, compensation for attendance at such workshops is left to the District. Article III(H)(2)(b), of the Agreement provides for compensation in the form of credit for committee work when it entails 15 hours per contract year during non-contract time. If the committee work does not entail 15 hours of non-contract time, the District is not required to provide the teachers with credit; however, the District is not precluded from providing meals for non-contract time spent in meetings relating to curriculum that does not meet the 15-hour standard.

Finally, Article VIII(B) of the Agreement provides that Board policy regarding teachers' wages, hours and conditions of employment shall remain in effect unless changed by mutual agreement of the parties. The District has had a policy since 1980 relating to a long-standing practice of providing meals in exchange for attendance at after-school meetings at which instructional issues are addressed. While the policy states that such meetings are most often "conducted after school hours", it contemplates the possibility that food and beverages may be provided to staff who voluntarily participate during school hours as well. Citing an arbitration award involving the parties, the District asserts Articles I and VIII, taken together, have been interpreted to recognize the Board's right to determine terms and conditions of employment, in that the Board may adopt reasonable work rules so long as they do not undermine or diminish any benefits or protections a teacher may have under existing policies, rules or under the labor agreement. Similar to that case, the instant dispute involves an existing policy referenced by the 1993-95 Agreement, and necessarily incorporated therein. Thus, there was no duty to bargain terms of employment pertaining to the policy if the District did not choose to modify that policy.

As the 1993-95 Agreement contained clear and unmistakable language relating to the "economic benefits" to be derived from voluntary participation in the retreat, and what was not specifically covered by Board policy or the Agreement is left to the District's discretion under Article I(A)(2), it must be concluded that the District did not unilaterally change the wages, hours

or conditions of employment in violation of MERA by conducting the April, 1996 retreat at St. Benedict's Center, since the Complainant has waived any statutory right to bargain with respect to that subject.

The District also asserts that Complainant's prior conduct establishes a waiver by past practice with respect to the instant dispute. Overwhelming evidence was presented of a past practice of holding similar retreats in the past with regard to which the Complainant did not demand to bargain the economic benefits or incentives thereof. The Board policy referenced above has been in place since 1980 and references a long-standing practice of providing meals in lieu of compensation for teachers' participation in voluntary meetings. Furthermore, Complainant mutually agreed to reference the Board policies on a continuing basis in the parties' Agreement. That same past practice was referenced in Hawley's letters to Matthews in response to his letters demanding to negotiate. Prior to the instant dispute, Matthews had never denied that such a past practice existed, even though he had that opportunity. Instead, Matthews responded to Hawley's letter of March 26, 1996 advising her that the past practice was severed, thereby acknowledging the existence of the practice referenced in Hawley's letter. Further, a similar retreat had been held in 1995, which had also been initiated by the West High teachers and included an overnight stay at the St. Benedict Center. The source of both the fall, 1995 and the April, 1996 retreats was the mini-grant for instructional strategies funded by the District. Burmaster testified that she has held similar voluntary workshops or retreats for faculty, citing overnight retreats held in 1990-91 and 1991-92 school years for the Hawthorne Elementary school faculty. There is no evidence that Complainant demanded to bargain any of those voluntary retreats. District witness Treglowne testified that she had researched the matter and discovered that the practice had existed for years within the District whereby teachers attend meetings after school or overnight retreats, and that in exchange for their voluntary attendance, the District provides meals, accommodations and substitute teachers. Her testimony and District exhibits establish that that practice has spanned at least the period of 1978 through 1997 and that at least since 1989 there is no evidence of any demand to bargain. The Complainant's reliance upon the Midvale/Lincoln Transition Team meetings as refuting the evidence of past practice, is misplaced. The problem there was that the teachers from the different schools received different messages from the different administrators as to what the District would provide. The parties' memorandum of understanding regarding that dispute was designed to bring about equal treatment of all the teachers who had participated in those meetings. In her response to Matthews' letter regarding the Midvale/Lincoln Transition Team meetings, Hawley corrected his assertion that the District must negotiate regarding providing a meal in return for attending the evening meetings, distinguishing providing meals for teachers who work after hours on a voluntary basis as opposed to those teachers who are required to work beyond the regular work day. Matthews also conceded that Complainant's members were involved in either planning or participating in the examples provided. It is therefore impossible to find that Complainant had no knowledge of the voluntary programs which were sponsored by the District and in which teachers

