STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of LOCAL 1053, MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE PUBLIC SCHOOLS	Case 313 No. 52592 DR(M)-558 Decision No. 29134
In the Matter of the Petition of THE MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and DISTRICT COUNCIL 48, AFSCME, AFL-CIO, LOCAL 1053	Case 314 No. 52593 DR(M)-559 Decision No. 29135
In the Matter of the Petition of LOCAL 1616, MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and	Case 315 No. 52666 DR(M)-561 Decision No. 29136

No. 29134 No. 29137 No. 29140
No. 29135 No. 29138 No. 29141
No. 29136 No. 29139 No. 29142

MILWAUKEE PUBLIC SCHOOLS

In the Matter of the Petition of

THE MILWAUKEE BOARD OF SCHOOL DIRECTORS

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

LOCAL 1616, MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

Case 316
No. 52667 DR(M)-562
Decision No. 29137

In the Matter of the Petition of

THE MILWAUKEE BOARD OF SCHOOL DIRECTORS

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

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 950

Case 319
No. 52867 DR(M)-566
Decision No. 29138

In the Matter of the Petition of

LOCAL 150, SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, CLC

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

MILWAUKEE PUBLIC SCHOOLS

Case 328
No. 53821 DR(M)-572
Decision No. 29139

In the Matter of the Petition of LOCAL 150, SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, CLC Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE PUBLIC SCHOOLS	Case 329 No. 53822 DR(M)-573 Decision No. 29140
In the Matter of the Petition of THE MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL 150-BSH	Case 331 No. 53915 DR(M)-577 Decision No. 29141
In the Matter of the Petition of THE MILWAUKEE BOARD OF SCHOOL DIRECTORS Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, LOCAL 150-FS	Case 332 No. 53916 DR(M)-578 Decision No. 29142

Appearances:

Mr. Grant Langley, City Attorney, by Mr. Thomas J. Beamish, Assistant City Attorney, 200 East Wells Street, #800, Milwaukee, Wisconsin, 53202, for the Milwaukee Board of School Directors.

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, by Mr. Timothy E. Hawks, 700 West Michigan, P.O. Box 442, Milwaukee, Wisconsin, 53201-0442, for Local 950, International Union of Operating Engineers.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, P.O. Box 12993, Milwaukee, Wisconsin, 53212, for Service Employees' International Union, Local 150.

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, by Ms. Carolyn H. Delery, 611 North Broadway, Suite 200, Milwaukee, Wisconsin, 53202, for Locals 1053 and 1616, Milwaukee District Council 48, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Beginning May 4, 1995, with Case 313 and ending on March 1, 1996, with Case 332, the above captioned parties filed petitions with the Wisconsin Employment Relations Commission seeking declaratory rulings pursuant to Sec. 111.70(4)(b), Stats., regarding their duty to bargain over certain matters.

The parties made unsuccessful efforts to voluntarily resolve their disputes and ultimately Cases 313, 314, 315, and 316 were noticed for hearing to commence May 20, 1996, in Milwaukee, Wisconsin, before Examiner Peter G. Davis. At the outset of the May 20, 1996, hearing, Local 950, International Union of Operating Engineers and Local 150, Service Employees' International Union were allowed to intervene as to Cases, 319, 328, 329, 331, and 332.

The parties filed post hearing argument and the record was closed August 23, 1996.

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

FINDINGS OF FACT

1. The Milwaukee Board of School Directors, herein the Board, is a municipal employer having its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin, 53208.

2. Locals 1053 and 1616, District Council 48, AFSCME, AFL-CIO, Local 150,

Service Employees' International Union, AFL-CIO, and Local 950, International Union of Operating Engineers, herein the Unions, are labor organizations representing certain employes of the Board for the purposes of collective bargaining.

3. Local 1053, District Council 48, AFSCME, AFL-CIO, herein Local 1053, and the Board have a dispute over their duty to bargain on the following contract proposal:

> The Board shall, during each pay period during the term of this Agreement, deduct from the biweekly earnings of employees in the bargaining unit, the employees voluntary political contributions, and submit said deduction to the Union on a biweekly basis. The political check form shall be as provided by the Union and in compliance with Federal Election Commission requirements.

Local 1053 contends the proposal is a mandatory subject of bargaining while the Board asserts the proposal is a permissive subject of bargaining.

