

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**DODGELAND SCHOOL DISTRICT**

Requesting a Declaratory Ruling Pursuant to Sections 111.70(4)(cm)6.g,  
111.70(4)(b), 111.70(4)(cm)5s. and 227.41, Wis. Stats.

Involving a Dispute between Said Petitioner and

**DODGELAND EDUCATION ASSOCIATION**

Case 22  
No. 55941  
DR(M)-586

**Decision No. 29490**

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Appearances:

Lathrop & Clark, by **Attorney Kirk D. Strang**, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, WI 53701-1507, appearing on behalf of the Dodgeland School District.

**Ms. Melissa A. Cherney**, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, WI 53708-8003, appearing on behalf of the Dodgeland Education Association.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING**

On December 30, 1997, the Dodgeland School District filed a petition with the Wisconsin Employment Relations Commission requesting a declaratory ruling pursuant to Secs. 111.70(4)(b), 111.70(4)(cm)5s, 111.70(4)(cm)6.g, and 227.41, Stats., as to certain legal issues arising in a dispute between the District and the Dodgeland Education Association.

Hearing was held in Juneau, Wisconsin on April 30, 1998 before Commission Examiner Peter G. Davis.

The parties filed post-hearing briefs, the last of which was received July 9, 1998.

By letter dated August 21, 1998, the parties were asked to file supplemental argument and to state their views on whether the Commission should take official notice of certain documents. The parties' responses were received by September 28, 1998. The record was closed on

October 21, 1998 upon receipt of the Association's position regarding a District request that the Commission take official notice of additional documents. The Commission hereby advises the parties that it takes official notice of documents which accompanied the August 21, 1998 submission to the parties.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

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

### FINDINGS OF FACT

1. The Dodgeland School District, herein the District, is a municipal employer having its principal offices at 302 South Main Street, Juneau, Wisconsin 53039.

2. The Dodgeland Education Association, herein the Association, is a labor organization representing certain professional employes of the District for the purposes of collective bargaining. The Association has its principal offices at P. O. Box 1195, Fond du Lac, Wisconsin 54936-1195.

3. On or about April 1, 1996, the District and Association entered into a memorandum of understanding which stated:

#### Preparation Time

The parties agree that the current practice as set forth below concerning preparation periods shall continue in effect until June 30, 1997, absent mutual agreement by the parties to modify the number of preparation periods. The recognized past practice shall be as follows:

High School	Two preparation periods
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Middle School	Two preparation periods
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Grades 1 – 5	Art, Music, Phy. Ed. and 30 minutes at lunch
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Kindergarten	One-half time or Art and Music that is applicable to grades 1 – 5 plus 30 minutes at lunch and 30 minutes every six days during library time so long as students are assigned to library aide.
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Although agreed upon as a practice to continue through June 30, 1997, the Collective Bargaining Agreement will not reflect the above references to preparation periods.

The 1995-1997 contract between the District and the Association stated in pertinent part:

III. SALARY SCHEDULES FOR TEACHING EMPLOYEES

...

E. Extra-Pay Schedule

Teachers shall be remunerated above and beyond their basic salary for performing certain duties specified on the Extra-Curricular Pay Schedule (see Appendix B). Payments shall be at the rates scheduled.

F. Grade School Preparation Period

In the event that the art, music or physical education instructor is unable to hold the regularly scheduled class said classroom teacher shall be paid at the same rate as high school teachers who substitute during their preparation period. Teachers are expected to teach art, music or physical education during the period when they substitute for art, music, or physical education teachers (see Appendix B).

G. Preparation Period Assignments

Teachers may be assigned to cover other classes during their regularly assigned preparation periods or other unassigned time and will be compensated in accordance with Appendix B Section C (Extra-Duty Activities) paragraph 7. (Substitute Pay).

...

EXTRA-CURRICULAR ASSIGNMENTS

...

C. Extra-Duty Activities

	1995-1996	1996-1997
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...

7. Substitute Pay

Per Period/first 5 days work  
for one teacher

	\$13.73	\$13.73
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Per Period for all consecutive  
days after 5                      \$19.57                      \$19.57

4. The Association's preliminary final offer for the 1997-1999 contract between the District and Association states in pertinent part:

4. Continuation of preparation time memorandum.

The District's preliminary final offer for the 1997-1999 contract states in pertinent part:

I. Amend the contract dates in Article XIV accordingly.

II. 1997-98 and 1998-99 calendars are per enclosed.

III. Points of Clarification document as per enclosed.

IV. Curriculum and committee work proposal as per enclosed.

V. 1. For any period of time after June 30, 1993, covered by the proposed collective bargaining agreement, the municipal employer shall maintain all fringe benefits and its percentage contribution toward the cost thereof as required by Sec. 111.70(1)(nc), Stats.

2. For each 12 month period or portion thereof which commences July 1, 1993, and is covered by this agreement, the municipal employer shall provide the minimum increase in salary which Sec. 111.70(1)(nc)2, Stats., allows for the purposes of a qualified economic offer.

5. By letter dated December 22, 1997, the District advised the Association as follows:

As you know, the issue of teacher preparation time has been the subject of much discussion between the School Board and the Dodgeland Education Association (DEA) for quite some time, including negotiations for the 1997-99 Master Contract between the District and DEA.

On November 3, 1997, I communicated with all DEA members regarding prep time, stating that since the Memorandum of Understanding regarding teacher preparation time ended June 30, 1997, there is no longer any guarantee of prep time.

I am writing at this time to inform you, as the president of the DEA, that the District hereby disavows any alleged past practice relating to guaranteed teacher prep time and

to notify you of the District's intention to discontinue the alleged teacher prep time past practice commencing with the next semester. At that time, teacher prep time, as a permissive subject of bargaining, shall be reserved to management and will fall within the parameters of Article I of the Master Contract.

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Should you have any questions regarding this notification, please feel free to stop in and visit with me in the near future. Should the DEA wish to continue to negotiate on this issue, the appropriate form for that would be with the mediator and the School Board.