voluntarily participated in exchange for meals, accommodations and substitutes. The evidence provided by Complainant that any time it had become knowledgeable about any kind of compensation, including snacks, soda, or time off, they demanded to bargain over those issues, did not demonstrate that such demands were made as to those subjects, nor is there any evidence that the District and Complainant reached a memorandum of understanding (MOU) regarding snacks, soda or time off. The MOU's offered by Complainant to refute the past practice for the most part state that they are non-precedential, and a number relate to items specifically covered by the Agreement. Further, the great majority of those MOU's do not relate to voluntary activities on the part of teachers. With regard to the non-precedential language in the MOU's, it was the District's intent that the MOU's not establish precedent in that the resolution of that dispute does not have any application to later incidents, and therefore has no impact on the terms and provisions of the Agreement. The letter from former assistant Labor Contract Administrator Massing, relied upon by Complainant to establish its interpretation of "non-precedential", clearly indicates that it was limited to memoranda regarding the specific teachers involved in that case and to memoranda waiving resignation fees for individuals, and does not reference all memoranda across the board, as Complainant asserts.

The District also asserts that Complainant's purported repudiation of the past practice is ineffectual. If an unwritten past practice is well-established and no effort has been made to discontinue it through bargaining, both parties have a right to believe that the practice continues to be part of the agreement. CITY OF MADISON, DEC. NO. 23967 (Crowley, 1987). In this case, the parties had submitted final offers to interest-arbitration before March 26, 1996, the date on which Matthews advised Hawley that the Complainant was severing the past practice. Since the Complainant did not propose to change the practice prior to submission of its final offer, the District had no opportunity to negotiate regarding the practice and had the right to believe that the practice continued to be part of the Agreement.

Next, the District asserts that even if it is found to have made a unilateral change, it must also be concluded that the change did not constitute a prohibited practice because of "necessity". Necessity has been recognized as a valid defense to a modification of the *status quo* during a contract hiatus. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). In this case, Complainant made its demand to bargain on March 13, 1996, after the retreat had been fully arranged. By necessity, the District could not halt the process already in place.

Even if the District is found to have committed a prohibited practice, the Complainant's request for fees and costs is not warranted, since the defenses in this case have not been shown to be frivolous or in bad faith or so devoid of merit as to warrant the imposition of costs and attorney's fees. MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28671-A (Crowley, 8/96). Further, the request that notices be posted in the office of all District buildings in addition to the

faculty lounge is objectionable, and such notices should be limited to those locations in which union postings are customarily posted, i.e., faculty lounges. Finally, the District asserts that it if it found to have committed prohibited practices, the relief should be prospective in nature.

In its reply brief, the District asserts that Complainant has, for the first time, raised two issues in its brief about which the District had no prior notice. Complainant alleged that the District failed to bargain the establishment of a fund which teachers may use to finance professional development activities such as the retreat. Since the District was not given prior notice of that charge, either through the complaint or hearing, and neither party submitted evidence on that issue, that issue is not properly before the Examiner. Further, as the evidence establishes that the mini-grant which financed the retreat was processed by the spring of 1995, the matter was untimely raised by the Complainant given the one-year statute of limitations. Complainant also alleged for the first time that the District committed a prohibited practice by allowing teachers to forego a day of teaching without loss of pay, despite the number of teaching days required in exchange for salary, a subject which already had been bargained. That allegation does not raise an issue encompassed by either Section 111.70(3)(a)1 or 4, Stats., rather, it alleges a violation of a collective bargaining agreement. The appropriate forum for that issue is either in grievance arbitration or pursuant to Section 111.70(3)(a)(5), Stats. Neither has been pursued by Complainant and the issue must not be considered to be before the Examiner.

The District asserts that Complainant is arguing that the District committed a prohibited practice by failing to bargain over the availability of substitute teachers and paid expenses to teachers who attended the 1996 retreat, a mischaracterization of what occurred. All West High teachers were given an option to attend the retreat at their own volition, as opposed to the District deploying teachers to do something other than teach students. Teachers who chose not to participate in the retreat were not required to perform additional work on behalf of those who did participate. Thus, no prejudice whatsoever resulted to either those who voluntarily participated in the retreat or those who chose not to participate.

Complainant mistakenly relies upon FRANKLIN, supra, however, that decision involved a declaratory ruling and the proposal at issue in that case differed substantially from the facts in this case. The Commission pointed out that the proposal "reflects an attempt to obtain additional monetary compensation for teachers who the District chooses to allow to attend conferences." In that case, the district's proposal left control over such issues as who might attend, which conferences might be attended, when substitute teachers would be provided, and whether expenses would be paid, to the district. In contrast, this case does not involve such stringent control by the District, but permits teachers to explore on a voluntary basis factors which relate directly to the quality of educational services provided to students. With respect to FRANKLIN, Complainant also asserted allowing teachers to forego a day of teaching without loss of pay and providing substitute

teachers to replace those who attended the workshop, affected the number of teaching days required in exchange for one's salary. In essence, this argues that the District has violated the Agreement by altering the number of days teachers will teach in return for their salary. Again, the appropriate forum for resolution of that issue is grievance arbitration.