4. Local 1616, District Council 48, AFSCME, AFL-CIO, herein Local 1616, and the Board have a dispute over their duty to bargain regarding continued inclusion of the following contract provision in a successor agreement:

> **A. PROMOTION PLANS**
>
> 1. The basic position levels for the following promotional plans are computer programmer III and systems analyst.
>
> > **a. COMPUTER PROGRAMMER III**. Programmers may be recruited at any level, depending upon individual qualifications, but recruitment is generally at the I level. Individuals who are recruited at the I level will be promoted to computer programmer II upon one (1) year of Board experience as a computer programmer I, passage of an appropriate qualifying examination, and recommendation of the division head.

Computer programmers II will be promoted to computer programmers III upon one (1) year of Board experience as a computer programmer II, passage of an appropriate qualifying examination, and recommendation of the division head.

b. SYSTEMS ANALYST. Individuals who are recruited as systems analyst trainees will be promoted to systems analyst upon two (2) years of Board experience as a trainee, passage of an appropriate qualifying examination, and recommendation of the division head.

c. NON-RECOMMENDATION. If recommendation for promotion in one (1) of the above plans is not given, the division head shall, upon request, state in writing his/her reasons for non-recommendation.

2. DATA PROCESSING SPECIALIST. All systems analysts and computer programmers III shall be promoted to data processing specialist upon meeting the following qualifications:

a. Possession of an appropriate bachelor's degree.

b. Four (4) or more years as a systems analyst or programmer with the Board.

c. Application by the employe for promotion and once applying, the employe shall be given the opportunity to fulfill the requirements in d below.

d. Satisfactory completion of a promotional task sequence which would demonstrate:

1) The ability to work independently

without direct supervision in a major area of application.

2) Demonstrated leadership ability as a team leader.

Note: This can be accomplished within the four (4)-year requirement in b above.

e. Passage of an appropriate qualifying examination.

f. Action by the division head to promote.

3. Vacancies for lead computer operators will be filled by a computer operator with seniority as a major consideration.

Local 1616 asserts the provision is a mandatory subject of bargaining while the Board argues the language is a permissive subject of bargaining.

5. Local 1616 and the Board have a dispute over their duty to bargain regarding continued inclusion of the following contract provision in a successor agreement:

PART II

. . .

F. LAYOFFS

. . .

6. **CONFIDENTIAL AND MANAGEMENT EMPLOYES.** Should there be a layoff of confidential or management employes, the laid off employe, provided qualified, may fill a vacant position within the bargaining unit that they previously held. Should no vacant position be

available within this bargaining unit, then the confidential or management employe may bump a less senior employe, provided qualified, within the unit. In order for a confidential or management employe to bump

> a position within this bargaining unit, he/she must have previous seniority within this unit and then they may only use up to three (3) years of seniority for bumping purposes.

Local 1616 contends the provision is a permissive subject of bargaining while the Board asserts the language is a mandatory subject of bargaining.

6. Locals 1053 and 1616, AFSCME and Local 950, International Union of Operating Engineers, herein Local 950, have a dispute with the Board over their duty to bargain regarding continued inclusion of the following contract provision in successor agreements:

> Bargaining unit members shall be enrolled in the City of Milwaukee Employes' Retirement System and receive retirement benefits in accordance with the appropriate ordinances of the Common Council of the city of Milwaukee and the applicable rules of the City of Milwaukee Employes' Retirement System pertaining to general city employes. All changes made by the Common Council of the city of Milwaukee to the City of Milwaukee Employes' Retirement System affecting general city employes shall automatically be implemented by the Board for this bargaining unit. The Board shall pay the employe's share of the necessary contributions.

Locals 950, 1053, and 1616 argue the provision is a mandatory subject of bargaining and the Board contends the provision is a permissive subject of bargaining.

Local 150, Service Employees' International Union, herein Local 150, and the Board have a dispute over their duty to bargain regarding continued inclusion of the following contract provision in a successor agreement:

> Bargaining unit members shall be enrolled in the City of Milwaukee Employes' Retirement System and receive retirement benefits in accordance with the appropriate ordinances of the Common Council of the city of Milwaukee and the applicable rules of the City of Milwaukee Employes' Retirement System pertaining to general city employes. The Board shall pay the employe's share of the necessary

contributions.

Local 150 contends the provision is a mandatory subject of bargaining while the Board asserts the provision is a permissive subject of bargaining.