6. It is the District's general expectation and teachers' general practice that preparation time will be used for some or all of the following purposes:

## HIGH SCHOOL

### General

- Photocopying
- Lesson planning
- Room preparation – bulletin boards, seating arrangements, AV material
- Grading papers
- Meeting with students having difficulties
- Make phone calls – parents, vendors, etc.
- Prepare labs
- Fill out administrative, EEN, student homework forms
- Meet with Independent students
- Coaching obligations – press releases, injuries, home game preparation, planning practice
- Planning NEW lessons; preview new texts and other materials
- Cover classes when substitutes are not available
- Listen to students with problems
- Learn new computer skills
- Budgeting, purchase requisitions

### Specific

- Special Education
  - Meet with teacher to monitor student progress
  - Formal testing for 3-year reevaluations
  - Helping students whenever they come in
- Labs
  - Deal with computer problems
  - Do job visits, explore potential job sites
  - Machine and tool maintenance
  - Assist elementary teacher with science projects

- Prepare chemical solutions
- Clean glassware, put away equipment
- Purchase materials for lab
- Have open computer labs for students
- Prepare computer presentation

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- Music
  - Voice lessons
  - Instrumental lessons
- AV Work
  - Repair, order, videotape, handle teacher requests
- Athletic Director
  - Schedule all athletic events
  - Contract officials
  - Enforce athletic code
  - Prepare all WIAA paperwork
  - Prepare meeting agendas
  - Correct coaching quizzes
  - Prepare and evaluate medical bid proposals, order, inventory and disperse medical supplies
  - Update handbooks
  - Wash towels
  - Prepare all transportation
  - Deal with weather cancellations – contacting press, rescheduling, etc.
- Agriculture
  - Prepare FFA material
- Extracurricular
  - Prepare submissions to ESC Math Contest
  - Forensics rehearsals
  - Planning student council work, coke machine maintenance

#### MIDDLE SCHOOL

- Write reports
- Talk to parents
- Check with other teachers on students' progress
- Testing, IEP's (writing, holding meetings)
- Grade papers
- Run off copies
- Prepare new projects, units
- Set up demonstrations
- Make repairs in lab
- Cut wood for projects
- Make less plans

- Fill out reports
- Decorate room
- Help students
- Help students with GLOBE weather data and reports
- Prepare for classes
- Grade level team meetings

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- Cover classes for absent staff
- Processing library materials
- Prepare sixth grade orientation
- Prepare sixth grade camp
- Writing directions, information, etc. on the chalkboard
- Reviewing lesson plans, making necessary changes
- Running papers (including waiting for the one copier)
- Stapling work
- Filing masters, resources materials, etc.
- Conferring with specialty teachers, principal, etc.
- Faculty meetings
- Inservice meetings
- Researching, preparing and creating bulletin boards
- Creating seasonal decorations
- Researching and creating seasonal and theme projects
- Filling out daily milk reports
- Filling out attendance reports and slips
- Friday folders
- Corresponding with parents (conferences, calling, writing/answering notes)
- Preparing for, and orientating new students
- Washing chalkboards and cleaning erasers
- Making out book club orders, and distributing books
- Getting and returning AV equipment
- Referrals for special services, include all aspects of the referral process
- Referrals for counseling
- Counseling students on non-academic issues
- Settling student social disputes
- Handling discipline problems
- Taking care of, and logging injuries
- Preparing for classroom parties and fieldtrips
- Checking for head lice
- Monitoring ill students, (attempting to) contact parents
- Cleaning up accidents
- Reading district and professional journals, fliers, memos, etc.
- Updating class lists
- Immunization records
- Insurance and other forms

- Invoices
- Selecting textbooks
- Stamp new text and workbooks
- Library book selections
- Stamp books
- Cards, card catalogue

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- Accession records
- Repairing torn books
- Library inventory
- Make out and redo schedules
- Long range planning
- Ordering supplies for the year
- Ordering films and AV supplies
- Preparing for parent/teacher conferences
- Report cards
- Organizing portfolios
- Conferences for parents who cannot attend scheduled evening times
- Arranging room, straightening library, straightening room, re-arranging desk, name tags for desk, dusting, general pick-up
- Writing lesson plans
- Reading the lesson, plan the method of presentation, skill stress
- Gathering resources and other supplemental materials
- Running of supplemental or reinforcement material
- Correcting papers, journals, creative writing
- Recording grades in gradebook
- Checking on missing assignments
- Writing and correcting tests
- Preparing make-up work for absent students
- Preparing supplemental and advanced material for gifted students
- Preparing reinforcement material for students in need of remediation
- Making hands on material as needed
- Making reading and math flash cards
- Gathering equipment and supplies
- Setting up demonstrations for various lessons
- Read student tradebooks
- Give make-up tests
- Individual help
- Supervising students required to stay in for recess
- Helping students with shoes, zippers, snaps, etc.
- Returning corrected papers
- Evaluating students
- Preparing reports and forms
- IEP development and writing



- M-team reports

However, a teacher performing in a satisfactory manner is not subject to discipline if he/she chooses to accomplish the above tasks at times other than preparation periods and uses preparation periods as break time.

7. At hearing in this litigation, the Association made the following proposal:

#### PREPARATION TIME

The parties agree that the practice set forth below shall constitute a normal workload.

High School	Two preparation periods
Middle School	Two preparation periods
Grades 1 – 5	Art, Music, Phy.Ed., and 30 minutes at lunch
Kindergarten	One-half time or Art and Music that is applicable to Grades 1 – 5 plus 30 minutes at lunch and 30 minutes every six days during library time so long as students are assigned to library aide.
Traveling Teachers	Equivalent of two preparation periods

In the event the District chooses to establish a schedule for a teacher which includes less preparation time than the normal amount set forth above, the teacher shall receive, as work overload compensation, an additional amount of compensation in excess of their regular teacher salary according to the following formula:

1. Every forty-two (42) minutes of normal preparation time shall be valued at one-sixth (1/6) of a teacher's regular teaching salary.
2. For every forty-two (42) minutes of normal preparation time not received, a teacher shall be compensated at one-sixth (1/6) of his/her regular teaching salary. Amounts lesser or greater than forty-two minutes shall be prorated.

Ex. Preparation Minutes Not Received x 1/6 teacher's regular teaching salary

42

3. Work overload compensation shall be part of a teacher's regular paycheck.

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8. The preparation time memorandum set forth in Finding of Fact 3 is primarily related to educational policy.

9. The preparation time proposal set forth in Finding of Fact 7 is primarily related to wages.

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

### **CONCLUSIONS OF LAW**

1. The preparation time memorandum set forth in Finding of Fact 3 is a permissive subject of bargaining.

2. Because the preparation time memorandum set forth in Finding of Fact 3 is a permissive subject of bargaining, said memorandum is neither an "economic" nor a "noneconomic" issue within the meaning of Secs. 111.70(1)(dm) and (4)(cm)5s., Stats.

3. Because the preparation time memorandum set forth in Finding of Fact 3 is a permissive subject of bargaining, said memorandum is not a "fringe benefit" within the meaning of Sec. 111.70(1)(nc)1.a., Stats.

4. The Association proposal set forth in Findings of Fact 7 is a mandatory subject of bargaining and an "economic issue" within the meaning of Sec. 111.70(1)(dm), Stats.