Complainant also relies upon MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 1983), a declaratory ruling regarding a proposal establishing a fund to be used for expenses for teachers attending inservice activities to promote professional development. Again, Complainant has not timely raised the issue of the establishment of the mini-grants and no evidence was provided as to whether the establishment of the fund or the amount of the money available through the mini-grants was bargained or not. Thus, the issue may not be considered. Also, Article I(A), of the Agreement, specifically instructs the Superintendent to seek advice and counsel of teaching staff with regard to matters of public policy relating to the instruction of pupils whenever the Superintendent deems such advice and counsel pertinent. That provision leaves to the discretion of the Superintendent the means by which such advice and counsel shall be sought. Thus, if the Superintendent seeks that advice through a retreat, there is no specific provision in the Agreement prohibiting the Superintendent from doing so.

As to the allegation that the District has bargained with individual teachers, the District asserts that there is no evidence of same, and that "encouragement" does not amount to bargaining. Regarding the assertion that the District had not already reached agreement with Complainant on the subject of retreats and substitute teachers, the District cites the evidence regarding the past practice in that regard.

The District asserts that even if it is found that it was obligated to bargain regarding the retreat, it can only be concluded that the impact of the District's decision is bargainable, and not the decision to hold the retreat itself. The decision to conduct the retreat is a matter of educational policy, and a conclusion that there was no impact to that decision is unavoidable. If there were any impact in this case, it was ***de minimis*** and it was created by the employes and not by the District.

Finally, the purpose behind MERA must be considered. Chapter 111 recognizes three major interests involved in the public policy of the State as to employment relations and collective bargaining: the public, the employe and the employer. Section 111.01, Stats., further recognizes that industrial peace, regular and adequate income for the employe, and non-interrupted production of goods and services promote these interests in the furtherance of employment peace and that these goals "are largely dependent upon the maintenance of fair, friendly and mutually-satisfactory employment relations." Section 111.01(2), Stats. The District questions how conducting the retreat at the behest and initiation of the teachers, disrupts the fair, friendly and mutually

satisfactory employment relations between the teachers and the District, and how conducting the retreat negatively impacts on the interest of the public, the employes or the District. If anything, to permit the teachers to pursue discussion of the betterment of educational policies promotes those interests, rather than hindering them. Section 111.06, Stats., evidences the type of activities the public policy behind MERA intends to guard against and the allegations in this dispute do not rise to that level. In this case, teachers have suffered no loss or no advantage by participating on a voluntary basis in the discussion of educational policy at the retreat. Thus, the complaint should be dismissed in its entirety.

DISCUSSION

It is first noted that the Complainant expressly states that it has not demanded to bargain over the decision to hold the retreat and workshop; rather, its demand is to bargain regarding teachers' compensation for attending and it is asserting that the District is required to bargain in that regard. Therefore, the District's decision to hold the retreat is not in issue in this case. Further, given that the decision to hold such a retreat/workshop is primarily related to educational policy, it is permissive, and the District was not required to postpone implementation of its decision.

Secondly, while the Complainant has argued that the District's permitting teachers to attend the workshop on April 17th, rather than teaching, without loss of pay, amounted to an economic benefit, the Examiner reads that to be part of Complainant's broader argument that the District refused to bargain with Complainant and has unilaterally established the "compensation" to be received by attendees and not raised as a separate issue. However, the Complainant's assertion that the establishment of the "mini-grants" is a mandatory subject of bargaining, over which the District was required to bargain, raises a separate issue from whether the District was required to bargain over the compensation to be received by attendees of the retreat. Given that Complainant raised that issue for the first time in its post-hearing brief, the Examiner has concluded that the issue has not been timely raised and it would be improper to address that issue in this proceeding.

The issue that is before the Examiner is whether the District was obligated under MERA to bargain in good faith with Complainant regarding the compensation teachers were to receive in return for attending the April 16-17, 1996 retreat and workshop, and concomitantly, whether the District violated MERA when it refused to do so and unilaterally established that compensation.

Complainant alleges that the District has violated Section 111.70(3)(a)4, Stats. That provision states that it is a prohibited practice for a municipal employer, unilaterally or in concert with others:

> To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed three (3) years.

The Complainant has the burden of proving, by a clear and satisfactory preponderance of the evidence, that respondent has violated Sec. 111.70(3)(a)4, Stats. A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with employes' rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats. GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84).