7. The Board and Locals 950, 1053, and 1616 have a dispute over their duty to bargain regarding continued inclusion of the following contract provision in a successor agreement:

> **PRINTING THE CONTRACT.** The Union shall print the contract and provide the Board with the number of copies requested by the Board. The Board shall reimburse the Union for one hundred percent (100%) of the cost of the Board's copies and fifty percent (50%) of the cost of the Union's copies. All proofs of the contract must be approved by both the Board and the Union before printing.

Local 1616 and the Board stipulated that in the context of their contractual relationship, this provision requires use of a union printer.

Locals 950, 1053, and 1616 allege the provision is a mandatory subject of bargaining and the Board argues the provision is a permissive subject of bargaining.

Local 150 and the Board have a dispute regarding their duty to bargain over inclusion of the following proposal in a successor agreement:

> The Board shall print the Contract and provide the Union with 2000 copies. All proofs of the contract must be approved by the Board and Union before printing.

Local 150 contends the proposal is a mandatory subject of bargaining while the Board asserts the proposal is a permissive subject of bargaining.

8. The Board and Locals 1053 and 1616 have a dispute regarding their duty to bargain over continued inclusion of the following provision in a successor contract:

> 1. This agreement shall continue in full force and effect from the date of ratification to and including June 30, 1994, unless specifically agreed otherwise in this contract. The Board and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this agreement or with respect to any subject or matter not specifically referred to or covered in this agreement, except as otherwise provided herein.

The Board contends the provision is a mandatory subject of bargaining while Locals 1053 and 1616 assert the provision is a permissive subject of bargaining.

The Board and Local 150 have a dispute regarding their duty to bargain over continued inclusion of the following provision in a successor contract:

> The Board and the Union for the life of this agreement each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligate to bargain collectively with respect to any subject or matter referred to or covered in this agreement or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement.

The Board asserts the provision is a mandatory subject of bargaining while Local 150 contends the provision is a permissive subject of bargaining.

9. The Board and Local 1053 have a dispute regarding their duty to bargain over continued inclusion of the following provision in a successor contract:

PART VII

GRIEVANCE AND COMPLAINT PROCEDURE

. . .

D. STEPS OF GRIEVANCE PROCEDURE

. . .

> 3. **PAYMENT OF ARBITRATION COSTS.** The Board shall pay the full cost of the impartial referee fee and the cost of two (2) transcripts each year for up to two (2) arbitrations from July 1, 1992, to June 30, 1994.
>
> In the event the Union does not exercise its option to any or all of the arbitration fees and transcript fees in the year indicated, they shall be accumulative and used in successive years of the contract.

Local 1053 alleges the provision is a mandatory subject of bargaining while the Board contends the provision is a permissive subject of bargaining.

Local 1616 and the Board have a dispute regarding their duty to bargain over continued inclusion of the following provision in a successor agreement:

> **PAYMENT OF ARBITRATION COSTS.** The Board shall pay the full cost of one (1) arbitration (including the impartial referee fee and transcript) for one (1) arbitration during 1992-93, one (1) during 1993-94.

Local 1616 contends the provision is a mandatory subject of bargaining and the Board asserts the provision is a permissive subject of bargaining.

The Board and Local 950 have a dispute regarding their duty to bargain over continued inclusion of the following provision in a successor agreement:

> **PAYMENT OF ARBITRATION COSTS.** The Board shall pay the full cost of the impartial referee fee and the cost of two (2) transcripts -- one (1) for the Union and one (1) for the Board -- for up to two (2) arbitrations during each contract year. In the event the Union does not exercise its option to any or all of the arbitration fees

in either of the first two (2) years, the balances shall be transferred to any of the succeeding years of the contract.

The Board contends the provision is a permissive subject of bargaining while Local 950 argues the provision is a mandatory subject of bargaining.

Local 150 and the Board have a dispute over their duty to bargain over continued inclusion of the following provision in a successor contract:

> During each year of the contract, the Board shall pay the cost of the impartial referee's fees plus one (1) transcript for the Union and one (1) transcript of the Board for up to two (2) arbitrations.

Local 150 argues the provision is a mandatory subject of bargaining while the Board contends the provision is a permissive subject of bargaining.

10. The provisions/proposals set forth in Findings of Fact 4 (in part), 6, 7 (in part), 8 (in part), and 9 primarily relate to wages, hours, and conditions of employment.

11. The provisions/proposals set forth in Findings of Fact 4 (in part), 5, 7 (in part), and 8 (in part) primarily relate to the management and direction of the school system or the formulation of public policy or have no relationship to wages, hours, and conditions of employment.