5. The District proposal set forth in Finding of Fact 4 is a "qualified economic offer" within the meaning of Sec. 111.70(1)(nc)1, Stats.

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

### **DECLARATORY RULING**

1. The District does not have a duty to bargain with the Association within the meaning

of Secs. 111.70(1)(a) and (3)(a)4, Stats., over inclusion in the parties' 1997-1999 contract of the preparation time memorandum set forth in Finding of Fact 3.

2. The District does have a duty to bargain with the Association within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over inclusion in the parties' 1997-1999 contract of the Association proposal set forth in Finding of Fact 7.

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3. Because the Association proposal to include the preparation time memorandum in the 1997-1999 contract is not an economic issue or a noneconomic issue, the Association cannot utilize interest arbitration under Sec. 111.70(4)(cm)6., Stats., to seek inclusion of the preparation time memorandum in the 1997-1999 contract.

4. Because the District has made a qualified economic offer to the Association and because the Association proposal set forth in Finding of Fact 7 is an economic issue, the Association cannot utilize interest arbitration under Sec. 111.70(4)(cm)6., Stats., to seek inclusion of said proposal in the 1997-1999 contract.

Given under our hands and seal at the City of Madison, Wisconsin, this 14<sup>th</sup> day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

I dissent.

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

**Dodgeland School District**

**MEMORANDUM ACOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECLARATORY RULING**

**THE PLEADINGS**

In its petition, the District seeks a declaratory ruling that: (1) the Association is precluded from proceeding to interest arbitration with respect to the non-mandatory proposal regarding teacher preparation time contained in the Association's final offer; (2) the terms and provisions of the parties' preparation time memorandum of understanding do not constitute a "fringe benefit" within the meaning of Sec. 111.70 (1)(nc) 1.a. Stats.; (3) the terms and provisions of the memorandum of understanding do not constitute an "economic issue" within the meaning of Sec. 111.70(1)(dm), Stats.; and (4) the District's July 24, 1997 qualified economic offer fully comports with Sec. 111.70(1)(nc), Stats.

In its response to the petition, the Association contends that because the District has failed to maintain the "fringe benefit" of the preparation time memorandum of understanding as it existed on the 90<sup>th</sup> day prior to contract expiration, the District does not have a qualified economic offer and the Association can proceed to interest arbitration.

**THE PARTIES' BRIEFS**

**The District's Initial Brief**

The District contends that the Association's proposal to include the expired preparation time memorandum of understanding in the 1997-1999 contract is primarily related to management and educational policy decisions of the District and thus is a permissive subject of bargaining. The District asserts the record clearly establishes the memorandum primarily relates to the allocation of the teacher work day, the ability to deliver educational programming using something other than the existing eight period day, the allocation of building space, and the ability to offer different programs and courses. The District alleges that its legal position as to the permissive status of preparation time proposals is consistent with existing Commission precedent.

Given the permissive nature of the preparation time memorandum, the District argues that it was free to act in a manner contrary to the memorandum once it expired and was repudiated. It urges the Commission to reject the Association's contention that preparation time is a mandatory subject of bargaining.

The District asserts the memorandum is not a “fringe benefit” within the meaning Sec. 111.70(1)(nc) 1.a, Stats. It notes that neither party to this dispute has ever costed preparation time as a benefit; that the WERC Qualified Economic Offer costing forms do not list preparation time as a fringe benefit; and that the Commission has ruled that “fringe benefits” include only those matters traditionally viewed as fringe benefits in the Wisconsin public sector collective bargaining context. Therefore, the District argues that by ceasing to honor the memorandum, it has not acted in a manner inconsistent with its qualified economic offer obligations because it has not altered a “fringe benefit.”

Because it has committed itself to do whatever is statutorily required to have a qualified economic offer, the District asserts it has made a qualified economic offer. The District stands ready to take any action necessary to cure any defects in its offer which are found by the Commission in this proceeding.

Lastly, the District urges rejection of the Association’s position that even if the memorandum is a permissive subject of bargaining, the qualified economic offer law gives the Association the right to proceed to interest arbitration. The District contends there is no evidence that the qualified economic law was intended to expand the scope of matters which can proceed to interest arbitration.

### **The Association’s Initial Brief**

The Association argues that the District does not have a qualified economic offer if it eliminates preparation time as contained in the memorandum of understanding. It asserts the qualified economic offer law was not intended to allow employers to eliminate valuable benefits to employees while at the same time avoiding interest arbitration.

In support of its general position, the Association alleges that preparation time is a “fringe benefit” within the meaning of Sec. 111.70(1)(nc) 1.a. Stats., and thus that the District is statutorily required to maintain the memorandum of understanding preparation time benefits if it wishes to have a qualified economic offer. The Association contends that the definition of “fringe benefit” used by the Court in *BROWN COUNTY ATTORNEYS ASSN. V. BROWN COUNTY*, 169 Wis. 2D 737 (CT. APP. 1992) supports its position.

The Association also asserts that preparation time in the context of these parties’ relationship is an “economic issue” within the meaning of Sec. 111.70 (1)(dm), Stats. The Association notes that the District is eliminating both the minimum preparation time guaranteed by the memorandum and the practice of compensating teachers who accept an additional assignment in lieu of preparation time. Thus, “salaries” and “extra duty” as used in Sec. 111.70(1)(dm), Stats., are affected by the District’s conduct. The Association also asserts that the elimination of preparation time itself has “job security” and “layoff” implications because the District will be able to employ fewer teachers. The Association contends that the

status of preparation time as an “economic issue” provides further support for its view that the District cannot alter preparation time benefits if it wishes to have a qualified economic offer.

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Even if the Commission were to erroneously conclude that preparation time is a permissive subject of bargaining, the Association contends that such a conclusion should not allow the District to both modify preparation time **and** have a qualified economic offer. The Association argues that the law now gives the District the choice of having a qualified economic offer and maintaining existing fringe benefits and economic issues (**even if they are permissive subjects of bargaining**) or proceeding under the traditional bargaining law which allows employers to unilaterally change permissive subjects of bargaining but also allows unions to proceed to interest arbitration on mandatory impact proposals. If the District can eliminate preparation time and prevent the Association from arbitrating mandatory impact proposals, the Association contends meaningful collective bargaining has been eliminated.

Under the facts of this case, the Association asserts preparation time should be found a mandatory subject of bargaining. It argues preparation time is primarily related to “hours” because it is analogous to a break time proposal (to the extent employees use the time in that manner) and because if employees do not have preparation time (to the extent they use it for tasks which must be completed sometime to satisfactorily perform the duties of a teacher) teachers must spend additional hours outside the work day to meet job requirements. The Association further argues that preparation time is a mandatory subject of bargaining because the District’s motivation to eliminate preparation time is cost-based rather than premised on educational policy considerations.