Because the parties' 1993-1995 Agreement continued in force until a successor agreement was reached, this case involves a demand/refusal to bargain in term. The Commission has consistently held that:

> A municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck.

CITY OF MADISON, DEC. NO. 27757-B (WERC, 10/94) at p. 10; CITY OF BELOIT (FIRE DEPARTMENT), DEC. NO. 27990-C (WERC, 7/96) and the cases cited therein at p. 10, footnote 2/.

It is first necessary to set forth the legal standard for determining whether a matter is a mandatory or is a permissive subject of bargaining. In its recent decision in CITY OF RIVER FALLS, DEC. NO. 29009 (WERC, 2/97), the Commission succinctly summarized the law in that regard:

It is useful to set forth the general legal framework within which the issues herein must be resolved. In Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), United School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977), and City of Brookfield v. WERC, 87 Wis. 2d 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively.

As the Court noted in West Bend Education Association v. WERC, 121 Wis. 2d, 1, 9, (1984),

> 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 weighted 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 contrast, 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.

(At p. 5)

The District asserts that the decision to hold the retreat was permissive and that there was no impact to bargain in this instance. The District also asserts that even if there was an impact, it was *de minimis*. That the decision to hold the retreat is a permissive subject of bargaining has been noted and is not in issue. The assertion regarding impact misses the point.

The argument that there were no changes in hours or wages, ignores that the April 16 portion of the retreat was held after the teachers' regular contract hours, that the District provided overnight lodging to those who desired to stay overnight on April 16th, and that the District provided a meal and substitutes for those teachers in attendance on April 17th. Compensation for after hours' work and compensation covering the cost of meals, lodging and substitutes primarily relate to employes' wages and, as such, are mandatory subjects of bargaining over which the District was obligated to bargain with Complainant upon demand. The fact that the District elected to cover those costs through the "mini-grant", does not eliminate Complainant's right to bargain

over those matters, for better or for worse. The Examiner is also not persuaded by the District's argument that whatever impact there was on the teachers' wages, hours and conditions of employment was *de minimis*. It is not the economic impact upon the District that is relevant on this point; rather, it is the possible economic impact on the individuals represented by the Complainant that is relevant to the "primarily related" test. Overnight lodging, meals and substitutes at no cost to the employe is not *de minimis*.

The District also has asserted that because attendance at the retreat was voluntary and because the subject matter of the retreat primarily related to educational policy, there was no duty to bargain on its part. In support of this assertion, the District cited WAUKESHA COUNTY TECHNICAL COLLEGE, supra, and CITY OF RIVER FALLS, DEC. NO. 29009, supra. In WAUKESHA COUNTY TECHNICAL COLLEGE, the Commission found a proposal to give bargaining unit employes a contractual preference for non-bargaining unit work that some had previously performed at the employer's discretion on a voluntary basis to be a permissive subject of bargaining. In RIVER FALLS, the Commission found a proposal that would give employes a contractual right to voluntarily give other employes rides to or from work at the beginning or end of their work shift to be a permissive subject of bargaining. In this case, the Complainant is not demanding to bargain over the right to attend the retreat, nor is it demanding to bargain over whether the District will have its teachers attend the retreat or perform their normal teaching duties. Complainant has demanded to bargain over the compensation teachers who attend the retreat would receive, whether in the form of additional pay or covering the cost of the expenses that would be incurred in attending the retreat.

While the record supports the District's assertion that attendance at the retreat was strictly voluntary and the District's decision to hold such a retreat is not being challenged, it does not follow that the matter of compensation for attending and/or who will bear the costs of attending would not primarily relate to the wages and hours of those teachers who would attend the retreat. The cases cited by the District in this regard distinguished between voluntary activities and work the employes may be required to perform for the purpose of determining whether a refusal to perform constituted an illegal strike. The logic of those cases in making such a distinction is inapplicable. While attendance at the retreat/workshops was voluntary and the activity is not bargaining unit work in the sense it can be claimed as such, attendance and participation was directly related to their status as teachers at West High.

The District also asserts that the Complainant waived its right to bargain in this area as the parties' Agreement already addresses the issue. In support of its assertion, the District cites the following provisions: Article I, A, I., b and d, A, 2 and A, 3, Article III, H, 2, b and d, and Article VIII, B. The Examiner has reviewed those provisions and finds them to be inapplicable to the issue of compensation for attending overnight retreats or voluntary workshops held during the teachers' regular contract hours. Article I, Sections A, 1, b and A, 2, expressly provide that

the Board's exercise of its powers under those provisions are "subject to the provisions of law" or are "limited by the terms of this agreement and the Wisconsin Municipal Employment Relations Act." As noted previously, under MERA a municipal employer is required to bargain in good faith with the representative of its employes with regard to their wages, hours and conditions of employment, and it is a violation of MERA for a municipal employer to refuse to do so.