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

CONCLUSIONS OF LAW

1. The provisions/proposals referenced in Finding of Fact 10 are mandatory subjects of bargaining.

2. The provisions/proposals referenced in Finding of Fact 11 are permissive subjects of bargaining.

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

DECLARATORY RULING 1/

1. The Milwaukee Board of School Directors and the appropriate Unions have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over the provisions/proposals referenced in Conclusion of Law 1.

2. The Milwaukee Board of School Directors and the appropriate Unions do not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over the provisions/proposals referenced in Conclusion of Law 2.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Paul A. Hahn /s/

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.

(footnote continued on page 14)

Paul A. Hahn, Commissioner

1/ (footnote continued from page 13)

(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.

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

. . .

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

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

MILWAUKEE PUBLIC SCHOOLS

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

BACKGROUND

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)(a), 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.

PROMOTIONS

A bargaining agreement between the Board and AFSCME Local 1616 provides:

1. The basic position levels for the following promotional plans

are computer programmer III and systems analyst.

a. COMPUTER PROGRAMMER III. Programmers may be recruited at any level, depending upon individual qualifications, but recruitment is generally at the I level. Individuals who are recruited at the I level will be promoted to computer programmer II upon one (1) year of Board experience as a computer programmer I, passage of an appropriate qualifying examination, and recommendation of the division head.

Computer programmers II will be promoted to computer programmers III upon one (1) year of Board experience as a computer programmer II, passage of an appropriate qualifying examination, and recommendation of the division head.

b. SYSTEMS ANALYST. Individuals who are recruited as systems analyst trainees will be promoted to systems analyst upon two (2) years of Board experience as a trainee, passage of an appropriate qualifying examination, and recommendation of the division head.

c. NON-RECOMMENDATION. If recommendation for promotion in one (1) of the above plans is not given, the division head shall, upon request, state in writing his/her reasons for non-recommendation.

2. DATA PROCESSING SPECIALIST. All systems analysts and computer programmers III shall be promoted to data processing specialist upon meeting the following qualifications:

a. Possession of an appropriate bachelor's degree.

b. Four (4) or more years as a systems analyst or programmer with the Board.

c. Application by the employe for promotion and once applying, the employe shall be given the opportunity to fulfill

the requirements in d below.

d. Satisfactory completion of a promotional task sequence which would demonstrate:

1) The ability to work independently without direct supervision in a major area of application.

2) Demonstrated leadership ability as a team leader.

Note: This can be accomplished within the four (4)-year requirement in b above.

e. Passage of an appropriate qualifying examination.

f. Action by the division head to promote.

3. Vacancies for lead computer operators will be filled by a computer operator with seniority as a major consideration.

The Board asserts that this provision establishes the minimum qualifications needed for the jobs referenced therein and thus is a permissive subject of bargaining. The Board contends the Commission has long held that the employer has the right to establish minimum qualifications because such decisions primarily relate to the formulation or management of public policy.

AFSCME Local 1616 contends this clause is a mandatory subject of bargaining which establishes the promotion rights of qualified unit employes. Citing Milwaukee County, Dec. No. 26247 (WERC, 11/89) and Glendale Professional Policemen's Ass'n v. City of Glendale, 83 Wis.2d 90 (1978), AFSCME argues it is clear the procedural requirements applicable to promotion of qualified employes primarily relate to wages, hours, and conditions of employment.

Both parties correctly recite existing Commission precedent to the effect that the employer need not bargain over the minimum job related qualifications applicable to a position, but is obligated to bargain over the criteria to be used when the employer determines which unit applicant possessing the minimum job related qualifications will receive a position. In our view, this provision establishes both minimum qualifications and applicable selection criteria for the positions of Computer Programmer III, Data Processing Specialist, and Systems Analyst. For instance, the provision establishes certain length of service requirements for promotion - a limitation on

employer rights to establish qualifications which we have previously found to be permissive, City of Milwaukee, Dec. No. 27996 (WERC, 5/94). To the extent it establishes minimum qualifications, the provision exceeds the scope of the language found mandatory in Milwaukee County and renders the provision permissive in part.

BUMPING RIGHTS

The bargaining agreement between the Board and AFSCME Local 1616 provides:

> 6. **CONFIDENTIAL AND MANAGEMENT EMPLOYES.** Should there be a layoff of confidential or management employes, the laid off employe, provided qualified, may fill a vacant position within the bargaining unit that they previously held. Should no vacant position be available within this bargaining unit, then the confidential or management employe may bump a less senior employe, provided qualified, within the unit. In order for a confidential or management employe to bump a position within this bargaining unit, he/she must have previous seniority within this unit and then they may only use up to three (3) years of seniority for bumping purposes.