Lastly, the Association argues that if the Commission erroneously concludes that (1) the District can eliminate preparation time benefits and still have a qualified economic offer and (2) preparation time is a permissive subject of bargaining, the Association must be given the opportunity to proceed to interest arbitration over a mandatory subject of bargaining impact proposal. The Association asserts that to hold otherwise is to allow employees to be deprived of a significant benefit and to deny their union the opportunity to meaningfully bargain a contract provision which would compensate employees for their loss.

### **The District’s Reply Brief**

The District asserts the Association’s initial brief is a treatise on the law the Association believes should exist instead of on the law which does exist. The District contends that the plain language of the statute governs the result of this case.

The District argues that when the Legislature passed the qualified economic offer law in 1993, it did not change the existing allocation of rights regarding the ability of a union to arbitrate permissive subjects of bargaining. Citing Sec. 111.70(4)(cm)6.am., Stats., the District contends it continues to be the case that there is no right to arbitrate permissive subjects of bargaining. The District disputes the Association claim that the expired preparation time memorandum is an “economic issue”. The memorandum itself does not implicate salaries, extra duty pay, job security or layoff. However, even if the memorandum has economic

ramifications, the District argues that so long as the memorandum is a permissive subject of bargaining, interest arbitration is unavailable.

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The Association's proposal to include preparation time guarantees in the parties' successor agreement is a permissive subject of bargaining which the Association has no right to arbitrate over the District's objections. The Association's own exhibits and the provisions of the expired agreement establish that preparation time is not "break time" but instead is part of the work day. On balance, preparation time is primarily related to educational policy.

The District urges the Commission to reject the Association contention that preparation time is a fringe benefit. The District argues that the definition of fringe benefit proposed by the Association (i.e., "something of value to the employe") would render certain permissive subjects of bargaining "fringe benefits" and thus is inconsistent with the existing balancing test required under MERA to determine whether a matter is a mandatory or permissive subject of bargaining. It contends that the BROWN COUNTY decision cited by the Association is inapplicable inasmuch the Court was therein interpreting a non-MERA statute and, in any event, does not support the Association's position because the matters found to be "fringe benefits" are all mandatory subjects of bargaining.

Because the preparation time memorandum is a permissive subject of bargaining, the District asserts it has no obligation to maintain the memorandum as part of a qualified economic offer. This is particularly so because the memorandum "sunsetted" by its own terms upon expiration of the parties' most recent contract.

The District acknowledges that it has a duty to bargain over the Association's impact proposal which provides compensation to employees if they do not receive certain amounts of preparation time during the work day. However, in the presence of its qualified economic offer, the District contends that the Association cannot proceed to interest arbitration over said proposal because it is an "economic issue."

Contrary to the Association, the District asserts the positions it is taking in this litigation are consistent with the plain language of MERA and with good faith collective bargaining. To the extent the Association asserts that MERA is presently unfair, the District contends such public policy contentions are for the Legislature to consider.

In conclusion, the District states:

The District requests the WERC to issue a declaratory ruling that fulfillment of the parties' agreement, whereby the Prep Time MOU expired on June 30, 1997, does not violate MERA. The Prep Time MOU (sic) a permissive subject of bargaining, as is clear under the "primarily related" test set forth by Wisconsin courts and followed by WERC rulings.

Further, WERC precedent establishes that the Union's proposal to continue the Prep Time MOU despite its own expiration date is a permissive subject of bargaining.

The WERC has consistently held that teacher preparation time is a permissive subject of bargaining and there is no reason now to deviate

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from those holdings. The Union has not presented any evidence that the case at hand is somehow different from prior cases such that this precedent should be changed.

Further, it is abundantly clear that teacher preparation time does not constitute a fringe benefit as that term is used in Sec. 111.70(1)(nc), Stats. There is no compensation associated with teacher preparation time as it is set forth in the Memorandum, and it is not a traditional “fringe benefit” as recognized between school districts and teacher unions. The Union’s characterization of “fringe benefits” corrupts the traditional meaning of the term to the point that any time a school district employer desires to change a matter of educational policy, if that matter is “of value” to an employee, it becomes a fringe benefit. The Union’s position cannot be permitted to stand, given the ruinous effect it would have upon MERA’s delicate balance.

Finally, the District has undoubtedly made a valid QEO. The Union’s proposal to include a permissive subject of bargaining in the successor contract is not subject to interest arbitration under current law. Moreover, because the Union’s impact proposal constitutes an economic issue, it, too, is not subject to interest arbitration given the fact that the District has made a valid QEO.

For the reasons cited herein and in its initial brief, the District respectfully requests the WERC to rule that: (a) the Prep Time MOU is a permissive subject of bargaining; (b) because the Prep Time MOU is a permissive subject of bargaining, the District is not precluded from permitting it to sunset, according to the original terms of the Memorandum; (c) the terms and provisions of the Prep Time MOU do not constitute a “fringe benefit” as that term is utilized in Sec. 111.70(1)(nc)1.a., Stats.; (d) the Union is precluded from proceeding to interest arbitration with respect to the Prep Time MOU because it is a permissive subject of bargaining; and (e) the District’s QEO made on July 24, 1997, fully comports with Sec. 111.70(1)(nc), Stats.

### **The Association’s Reply Brief**

The Association contends the memorandum’s expiration is irrelevant to the issues at hand inasmuch as the memorandum was in effect on the 90<sup>th</sup> day prior the expiration of the contract.

The District’s contention regarding the meaning of the phrase “fringe benefit” ignores the specific language of the statute and the persuasive BROWN COUNTY decision. The Association asserts there is no statutory support for the proposition that only those fringe benefits which have historically been “costed” fall within the scope of a “fringe benefit”. The Association also argues that the interpretation proposed by the District is “harsh and absurd” because it would allow employers to modify any



(i.e. holidays, vacation, sick leave, etc.). The Association alleges that its interpretation is consistent with the existing case law (BROWN COUNTY) at the time MERA was amended to incorporate the qualified economic offer.

In conclusion, the Association contends:

This case presents an opportunity for the Commission to interpret the QEO law in a manner consistent with the policy objectives of Chapter 111.70 and the intent of the Legislature. There is no question that the Legislature enacted the QEO law to limit the collective bargaining representative’s right to seek interest arbitration for new and increased economic benefits. However, the Employer in this case is attempting to use the QEO law to roll back an important existing benefit; a benefit that it acknowledges it wishes to eliminate for economic reasons. In essence, it wants a freebie, a take-back with no corresponding bargaining. This was not contemplated by the Legislature.