Article III, H, of the Agreement pertains to when and how "professional advancement credits" are earned. The District's argument appears to be that since the retreat and workshop in this case do not fit within the types of conferences covered by those provisions, and since it has provided the attendees with financial support, those provisions do not apply and therefore the Agreement leaves it to the District to determine the compensation for attendees. That argument is inconsistent with the District's assertions that the Agreement expressly addresses the matter and also relies upon the District's having unilaterally provided the "financial support" to those teachers to further exclude this situation from coverage by the provision. While the argument is incongruous at best, it is accurate as far as those provisions not being applicable.

As to Article VIII, B, 1, of the Agreement, that provision requires that all Board policies affecting teachers' wages, hours and conditions of employment shall remain in effect for the duration of the Agreement, unless changed by the mutual agreement of the parties. However, despite the District's attempt to expand its coverage, the policy upon which the District relies (No. 2612) has limited applicability. The policy does state that "Food in the form of snacks or a dinner has been provided in lieu of paying the teacher for extended employment or paying the cost of a substitute and holding the meeting during the day." The policy would cover the dinner provided attendees on the evening of April 16th, however, the policy goes on to state:

> 1. Money can be expended when staff members volunteer to attend a meeting regarding the planning, development, implementation, and/or evaluation of the instructional program that is outside the regular working day.
>
> 2. Food or beverages provided during the regular working day will be provided at the participant's own expense.

It is clear from the above that the policy was not intended to apply to meetings taking place during the teacher's work day. Thus, it had no application to the workshop portion held on April 17th, nor does the policy address payment for overnight lodging.

The District also asserts that there is a long-standing past practice of providing meals, overnight lodging and substitutes for teachers attending such voluntary retreats/workshops and cites a number of examples. The relevancy of such a practice would be to establish a waiver of

Complainant's right to bargain regarding compensation for voluntarily attending overnight retreats and workshops held during the teacher's work day. Such a waiver must be clear and unmistakable. CITY OF WAUWATOSA, DEC. NOS. 19310-C, 19311-C, 19312-C (WERC, 4/84). While the District has conducted a number of voluntary overnight retreats, it appears from the record that at least some of those involved the night before a contractual in-service day. (Transcript, Burmaster, pp. 65-66, 68) and did not involve providing substitute teachers or being excused from teaching duties. Other examples provided by the District dealt solely with providing a meal or snacks for voluntarily attending meetings after the school day. The only example exactly on point was District Exhibit No. 5, which described a two-day "Work-Retreat" for thirty staff members (half to be teachers) with the District to provide food, lodging, transportation and substitutes for those who needed them. That exhibit indicated the 1991 retreat was the "Sixth Annual" such "Work-Retreat On Choice and Change". Complainant's Executive Director, Matthews, testified that Complainant had no knowledge of the retreat/workshops offered by the District as examples of similar instances. While Complainant's members participated in those retreats/workshops and there was no attempt to conceal them from the Complainant, there is no evidence of any attempt to make Complainant aware of them. Also, while Matthews' March 26, 1996 response to Hawley stating the practice is severed could arguably support an inference Complainant conceded the existence of such a practice, the rest of the evidence and Matthews' testimony does not support such a finding. The only practice that appears to be consistent, and which also conforms to Board Policy No. 2612, is that of providing snacks or meals for teachers attending voluntary meetings after their work day. For this reason, the Examiner has concluded that the evidence does not establish a clear and unmistakable waiver on Complainant's part of its statutory right to bargain over the compensation its members are to receive in this situation.

Having concluded that the subject of compensation for teachers voluntarily attending an overnight retreat and a workshop taking place during their contract hours is a mandatory subject of bargaining over which the District was required to bargain with Complainant, it follows that the District violated Sec. 111.70(3)(a)4, and derivatively, (3)(a)1, Stats., by refusing to do so upon Complainant's demand and by unilaterally establishing that compensation.

As to remedy, an order to bargain upon Complainant's request and the usual posting requirement is deemed sufficient to address the violation. An award of costs and attorney's fees is appropriate only in cases where a party's position is frivolous or taken in extraordinary bad faith. WINNEBAGO COUNTY, DEC. NO. 27798-B (WERC, 8/94). The District's defenses do not approach that standard. Therefore, that relief has been denied.

Dated at the City of Madison, Wisconsin this 31st day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc
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