AFSCME Local 1616 asserts this provision is a permissive subject of bargaining because the clause establishes conditions of employment for individuals who are not represented by Local 1616.

The Board contends the provision is a mandatory subject of bargaining primarily related to seniority and bumping rights of formerly confidential or management employes vis-a-vis less senior unit employes.

While the Board correctly notes that the topics dealt with by the contract language (i.e., seniority, bumping, etc.) are generically mandatory subjects of bargaining, AFSCME correctly and dispositively argues that even wage rate proposals are permissive if they apply to non-unit employes. Wisconsin Rapids School District, Dec. No. 17877 (WERC, 6/80); City of Sheboygan, Dec. No. 19421 (WERC, 3/82); Milwaukee Board of School Directors, Dec. No. 200193-A (WERC, 2/83). Here, non-unit employes (i.e., laid off confidential and management employes) are the individuals given rights by the contract language and thus the provision is a permissive subject

of bargaining.

PENSION

Collective bargaining agreements between the Board and AFSCME Locals 1616 and 1053 and between the Board and Operating Engineers Local 950 provide:

> Bargaining unit members shall be enrolled in the City of Milwaukee Employes' Retirement System and receive retirement benefits in accordance with the appropriate ordinances of the Common Council of the city of Milwaukee and the applicable rules of the City of Milwaukee Employes' Retirement System pertaining to general city employes. All changes made by the Common Council of the city of Milwaukee to the City of Milwaukee Employes' Retirement System affecting general city employes shall automatically be implemented by the Board for this bargaining unit. The Board shall pay the employe's share of the necessary contributions.

The collective bargaining agreement between the Board and Service Employees' Local 150 provides:

> Bargaining unit members shall be enrolled in the City of Milwaukee Employes' Retirement System and receive retirement benefits in accordance with the appropriate ordinances of the Common Council of the city of Milwaukee and the applicable rules of the City of Milwaukee Employes' Retirement System pertaining to general city employes. The Board shall pay the employe's share of the necessary contributions.

To the extent the above quoted contract provisions require the Board to automatically provide unit employes whatever pension benefits are bargained by the City of Milwaukee and its employe unions, the Board asserts these provisions are not mandatory subjects of bargaining.

The Board contends that the provisions effectively force it to abdicate its right to bargain over pension issues. The Board argues that it is inconsistent with public policy underlining

collective bargaining to have benefits established through the bargain struck by other parties.

The Board alleges that "mischief and harm" are the consequences of a conclusion that the existing pension provisions are mandatory subjects of bargaining. Such a conclusion would allow a party to a contract to be saddled with pension benefits produced by a third party bargain in which there is a significant power imbalance. Such a result further supports the impropriety of depriving parties of the ability to bargain for themselves over pension issues.

The Board also contends that the pension provisions are not mandatory subjects of bargaining because the cost impact is not ascertainable.

Given the foregoing, the Board asks the Commission to find the pension provisions to be permissive subjects of bargaining.

AFSCME Locals 1053 and 1616, Operating Engineers Local 950 and Service Employees' Local 150 contend the existing pension provisions are mandatory subjects of bargaining. Contrary to the Board's claim, the Unions argue the Board continues to have the unfettered right to bargain about pension issues, including the identity of the plan, its benefits, and administration. The Unions assert that if the Board wishes to end its current participation in the City of Milwaukee pension system, it can and should come to the bargaining table and seek such a change.

The Unions view the existing pension scenario as akin to bargaining over a health insurance plan offered by a specific carrier. Once a specific plan/carrier is bargained, the carrier may change certain features of the plan without seeking or obtaining approval from the union or employer. By selecting a specific carrier, the parties may also bind themselves to changes the carrier may subsequently impose.

The Unions argue it is clear that benefit proposals do not cease to be mandatory subjects of bargaining because their cost is not ascertainable. The Unions contend that the final cost of many benefit proposals is never known at the time the bargain is struck, (i.e., fully paid insurance, sick leave, deferred compensation) and such proposals clearly retained their status as mandatory subjects of bargaining.

Given the foregoing, the Unions ask that the existing pension provisions be found to be mandatory subjects of bargaining.

We conclude that the pension provisions are mandatory subjects of bargaining. The existing provisions are primarily related to wages and do not deprive these parties of their right to bargain over pension issues.