The Employer has a choice under the QEO law. It can maintain the *status quo* on all fringe benefits and economic issues, and submit the minimal salary and fringe benefit increases. However, if it wishes to change benefits or other economic issues, it must bargain over those changes, and, if necessary, must submit those issues to arbitration. If, as contended by the Employer, the cost of the preparation time is so great that it will affect the Employer’s ability to provide services, that is an argument to be made at the bargaining table and to an interest arbitrator.

For all the reasons stated in this brief and its initial brief, the Association requests that the Commission require the Employer to maintain the *status quo* as to preparation time as part of any valid QEO.

## **DISCUSSION**

### **Is the Preparation Time Memorandum a Mandatory Subject of Bargaining?**

We begin our analysis with the question of whether the preparation time memorandum is a mandatory or permissive subject of bargaining. In *BELOIT EDUCATION ASSOCIATION V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION*, 73 Wis.2d 43 (1976), *UNITED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION*, 81 Wis.2d 89 (1977), and *CITY OF BROOKFIELD V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION*, 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. WISCONSIN EMPLOYMENT RELATIONS COMMISSION*, 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.

The question of whether preparation time is a mandatory or permissive subject of bargaining was first addressed in *OAK CREEK-FRANKLIN JOINT CITY SCHOOL DISTRICT NO. 1*, DEC. NO. 11827-D (WERC, 9/74). In that case, the proposal at issue stated:

#### Contact Hours

Section 21.5 No teacher load should exceed 25 contact hours. A contact shall be defined as any classroom contact, and any other supervision such as passing time, study hall, noon hour supervision, or other assigned duty. In the Junior and senior High Schools, a contact hour shall be defined further as equal to one class period plus passing time as per the 1972-73 schedule.

...

Section 21.7 This 25 contact hours may be averaged out over the entire school year. In the 1972-73 school year, no teacher in the Senior High School shall be obligated to teach more than five classes each semester. No 7-12 school teacher shall be required to teach more than three different preparations or ability levels. If a teacher agrees to more than three different preparations, said teacher shall be freed from all other supervisory duties such as study hall, lunchrooms, etc. They shall be guaranteed 2 preparation periods per day. If the teacher wishes, he or she may agree to take other supervisory duties as study hall."

The Commission found the proposal to be a permissive subject of bargaining and stated:

### Contact Hours

We conclude that the Association's proposal with regard to teacher-pupil contact hours, and the number of preparations that may be required of a teacher concern matters of educational policy, and therefore are permissive and not mandatory subjects of bargaining. Such decisions directly articulate the District's determination of how quality education may be attained and whether to pursue same. However, the impact thereof, also as in the "class size" issue, have direct affects on a teacher's working conditions, and therefore, the impact thereof is subject to mandatory bargaining.

The Commission's decision was affirmed in Dane County Circuit Court in November 1975 (CASE 144-473). Circuit Court Judge William C. Sachtjen stated in pertinent part:

### Contact Hours.

The third proposal submitted by the Association would reduce the number of "contact hours" (i.e., hours of contact with students) required of each teacher. The proposal would also establish the number of daily "preparation periods" allowed a teacher and the number of different "ability levels" which a teacher could be called on to teach without being freed from certain supervisory tasks.

The Association points out that the number of hours a teacher spends in contact with students, in "preparation periods," and in work on different "ability levels" directly affects the number of hours which a teacher must work each day. Thus, the Association characterizes the subject of this proposal as one of "work-load."

We recognize that the subjects of the proposal here may have a significant effect on a teacher's total workload. But one could also look at the proposals from another perspective: The Association's proposals relate to the allocation of a teacher's work day. The allocation of the time and energies of its teachers is a consequence of basic educational policy decisions on the part of the District. It is not without reason to conclude that those decisions significantly affect the quality of education offered in the District.

Again, as noted by WERC, the effects of the District's allocation of teacher time on the wages, hours, and conditions of employment of the teachers must be bargained.

The ruling of WERC is affirmed in all respects.

In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83), the Commission followed its holding in OAK CREEK and found proposals which required that preparation time be provided during the teacher work day were permissive subjects of bargaining.

Recently, in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28859-B (WERC, 3/98), the Commission again found preparation time to be a permissive subject of bargaining stating:

9/ In prior decisions, preparation time has been found to be a permissive subject of bargaining because the educational policy implications in terms of the allocation of the teacher work day outweighed the impact on teacher hours and conditions of employment. OAK CREEK SCHOOL DISTRICT, DEC. NO. 11827-D (WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 9/74) AFFIRMED (CIR CT DANE, 11/75); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 2/83). This record does not persuade us that a different result should be reached here.

The preparation time memorandum set forth in Finding of Fact 3 requires the District to provide the specified amounts of preparation time during the teacher workday. From the testimony of Superintendent McLeod, we are satisfied that the amount of preparation time provided to teachers during the workday directly impacts on fundamental educational policy issues such as: (1) how many and what types of classes can be offered to students; (2) how will existing school buildings be used; and (3) how should the student day be structured. Balanced against this impact on educational policy choices is the impact on employe hours and conditions of employment generated by the reality that: (1) if teachers do not receive preparation time during the scheduled work day, the various tasks typically accomplished during preparation time (as set forth in Finding of Fact 6) will need to be performed at times outside the scheduled work day; and (2) to the extent preparation time can legitimately be used as paid break time, reduced preparation time reduces break time.

Here, based on the record before us, we conclude that when the preparation time memorandum's impact on educational policy is balanced against the impact on teachers' hours and conditions of employment, the memorandum is primarily related to educational policy and thus is a permissive subject of bargaining.

Because the memorandum is a permissive subject of bargaining, the District cannot be compelled to bargain over inclusion of the memorandum in the parties next contract. However, the memorandum's permissive status does not prevent the parties' from voluntarily bargaining over its terms. Indeed, that is exactly what led to the memorandum's existence for the 1996-1997 school year.

Having reached this conclusion, it is important to note that the impact of preparation time decisions on employe wages, hours and conditions of employment has always been (see OAK

CREEK, SUPRA; RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 20652-A,20653-A (WERC, 1/84); STOUGHTON AREA SCHOOL DISTRICT, DEC. NO. 23666 (WERC, 5/86) and continues to be a mandatory subject of bargaining. Thus, while the District can elect to unilaterally control the amount of preparation time available to employees during a workday, it must bargain over the amount of compensation, if any, which must be paid to employees who do not receive a specified amount of preparation time. In the context of this litigation, the Association has made such an “impact” proposal (See Finding of Fact 7) and the District correctly concedes that said proposal is a mandatory subject of bargaining. (See Conclusion of Law 4) as to which it must bargain (see Declaratory Ruling 2).

### **Is Preparation Time a “Fringe Benefit”?**

Under MERA as it existed prior to the 1993 amendments which created “qualified economic offers” and “economic issues”, because the preparation time memorandum is a permissive subject of bargaining, the District would: (1) have had the right to allocate preparation time as it saw fit once the memorandum expired by its own terms; (2) have had no duty to bargain over the inclusion of the memorandum in a successor agreement; *and* (3) have had no obligation to proceed to interest arbitration over the inclusion of the memorandum in a successor agreement. However, because a preparation time “impact” proposal is a mandatory subject of bargaining, the District would have had an obligation to bargain over the “impact” proposal and could be compelled to proceed to interest arbitration over the inclusion of the “impact” proposal in a successor agreement.

This declaratory ruling litigation raises the question of whether the foregoing allocation of rights and duties continues to be valid under MERA as it now exists.

The District contends that the allocation of rights and duties continues unchanged except that it cannot be compelled to proceed to interest arbitration over the preparation time “impact” proposal if it makes a “qualified economic offer.”

The Association asserts that the allocation of rights and duties continues unchanged if the District chooses not to make a “qualified economic offer.” However, if the District chooses to make a “qualified economic offer,” the Association argues the District is obligated to honor the terms of the preparation time memorandum for the duration of the successor agreement because the memorandum is a “fringe benefit.” In essence, the Association contends that **if** the District wishes to exercise its “qualified economic offer” right to block Association access to interest arbitration over a preparation time “impact” proposal, **then** the law requires the District to give up the right to act unilaterally as to the permissive subject of bargaining preparation time memorandum.

We proceed to resolve these issues.

The statutory definition of a “qualified economic offer” in Sec. 111.70(4)(nc) 1.a., Stats., includes a requirement that the District “maintain all **fringe benefits** provided to the municipal employees . . .”

The Association argues that even if the preparation time memorandum is a permissive subject of bargaining, it is nonetheless a “fringe benefit” to teachers within the meaning of Sec. 111.70(4)(nc) 1.a., Stats., which thus must be maintained if the District wishes to make a “qualified economic offer.” The District counters by contending that “fringe benefits” only include matters traditionally “costed” as a part of the collective bargaining process.

We conclude the term “fringe benefits” has a definition which is broader than that proposed by the District and narrower than that proposed by the Association. Contrary to the District, we conclude that “fringe benefits” include matters which have not traditionally been “costed” by the parties to a specific dispute or by public sector unions and employers generally. As argued by the Association, the statutory obligation to maintain “fringe benefits” is free standing in the statutory language and not necessarily limited to “fringe benefits” which have a definable cost. For instance, many parties do not typically “cost” personal days or vacation when they are calculating the cost of a contract. Nonetheless, we think it beyond dispute that personal days and vacation are “fringe benefits” which must be maintained as part of a “qualified economic offer.” However, contrary to the Association, we further conclude that “fringe benefits” do not include permissive subjects of bargaining.

The term “fringe benefit” is not defined in MERA or elsewhere in the statutes. Absent a statutory definition, a term is to be given its ordinary and accepted meaning. *BROWN COUNTY, SUPRA*. This meaning may be ascertained from a recognized dictionary.

As noted by the District, Roberts’ Dictionary of Industrial Relations (4<sup>th</sup> Edition, BNA, 1994) defines “fringe benefits” as:

Non-wage or indirect compensation received by workers, paid for in whole or in part by employers, including such items as vacations, sick leave, holidays, pensions and insurance.

The Court in *BROWN COUNTY* used a dictionary definition of:

An employment benefit . . . granted by an employer that involves a money cost without affecting basic wage rates.”

We concede that these definitions do not conclusively support our view that “fringe benefits” are limited to mandatory subjects of bargaining. Preparation time can be viewed as “non-wage or indirect compensation”. However, on balance, we are persuaded that the dictionary definitions, particularly the examples provided (vacations, holidays etc.), are supportive of the result we have reached.

We followed the ordinary meaning of “fringe benefit” in our administrative rules (ERC 33) implementing the 1993 statutory amendments at issue here. The definitional examples of “fringe benefits” used in our administrative rules (ERC 33, Form B) do not include any permissive subjects of bargaining and do include the following mandatory subjects of bargaining: Credit Reimbursement, Retirement, Health Insurance, Dental Insurance, Vision Insurance, Life Insurance, Disability Insurance and Long Term Care Insurance. In decisions we have issued interpreting Sec. 111.70(1)(nc) 1.a., Stats., the “fringe benefits” in question were mandatory subjects of bargaining (CAMPBELLSPORT SCHOOL DISTRICT, DEC. NO. 27578-B (WERC 8/94)-health insurance; MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 27612-B (WERC 4/95)-holidays, convention days and snow days.

In all instances in which the phrase “fringe benefits” is used elsewhere in the Wisconsin Statutes, 1/ we find nothing in those statutory provisions which suggests that the matters therein referenced include permissive subjects of bargaining.

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*1/ Sections 7.33; 11.01; 11.40; 16.336; 16.964; 19.21; 20.928; 20.455; 20.475; 20.865; 20.925; 20.928; 40.02; 40.05; 46.935; 50.05; 66.11; 67.04; 100.201; 111.17; 111.34; 111.91; 111.92; 111.93; 118.245; 119.55; 165.85; 230.12; 230.26; 230.36; 234.94; 440.945; 560.14; 753.07; 758.19; 978.045; 978.12.*

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Indeed, in all instances which we could locate wherein the term “fringe benefit” has been used by the Wisconsin courts, the “fringe benefit” involved has always been a matter which would be a mandatory subject of bargaining. BROWN COUNTY, SUPRA - seminar fees and bar dues, beeper pay, mileage reimbursement, casual day disability plan; CITY OF BROOKFIELD V. WERC, 153 Wis.2D 238 (CT.APP. 1989) - health insurance benefits; KOENINGS V. JOSEPH SCHLITZ BREWING CO., 123 Wis.2D 490 (CT.APP.1985) - insurance (medical, dental vision, life, travel accident, personal accident) retirement, stock ownership, relocation benefits; FERRARO V. KOELSCH, 124 Wis.2D 154 (1985) - bonus, pension plan; KIMBERLY-CLARK CORP. V. LIRC, 95 Wis.2D 558 (CT.APP. 1980) - disability insurance; GOODYEAR TIRE & RUBBER CO. V. DILHR, 87 Wis.2D 56 (CT. APP. 1978) - sickness and disability payments; FORD MOTOR CREDIT CO. V. AMODT, 29 Wis. 2D 441 (1966) - use of a car.