These provisions exist as a result of bargaining between the parties to this dispute over pension issues. At the time the bargain was originally struck, these parties elected to have pension benefits provided through and established by the City of Milwaukee's pension system. City of Milwaukee pension system benefit levels are typically determined by collective bargaining between the City and its employe unions. If a party to the bargain voluntarily struck by these parties wishes to use the bargaining process to seek a change in the existing bargain, it is free to do so. If a party to the existing bargain wishes to seek to maintain the existing pension benefit mechanism, we find no public policy basis for preventing it from doing so. 2/ Thus, we do not agree that the existing provisions somehow deprive the parties of their ability to bargain over pension. The concerns cited by the Board over possible power imbalances go to the merits of the existing pension provisions, but not to their mandatory nature.

We also reject the Board's contention that the uncertain cost and benefit levels mandated by the pension provisions render them permissive subjects of bargaining. 3/ As pointed out by the Unions, the precise cost and sometimes even the exact composition of the benefit is unknown when many common fringe benefits are bargained. Cost and benefit uncertainty is certainly a relevant consideration when parties are determining whether they wish to agree to a proposal. However, cost and benefit uncertainty is not a relevant consideration when determining whether a proposal is a mandatory subject of bargaining. 4/

Given the foregoing, we find the pension provisions to be mandatory subjects of bargaining.

2/ We note that in City of West Allis, Dec. No. 12706 (WERC, 5/74), the Commission rejected a Union argument that a parity agreement between an employer and another union did not deprive the Union of its right to bargain collectively over wages.

3/ The Board cites Village of West Milwaukee, Dec. No. 17927-A (WERC, 9/80) in support of its position. Initially, it is important to note that the issue in West Milwaukee was not whether a proposal was mandatory or permissive, but rather whether a proposal was a valid "final offer" under Sec. 111.77, Stats., interest arbitration. Further, unlike the wage offer found indefinite in West Milwaukee, these retirement proposals are sufficiently definite so as to allow the Board to intelligently respond thereto both at the bargaining table and, if necessary, in its own final offer.

4/ For instance, in School District of Janesville, Dec. No. 21466 (WERC, 5/84), the Commission held that the cost implications of a wage proposal upon employer service level choices were relevant to a proposal's reasonableness, but not its mandatory status.

PRINTING CONTRACTS

Collective bargaining agreements between the Board and AFSCME Locals 1616 and 1053 and between the Board and Operating Engineers Local 950 provide:

> The Union should print the contract and provide the Board with the number of copies requested by the Board. The Board shall reimburse the Union for one hundred percent (100%) of the cost of the Board's copies and fifty percent (50%) of the cost of the Union's copies. All proofs of the contract must be approved by the Board and the Union before printing.

Service Employees' Local 150 has proposed that its next agreement with the Board provide:

> The Board shall print the contract and provide the union with 2,000 copies. All proofs of the contract must be approved by the Board and the Union before printing.

The Board contends these provisions are permissive because the printing obligations contained therein are primarily retailed to the administrative expenses of the labor organization and not to wages, hours, and conditions of employment. The Board further asserts that to the extent the contract language obligates the Board to use a union printer, the National Labor Relations Board has determined the inclusion of the "union bug" on a contract does not implicate the employer/employe relationship. Because it believes the contract provision has at best a remote relationship to wages, hours, and conditions of employment, the Board argues it need not bargain over the inclusion of these provisions/proposals in successor agreements.

The Unions argue that the allocation of the expense of printing a contract is primarily related to conditions of employment and, thus is a mandatory subject of bargaining. The Unions note that the expense in question is the product of an agreement negotiated by both parties. The Unions assert the mandatory status of such contract language proposals has been historically presumed and thus never before challenged. Because the bargaining agreement provides the means by which employes may verify the negotiated terms and conditions of employment, the Unions contend the allocation of the cost of production is a mandatory subject of bargaining.

No. 29134 No. 29137 No. 29140
No. 29135 No. 29138 No. 29141
No. 29136 No. 29139 No. 29142

Section 111.70(1)(a), Stats., specifies that collective bargaining includes ". . . the reduction of any agreement reached to a written and signed document." Thus, existence of a written agreement is a core feature of the collective bargaining process. As a practical matter, existence of a written contract is dependent upon the physical production of the document itself. To produce a written contract, decisions need to be made about how and where the contract will be printed. Production of the document/contract also necessarily generates expense.