Lastly, we observe that we have no extraneous evidence of a legislative intent to define “fringe benefits” in a way which would include permissive subjects of bargaining. If the legislature had intended that the quid pro quo for use of the qualified economic offer was the loss of employer control over matters primarily related to educational policy, such a significant concept would surely have found its way into the evidence of legislative history (Commission Exhibits 1-14) which is part of the record in this case.

Given all of the foregoing, we conclude that because the preparation time memorandum is a permissive subject of bargaining, it is not a “fringe benefit” which the District must maintain as part of its qualified economic offer.

### **Can the Association Arbitrate a Mandatory Impact Proposal?**

The Association has argued in the alternative that if the Commission erroneously concludes the memorandum is a permissive subject of bargaining and not a “fringe benefit,” the Commission must at least give the Association the right to proceed to interest arbitration on its “impact” proposal. To do otherwise, the Association argues, is to make the right to bargain over the “impact” proposal a meaningless right. We disagree.

The parties’ own bargaining history surrounding their 1995-1997 contract demonstrates that the Association’s “bargaining is meaningless” view is incorrect. During that bargaining, the “qualified economic offer” law was in effect. The Association had no access to interest arbitration over “economic issues” such as an “impact” proposal and had no right to bargain over the preparation time memorandum because it was a permissive subject of bargaining. Nonetheless, the dynamics of the collective bargaining process produced a scenario in which the District was willing to bargain over and reach agreement on a permissive subject of bargaining (the memorandum) as part of an overall contract settlement. This history demonstrates that the absence of access to interest arbitration does not make the collective bargaining process meaningless.

It is also worth recalling that interest arbitration for non-law enforcement/non-firefighting employees first came into being in 1978. Thus, from the 1971 creation of an enforceable duty to bargain under MERA through the 1978 creation of interest arbitration, the duty to bargain stood alone. We do not think it can realistically be argued that during this seven year period, the right to collectively bargain was meaningless.

In the presence of a qualified economic offer, neither party can proceed to interest arbitration over “economic issues.” See Sec. 111.70(4)(cm)5.s., Stats. Economic issues are defined in Sec. 111.70(1)(dm), Stats. In LACROSSE SCHOOL DISTRICT, DEC. NO. 28462 (WERC, 11/95) we were confronted with the question of whether a proposal which required payment of additional compensation to teachers who did not receive specified amounts of preparation time was an “economic issue.” We held:

Applying the foregoing to the District proposal, we find it is an “economic issue” within the meaning of Sec. 111.70(1)(dm), Stats. Under the 1991-1994 contract, the District has the flexibility to schedule the teacher work day as it sees fit but must give teachers additional salary if the District’s scheduling decisions do not meet the compensation standards set forth in Article IX. The District’s proposal lowers the existing standards for additional salary. As such, we are



satisfied the proposal implicates the “salaries,” “extra duty pay” and “temporary assignment pay” components of the definition of an “economic issue” set forth in Sec. 111.70(1)(dm), Stats. Therefore, Sec. 111.70(4)(cm)5s, Stats., does not allow the District to arbitrate its proposal where, as here, the District has also submitted a qualified economic offer.

The Association’s preparation time impact proposal requires payment of additional compensation if the specified amount of preparation time is not provided. Like the employer’s proposal in LACROSSE, the Association’s proposal implicates the “salaries,” “extra duty pay” and “temporary assignment pay” components of the definition of “economic issue” set forth in Sec. 111.70(1)(dm), Stats. Thus, the proposal is an economic issue which cannot proceed to arbitration.

Dated at Madison, Wisconsin this 14<sup>th</sup> day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

**Dodgeland School District**

**DISSENTING OPINION OF COMMISSIONER A. HENRY HEMPE**

In its collective bargaining with the Dodgeland Education Association (which represents the professional school employees, including teachers, of the Dodgeland School District) the District has made what it professes to be a qualified economic offer (QEO). However, the District's offer does not include any provision for the continuation of certain teacher preparation time amenities described in a Memorandum of Understanding (MOU) signed by the parties and in effect "on the 90<sup>th</sup> day prior to expiration of any previous collective bargaining agreement between the parties."

In fact, the District has specifically repudiated the preparation time terms contained in the MOU on the grounds that they constitute a permissive subject of bargaining. Based on the District's contention that it has made a valid qualified economic offer, it is also unwilling that any "impact" proposals offered by the Association in connection with the preparation time issue be subject to interest arbitration.

The majority gives the School District the license the District seeks to accomplish its designs. Specifically, the majority finds that the law permits the School District to impose a qualified economic offer (thus avoiding interest arbitration as to economic issues). At the same time the District is allowed to eliminate by unilateral fiat the preparation time benefit previously agreed to by the parties because the majority finds the benefit to be a permissive subject of bargaining. Finally, the majority concludes that the teachers should be further deprived of the opportunity to use interest arbitration as a means of measuring the economic impact on them this loss of benefit would cause. According to the majority such a measurement would constitute an economic issue not eligible for interest arbitration when a valid QEO has been made.

Thus, the teachers end up not with the short straw; they end up with no straw at all!

I find the majority's reasoning in support of this result neither legally compelled nor persuasive. Indeed, I view the statutes on which the majority relies for its unbalanced result as leading to a conclusion quite opposite.

Section 111.70(4)(cm) 5s., Stats., enables school districts to avoid interest arbitration with its professional school employees on all *economic* issues if the district has made a "qualified economic offer."

A qualified economic offer is defined in Sec. 111.70(1)(nc) 1.a., Stats. It includes a requirement that the district ". . . maintain *all fringe benefits* provided to the municipal employees in a collective bargaining unit, as such contributions and benefits existed on the 90<sup>th</sup>

day prior to expiration of any previous collective bargaining agreement between the parties. . . .” (Emphasis supplied).

In the instant matter, it seems obvious that elimination of preparation time will necessarily either lengthen the teachers’ working day or deprive them of existing break time. In either case the teachers are losing a valuable benefit without even the opportunity to measure through interest arbitration the economic impact of their loss in the event the parties reach impasse on the issue.

This is not an inconsiderable loss. Indeed, the notion that teacher preparation time is a valuable benefit is hardly a new idea. For example, even though he affirmed a 1974 Commission decision that found a preparation time proposal to be a permissive subject of bargaining, Dane County Circuit Judge Sachtjen conceded: “We recognize that the subjects of the proposals here may have a significant effect on a teacher’s total workload.” OAK CREEK-FRANKLIN JOINT CITY SCHOOL DISTRICT NO. 1, DEC. NO. 11827-D (WERC, 9/74).