It is also important to note that a written contract provides the primary means by which employes became aware of their wages, hours, and conditions of employment. By making copies of contracts available to employes, a union enhances its ability to meet its responsibility to enforce the terms of the contract and to more generally fulfill its function as the exclusive collective bargaining representative.

In prior cases, this clear nexus between a union's responsibilities and functions as the exclusive bargaining representative and employes' wages, hours, and conditions of employment has formed the basis for conclusions that proposals related to union bulletin boards [City of Sheboygan, Dec. No. 19421 (WERC,3/82)], paid time off for bargaining and grievance processing [City of Madison, Dec. No. 16590 (WERC, 10/78)], and union use of employer facilities [School District of Janesville, Dec. No. 21466 (WERC, 3/84); School District of Shullsburg, Dec. No. 20120-A (WERC, 4/84)] were mandatory subjects of bargaining.

In our view, this relationship between employe wages, hours, and conditions of employment and matters which enhance a union's ability to meet its statutory obligation to bargain and to then protect the bargained employe wages, hours, and conditions of employment warrants finding allocation of the actual cost of printing contracts to be a mandatory subject of bargaining. Proposals seeking to have an employer bear the production costs leave a union with more resources to meet its statutory obligations than would otherwise be the case. Thus, we generally find the proposals of Locals 950, 1053, 1616, and 150 to be mandatory subjects of bargaining. However, to the extent the proposals require use of a union printer (the parties stipulated that the Local 1616 provision requires such use), they are permissive subjects of bargaining. As persuasively argued by the Board, the presence or absence of the "union bug" on a contract has no relationship to the union's ability to meet its representational obligations and thus has no relationship to employe wages, hours, and conditions of employment.

ZIPPER CLAUSE

Collective bargaining agreements between the Board and AFSCME Locals 1053 and 1616 provide:

> The Board and the Union, for the life of this agreement each voluntarily and unqualifiedly waive the right and each agrees that the other should not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this agreement or with respect to any subject or matter not specifically referred to or covered in this agreement, except as otherwise provided.

Collective bargaining agreements between the Board and Service Employees' Local 150 provide:

> The Board and the Union for the life of this agreement each voluntarily and unqualifiedly waive the right and each agrees the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this agreement or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement.

The Unions contend these provisions are permissive subjects of bargaining to the extent they seek Union waiver of statutory right to bargain during the term of a contract. Citing Deerfield Community School District, Dec. No. 17503 (WERC, 12/79) and State of Wisconsin, Dec. No. 13017-D (WERC, 5/77), the Unions argue they cannot be compelled to bargain over waiver of the right to bargain regarding matters which arise during the contract and are not covered thereby.

The Board asserts these clauses are mandatory subjects of bargaining to the extent they are narrowly interpreted to establish that the parties have exhausted their obligation to bargain for the term of the contract. Citing St. Croix Falls School Dist. v. WERC, 186 Wis.2d 671 (CtApp, 1994), the Board argues that the normal function of a zipper clause is "to maintain the status quo, not to facilitate unilateral changes."

In Racine Unified School District, Dec. Nos. 19980-B, 19981-B (WERC, 1/83), the Commission stated:

> The Commission has applied the above test to waiver clauses and has held that a waiver proposal is a mandatory subject of bargaining where it relates to a matter which is covered by the existing collective bargaining agreement, or to a matter which arose during negotiations leading to the agreement. The Commission has held that a waiver clause is a permissive subject of bargaining where it relates to a matter which may not have been within the knowledge or contemplation of either or both of the parties at the time the agreement was negotiated or signed.

Applying this holding to the zipper clause contained in the Local 150 contracts, it is clear the clause is permissive to the extent it waives Local 150's statutory right to bargain over matters not within "knowledge or contemplation" of the parties when they bargained the contract.

We are also persuaded the Racine holding renders the zipper clause in the AFSCME contracts permissive. While the AFSCME contract language lacks the explicit "knowledge or contemplation" language found in the Local 150 agreements, the AFSCME contract language generally applies to "any subject or matter not specifically referred to or covered in this agreement." To the extent the absence of any specific reference in the contract is due to a matter not being within the "knowledge or contemplation" of a party (as opposed to a scenario in which contract proposals are made and ultimately dropped) the AFSCME contract language suffers from the same flaw found in the Local 150 agreements. To that limited extent, the AFSCME contract language is also permissive.

The Board correctly recites the St. Croix Court's statement that "the normal function of 'zipper' clauses is to maintain the status quo, not to facilitate unilateral changes." However, we note that the mandatory/permissive status of a zipper clause was not at issue in St. Croix and that in any event, the "zipper" language referenced by the Court was substantively different from that before us herein to wit:

> This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. Any supplemental amendments to this Agreement or past practices shall not be binding on either party unless executed in writing by the parties hereto.

PAYMENT OF ARBITRATOR FEES AND TRANSCRIPT COSTS

The bargaining agreement between the Board and AFSCME Local 1616 provides:

> The Board shall pay the full cost of one (1) arbitration (including the impartial referee fee and transcript) for one (1) arbitration during 1992-1993, one (1) during 1993-1994.

The bargaining agreement between the Board and AFSCME Local 1053 states:

> The Board shall pay the full cost of the impartial referee fee and the cost of two (2) transcripts each year for up to two (2) arbitrations from July 1, 1992, to June 30, 1993, and two (2) arbitrations from July 1, 1993, to June 30, 1994.
>
> In the event the Union does not exercise its option to any or all of the arbitration fees and transcript fees in the years indicated, they shall be accumulative and used in successive years of the contract.

The contract between the Board and Operating Engineers Local 950 specifies:

> The Board shall pay the full cost of the impartial referee fee and the cost of two (2) transcripts -- one (1) for the Union and one (1) for the Board -- for up to two (2) arbitrations during each contract year. In the event the Union does not exercise its option to any or all arbitration fees in either of the first two (2) years, the balances shall be transferred to any succeeding years of the contract.

The agreements between the Board and Services Employees' Local 150 provide:

> During each year of the contract the Board shall pay the cost of the impartial referee's fees plus one (1) transcript for the Union and one

(1) transcript for the Board for up to two (2) arbitrations.

The Board asserts that these contract provisions are permissive subjects of bargaining because they constitute indemnification clauses or relate to the administrative expenses of a union. The Board cites precedent under the National Labor Relations Act in support of its position. The Board argues that like the "hold harmless" clause found permissive by the Commission in Milwaukee Board of School Directors, Dec. No. 23208-A (WERC, 2/87), the effect of these provisions is to compel the Board to underwrite legal challenges to its authority and to impose on the Board costs totally within the Unions' control. The Board asserts that it should not be required to bargain over these provisions.

The Unions argue that allocation of the cost of an arbitration proceeding is a substantive component of the grievance arbitration procedure and as such is a mandatory subject of bargaining. The Unions contend that existing precedent under the National Labor Relations Act supports their position.

It is well established that the presence (or lack thereof) of a grievance arbitration provision in a contract is a mandatory subject of bargaining. School Board, School District No. 6, City of Greenfield, Dec. No. 14026-B (WERC, 11/77); Crawford County, Dec. No. 20116 (WERC, 12/82). A fundamental element of an arbitration provision is the allocation of the costs of the arbitration process between the union and employer. Thus we are persuaded that as a general matter, the allocation of arbitration costs is a mandatory subject of bargaining.

As argued by the Unions, the Board does not appear to dispute the general mandatory status of arbitration costs. Rather the Board contends that a cost allocation proposal loses its mandatory status when the proposal requires the Board to pay more than half the cost. We do not find the Board's arguments persuasive.

The Board's payment of "the Union share" of arbitration costs is not the analytical equivalent to the indemnification clause found permissive in Milwaukee Schools. 5/ In Milwaukee,

---

5/ The Board has also cited various cases decided under the National Labor Relations Act to the effect that indemnification/performance bond provisions/proposals are permissive subjects of bargaining. As is true for the Milwaukee Schools decision, these cases are analytically inapplicable. The provisions before us relate to the cost of determining whether a contract has been violated. Indemnification/performance bond provisions related to the

the clause was permissive because it interfered with the employer's policy interest in defending itself as its interests dictate. That concept has no analytical application here.

---

cost of insuring that a party meets its contractual obligations.

As was true for the "cost of printing contracts" proposals discussed earlier herein, the cost in questions is not fundamentally a "union administrative expense" (as argued by the Board), but rather an expense closely related to the core of a union's representational responsibilities under the law (i.e., enforcing the contract which establishes employe wages, hours, and conditions of employment). Thus, there is a clear nexus to wages, hours, and conditions of employment which renders these proposals mandatory subjects of bargaining.

POLITICAL CHECK OFF

A decision regarding this proposal will be forthcoming.

Dated at Madison, Wisconsin, this 3rd day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Paul A. Hahn /s/
Paul A. Hahn, Commissioner