In my opinion, the loss of this benefit is a remedy far more draconian than any contemplated by the Legislature. As the majority notes, Sec. 111.70(1)(nc)1.a., Stats., contains no definition of “fringe benefits.” But none was needed, for a court-endorsed definition was already in place as a result of a virtually identical definitional gap in a different statute.

“Because the term ‘fringe benefit’ is not defined in sec. 978.12(6), Stats., we give it its ordinary and accepted meaning. WILSON V. WAUKESHA COUNTY, 157 WIS. 2D 790, 795, 460 N.W. 2D 830 (CT. APP. 1990). This meaning may be ascertained from a recognized dictionary. *Id. Webster’s Third New Int’l Dictionary*, 912 (Unabr. 1976), defines ‘fringe benefit’ as: [A]n employment benefit . . . granted by an employer that involves a money cost without affecting basic wage rates.’ *All fringe benefits, as a benefit to the employee at a money cost to the employer, are essentially ‘compensation’ for work done.*” (Emphasis supplied) BROWN COUNTY ATTORNEYS ASSOCIATION V. BROWN COUNTY, 169 WIS. 2D 737, 742-3, 487 N.W.2D 312 (CT. APP. 1992).

On its face this court-supplied definition would appear to have equal utility in the instant matter. Indeed, there can be little dispute that preparation time is “an employment benefit granted by an employer that involves a money cost without affecting basic wage rates.”

Moreover, virtually the same term that was undefined in Sec. 978.12(6), Stats., was not defined in Sec. 111.70(1)(nc)1.a., Stats. But at the time the Legislature enacted Sec. 111.70(1)(nc)1.a., Stats., it had the advantage of knowing the court-endorsed “ordinary and

accepted meaning” of the term. 1/ There is no evidence that 1) the “ordinary and accepted meaning” of “fringe benefit” fits only the fringe benefits referred to in Sec. 978.12(6), Stats., or 2) that the Legislature saw any need to tamper with that definition.

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*1/ When determining legislative intent we must assume that the lawmakers knew the law in effect at the time they acted. STATE V. ROSENBERG, 208 WIS.2D 191, 560 N.W. 266 (1997).*

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The majority disagrees. In the majority’s view the “fringe benefits” to which the BROWN COUNTY ATTORNEYS ASSOCIATION appellate court referred were all mandatory subjects of bargaining (even though this distinction went unnoticed by the Court), whereas the preparation time benefits in the instant matter are *permissive* subjects of bargaining. 2/ Exercising a license to legislate I doubt we possess, the majority then inserts the word “mandatory” as a modifier of the term “all fringe benefits.”

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*2/ Commission attempts to distinguish permissive from mandatory subjects of bargaining have not been an exact science. As the majority notes, under the traditional test used by the WERC (developed long before any QEO conceptions had emerged from the Legislature) we try to determine whether the issue primarily relates to “wages, hours and conditions of employment” or to the “formulation or management of public policy.” (Citations omitted) Although this standard appears to be straightforward and reasonably serviceable, our applications of it have not always been consistent. Thus, for instance, we continue to require the employer to bargain over what constitutes a school year (school calendar) as a mandatory subject of bargaining at the same time we insist that the employer need not bargain over what constitutes a working school day.*

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I find no adequate legal basis for this inventive legerdemain of interpretation. In my opinion, it is legally unjustified and represents a usurpation of legislative authority. If the Legislature had intended to jettison the court-approved definition of “fringe benefit” and limit the term to only those fringe benefits that are mandatory subjects of bargaining it seems to me most likely that the Legislature would have done so directly. Put differently, if the Legislature had intended to adopt the limitation the majority now legislates it seems highly unlikely that it would have done so by relying on the uncertain chance that some future quasi-judicial review would manufacture and insert the modifying word.

Unlike the majority, I find unremarkable that the legislative history of Sec. 111.70(1)(nc)1.a., Stats., contains no comment on the statute’s embracement of both mandatory and permissive fringe benefits. In view of the unmistakably plain language of that section (i.e., *all* fringe benefits) special comment on the obvious would be superfluous.

If, however, the Legislature had intended to adopt some meaning other than an “ordinary and accepted” one – the one provided by the BROWN COUNTY ATTY ASS’N Court - I would expect some indication of this to appear somewhere in the law’s legislative history. I find none.

Moreover, as demonstrated by this case, excluding fringe benefits that are permissive subjects of bargaining from the purview of Sec. 111.70(1)(cm)1.a., Stats., is simply unfair. Under apparent color of law the teachers are peremptorily stripped of their previous legal right to arbitrate the economic impact of the loss of their benefit without any compensatory recourse. For this to be done by the Legislature is one matter. But for it to be done in the course of a quasi-judicial review in the absence of a legislative mandate to do so is quite another, and in this instance in total disharmony with apparent legislative efforts to create a balanced *quid pro quo*.

It seems clear enough that in adopting the QEO legislation the Legislature afforded to each school district the option of avoiding interest arbitration, *but only if* the district makes a qualified economic offer to its represented professional employees. For there to be a valid QEO the continued maintenance of *all* fringe benefits, mandatory and permissive alike, is a *sine qua non*.

This is not to say that a school district cannot unilaterally eliminate a permissive subject of bargaining to which the parties have agreed once the agreement expires. This is to say, however, that if a permissive subject of bargaining has established a benefit for school professional employees (including teachers), under the law that benefit cannot be unilaterally eliminated by the district without at the same time extinguishing any valid qualified economic offer that would have otherwise existed.

Put another way, I do not view the law as permitting the Dodgeland teachers to proceed to interest arbitration as to the economic impact of the preparation time benefit *unless* the District eliminates the benefit. If this occurs and the parties reach a bargaining impasse as to the economic impact of that benefit, that issue (along with any other mandatory or mutually permissible issues of bargaining on which the parties are deadlocked) may be resolved by interest arbitration. Under this circumstance the right to interest arbitration does not exist as an exception to the QEO legislation, but as an express manifestation of it. In short, it exists because the District failed to make a qualified economic offer that maintained *all* fringe benefits.

The fact that the benefit in question is a permissive subject of bargaining is thus immaterial to this analysis, in my view. What is germane is that Sec. 111.70(1)(nc)1.a., Stats., requires the continued maintenance of *all* fringe benefits for there to be a valid QEO. If an existing benefit, mandatory or permissive, is not maintained, under the law there can be no QEO.

As a Commission, we have the continuing responsibility of administering Wisconsin's labor relations laws in an impartial fashion that is both legal and fair. Given a choice – as this case provides – it is up to us to opt for the alternative that provides the most reasonable balance of these elements. In my view that balance has not been achieved in this matter. Hence this dissent.

Dated at Madison, Wisconsin this 14<sup>th</sup> day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner