

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant,

vs.

**RACINE UNIFIED SCHOOL DISTRICT and BOARD OF
EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT**, Respondents.

Case 187
No. 57636
MP-3528

Decision No. 29659-A

Appearances:

Kelly & Petranech, by **Attorney Brett C. Petranech**, 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Racine Education Association.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker**, Ten East Doty, Suite 900 P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District and the Board of Education of the Racine Unified School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Racine Education Association filed a complaint with the Wisconsin Employment Relations Commission on June 16, 1999, alleging that the Racine Unified School District and the Board of Education of the Racine Unified School District had committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally implementing bargaining proposals relating to certain employees and amounts of pay for inservice training. On July 2, 1999, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on July 29 and September 14, 1999, in Racine, Wisconsin. The parties filed post-hearing briefs and reply briefs, the last of which

were exchanged on November 2, 1999. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Racine Education Association, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal office at 1201 West Boulevard, Racine, Wisconsin 53405-3021. James J. Ennis, hereinafter Ennis, is the Executive Director of the Association and has acted on its behalf.

2. The Racine Unified School District, hereinafter referred to as the District, and the Board of Education of the District, hereinafter referred to as the Board, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal office is located at 2220 Northwestern Avenue, Racine, Wisconsin 53404. Frank L. Johnson, hereinafter Johnson, is the District's Director of Employee Relations and has acted on behalf of the District.

3. At all times material to this proceeding, the Association has been the certified exclusive bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the District, excluding on-call substitute teachers, interns, supervisors, administrators and directors.

4. The Association and the District have been parties to a series of collective bargaining agreements, the most recent of which was in effect for the 1997-1999 school years and expired by its own terms on June 30, 1999. The agreement contained the following provisions:

10.5 Building/Departmental/Subject Area Meetings

Teachers, unless excused for a valid reason may be required by an administrator to attend the following meetings outside the regular student day: M-Team and IEP meetings, 504 meetings, Student Support Team meetings, Inservice/Staff Development meetings, building staff meetings, departmental meetings and subject area meetings called by Curriculum and Instruction Supervisors/Director of Exceptional Education and Exceptional Education Supervisors. However, the District agrees to reschedule M-Team meetings, IEP meetings, and 504 meetings that are scheduled on short notice and that interfere with prior teacher commitments. Any teacher required to attend more than thirty (30) hours per school year in these required meetings will be compensated at twenty-five cents (25¢) per minutes (sic) for all additional time and will only be required in the event of an emergency.

10.5.1 Teachers who work and are paid for less than full-time, shall have the required number of Section 10.5 meetings reduced by the percentage of time worked and paid. The appropriate administrator will determine which meetings are required. If the part-time teachers are required, for any reason, to attend a greater percentage of said meetings, they shall be compensated according to Section 10.5.

10.5.2 Tuesday's will be designated as building meeting days. Wednesdays will be designated as departmental meetings, subject area meetings, team leader/subject area representative meetings, central office administrations meeting days. Thursdays will be designated as Inservice meeting days. Other meetings identified in this provision can be held on any day of the regular work week. However, the District agrees to reschedule M-Team meetings, IEP meetings and 504 meetings that are scheduled on short notice and that interfere with prior teacher commitments.

. . .

18.14 Extra Duty Jobs Created During Term of Agreement or Hiatus

Any extra duty job that is created during the term of an agreement or hiatus will be sent to the Association directly or in Board of Education packets. The District will indicate its recommended rate of pay for each job. If the Association requests, the matter will be bargained. If no request is made or the parties cannot reach agreement, the District may implement such recommended pay subject to retroactive change when a new agreement is determine.

5. Prior to the 1998-1999 school year, the District employed an Education Assistant in the position of Parent Involvement Coordinator. The District decided to create a certified position to perform these and other duties and the position was designated Title I Parent/Family Involvement Coordinator. The new position was approved by a number of Committees and the Board of Education. The new position was posted on June 22, 1998, and was filled by Dorothy Bridges-Goines on or about July 15, 1998, and she began her duties at the start of the 1998-1999 school year. The Association filed a grievance over implementation of the position on August 31, 1998. On October 15, 1998, Johnson sent Ennis a letter indicating that the District was willing to negotiate the wages, hours and working conditions of the position if a request to do so was made. On January 8, 1999, Robert C. Kelly, the Association's attorney sent a letter to Johnson requesting bargaining over the position. The parties agreed to meet on February 18, 1999. The parties met and during the discussions the Association asserted that the position was similar to the Title I/Standards Program Specialist and should get extra-duty compensation. The parties met again on March 11, 1999. Prior to the second meeting, Ennis met with Jetha Pinkston Lawson, Assistant Superintendent of Human Resources, over the job

description and other issues which were resolved. At the March 11, 1999 meeting, the individual contact periods were agreed to at 10.5 and the extra compensation ratio was .037, and all that was needed was to add the positions and rates in the next contract. The employee was given back pay in accordance with this agreement.

6. On November 16, 1998, Johnson sent a letter to Ennis and enclosed an inservice pay proposal for After-School Mandatory Inservice Presenters and Voluntary Inservice Presenter (after school, evenings, Saturdays). The Association did not make a response to this letter. On or about December 16, 1998, the Association notified the District of its desire to negotiate a collective bargaining agreement for 1999-2001, a successor to the 1997-1999 contract.

7. Johnson sent Ennis a letter dated January 13, 1999, which stated the following:

Dear Mr. Ennis:

RE: Student Assistance Program

The Student Assistance Program coordinated by Delaine Moe has need to provide student assistance training workshops for any teacher interested in attending outside of the school day.

As you are aware, these workshops are presently being conducted during the school day and a participating teacher's class has been covered by substitute teachers. Because of the drain on the available supply of substitute teachers that this causes, it was determined that such workshops should be shifted to outside the school day. Attendance would be voluntary.

The District proposes pay for teachers volunteering as follows:

- (1) \$15 per hour for up to two and one-half hour workshops.
- (2) \$42 per half day (3.5 hrs./\$12 per hr.)
- (3) \$84 per full day (7 hrs./\$12 per hr.)

These workshops would be after school and on Saturdays or other non-school days. Any teacher wishing to participate could do so.

Normally, we would wait and propose and discuss this rate of pay during the time we bargain the entire agreement but because scheduling must take place in March, we are unable to wait.

The District plans to implement this pay for these workshops unless the District and the Association agree to something other than these amounts. If you do not agree with these amounts or wish to make other proposals, we can attempt to reach agreement now or if you would prefer, we could take this issue up during regular bargaining and make any monetary change retroactive for those teachers taking part in the workshops.

Attorney Robert C. Kelly responded to this letter by a letter dated January 19, 1999, which stated:

Re: Student Assistance Program

Dear Mr. Johnson:

Your letter of January 13, 1999 addressed to James Ennis relative to the above entitled matter has been referred to this office for response.

The District's unilateral determination to schedule student assistance training workshops outside the school day, i.e. after school, on Saturdays or on other non-school days, is very troubling. This despite your assertion that attendance at any or all such workshops will be voluntary. These workshops are, we assume, meaningful programs, meant to assist teachers in the performance of their professional duties. If that is the case, how can one take the position that participation in the same is unnecessary or that failure to "voluntarily" participate won't lead to poor performance evaluations or other kinds of discipline?

Further, we are of the opinion that the rate of pay for workshop attendance is a matter of wages and as such is subject to the parties' mutual collective bargaining obligation. There is no emergency here – no need for unilateral action – as your admission that wages payable for such workshop attendance need not be established until March clearly indicates.

The REA, under these circumstances, will resist in an appropriate forum any attempt by the District to unilaterally implement the program you outline in your January 13th letter. We hope that such a response will not be necessary.

By a letter dated January 28, 1999, Johnson responded to Kelly as follows:

This is in response to your letter dated January 19, 1999.

Your letter did not respond to the District's bargaining proposal which suggested amounts for teachers' pay who volunteer to receive Student Assistance training after school and on Saturdays. The District remains willing to meet and bargain over this voluntary inservice but based on our past experience, we are not willing to put the program on hold until the Association decides if and when it is willing to bargain about this.

Please let me know if the Association has a bargaining proposal on this and if the Association is willing to meet prior to the program's implementation date in March.

Kelly responded by letter dated January 28, 1999, as follows:

Re: *Student Assistance Program*

Dear Mr. Johnson:

We acknowledge receipt of your letter of January 28, 1999 relative to the above entitled matter.

We are pleased to know, once again, that the District remains "willing to meet and bargain over the voluntary inservice." The REA, as we have previously informed you, is willing, ready and able to do the same. This being the case, let's get at it!! There is no requirement, as you well know, that the REA respond to your letter on proposed compensation or that it provide you with a bargaining proposal prior to your scheduling a time certain to commence bargaining on this matter. The REA is available to meet with the District's representatives for this purpose on:

February 8, 1999 – all day
February 9, 1999 – prior to 1:00 p.m.
February 11, 1999 – prior to 3:00 p.m.
February 12, 1999 – all day

There is thus ample opportunity to come to agreement before you unilaterally establish a March implementation date. Likewise, you should know the REA

would resist any attempt on the District's part to do so. Hence, please inform us by fax, which of these dates (one or hopefully more) you are available to meet.

We await your timely advice.

Johnson responded to Kelly by a letter dated February 3, 1999, which stated the following:

RE: Student Assistant Program
Response to your January 28, 1999 Letter

This is in response to your letter dated January 28, 1999 concerning the District's willingness to meet and bargain the impact of the Student Assistant Program. You suggested four possible days.

February 8, 1999 is partially clear for me but I only have the hours between 9:00 a.m. and 11:00 a.m. I am also available on February 17, 1999 starting at 1:30 p.m. and February 18 after 2:00 p.m. Please let me know if any of these times will work for you.

As you will recall from my January 28, 1999 letter regarding the Title I Parent/Family Involvement Coordinator position, an impact bargaining proposal from you in advance will make bargaining more meaningful and possibly prevent a short session with subsequent rescheduling. If you agree, please consider sending your impact proposal in advance of any agreed upon date so that I may discuss it with others and evaluate it in light of District needs and resources. I hope to avoid wasted time for both of us.

Kelly responded the same day as follows:

We are presently, as you know, scheduled to meet in bargaining as concerns the Title I Parent/Family Involvement Coordinator position on February 18, 1999 commencing at 4:00 p.m. It makes sense since you are available to meet in bargaining on the same date, i.e. February 18, 1999 commencing at 2:00 p.m., to establish that date and time as the date and time for negotiating as concerns the Student Assistance Program. Hence, the REA will be available to deal with the Student Assistance Program on February 18 commencing at 2:00 p.m.

Once again I offer the facilities of the REA for such meeting. If, however, you have difficulty with that please inform me as to an alternative site at your early convenience.

On February 4, 1998, Johnson responded as follows:

We accept February 18, 1999, 4:00 p.m. in the REA office. Hopefully, you will have an impact proposal in our hands prior to that date.

We also accept February 18, 1999, 2:00 p.m. in the REA office to meet on the Student Assistance Program. Again, hopefully you will have an impact proposal in our hands prior to that date.

The parties met on February 18, 1999, and again on March 11, 1999. Various issues relating to the Student Assistance Program were discussed and at the end of the meeting, no one stated that they had reached an agreement which should then be reduced to writing. No further meetings were scheduled.

8. By a letter dated March 19, 1999, from Johnson to Ennis, with a copy to Attorney Kelly, Johnson stated the following:

Dear Mr. Ennis:

RE: Mandatory Staff Development (Inservice)
Extra Duty Positions Ratios

Enclosed are copies of proposed contract language covering inservice and presenter stipends for after school and Saturday inservice meetings. This is pretty much what we discussed at the REA office on March 11, 1999.

If this will do the job, please let me know. If not, please let me know what you believe would work.

Also as we discussed, the following three extra duty positions need to be added to the contract.

Coordinator, Title I Parent/Family Involvement
Title I/Standards Program Specialist (2 positions)

As we agreed, all three of these positions would be 10.5 individual contracts and receive an extra compensation ratio of .037.

If you have any questions, please let me know.

The following was attached to the letter:

Racine Unified School District
Proposal
March 17, 1999

Mandatory Staff Development (Inservice)

Mandatory inservice meetings after regular school hours must be attended by all persons directed to attend unless excused for just cause by their principal or supervisor.

Mandatory inservice meetings may be held after regular school hours on Thursdays or on Saturdays. No teacher will be required to attend more than three (3) Saturday inservice meetings.

Bargaining group members attending these inservice meetings (excluding inservice on early release days, Institute Day and special education inservice designated as Section 10.5 meetings) will be paid a stipend of \$80.00 for attending a Saturday inservice meeting and \$40.00 for attending an after-school inservice meeting. Saturday meetings will be approximately four (4) hours long and after-school inservice meetings will be approximately two (2) hours long. Student Assistance sponsored workshops that are held on Saturdays may be up to seven (7) hours long, including lunch, and the stipend for attending this length of meeting shall be \$100.00

Bargaining group members who are required to be presenters at these meetings will be paid the same as Institute Day Inservice Presenters as specified in Section 18 of the collective bargaining agreement. This will be in addition to their stipend as an inservice attendee.

After-school and Saturday inservice meetings will not be held between May 15th and the end of the school year. These meetings will also not be held between the start of the school year and September 15th. This applies to teachers assigned to teach during the regular school year.

Student Assistance sponsored workshops may be held during summer months for periods not to exceed three (3) days. A stipend of \$100.00 per seven (7) hour day will be paid in such case. Excuses for not being able to attend a summer workshop will be liberally considered.

The Association did not respond to Johnson's letter and by letter of April 19, 1999, Johnson stated to Ennis the following:

Dear Mr. Ennis:

RE: Staff Development

On March 19, 1999, I sent you a copy of the District's staff development proposal that was developed as a result of the meeting we had at the REA office. Since you have not responded, I assume you want to make some changes. It would facilitate resolution if I knew the Association's position on this.

Please let me know if you see a need to have another meeting to discuss this proposal.

The Association did not make any written response to this letter.

Sometime after April 19, 1999, Johnson and Ennis met in person and Johnson asked for Ennis' position on the Inservice proposal and Ennis stated that it was his intention not to agree to anything unless the parties got the whole contract resolved. The parties reached impasse at that meeting.

9. On June 8, 1999, the parties met and exchanged their proposals for the 1999-2001 contract. Included in the District's proposals was the following:

18.15 Schedule Compensable Extra-Duty Responsibilities

SCHEDULE COMPENSABLE EXTRA-DUTY RESPONSIBILITIES

	Individual Contact Periods	Extra Compensation Ratio * (1.00 = MA+24)
Coordinator, Title 1 Parent/Family Involvement	10.5	.037
Title I/Standards Program Specialist	10.5	.037

Institute Day Inservice Presenter and After-School Mandatory Inservice \$40.00
Presenters

(Excluding Staff Development Teacher(s) and providing
the request to speak has been submitted on behalf of the
District's Administration.)

Voluntary Inservice Presenter. Voluntary inservice presenter \$35.00/hr.
outside of the school day (after school, Saturdays or other
non-school day.)

Voluntary Workshops (after school, Saturdays or other non-school day)

\$15.00 per hour for up to two and one-half hour workshops

\$42.00 per half day (3.5 hrs./\$12.00 per hour)

\$84.00 per full day (7 hrs./\$12.00 per hour)

Mandatory Inservice meetings may be held after regular school hours on
Thursdays or on Saturdays. No teacher will be required to attend more than
three (3) Saturday inservice meetings.

Bargaining group members attending these inservice meetings (excluding
inservice on early release days, Institute Day and special education inservice
designated as Section 10.5 meetings) will be paid a stipend of \$80.00 for
attending a Saturday inservice meeting and \$40.00 for attending an after-school
inservice meeting. Saturday meetings will be approximately four (4) hours long
and after-school inservice meetings will be approximately two (2) hours long.
Student Assistance sponsored workshops that are held on Saturdays may be up
to seven (7) hours long, including lunch, and the stipend for attending this
length of meeting shall be \$100.00.

Bargaining group members who are required to be presenters at these meetings
will be paid the same as Institute Day Inservice Presenters as specified in
Section 18 of the collective bargaining agreement. This will be in addition to
their stipend as an inservice attendee.

After-school and Saturday inservice meetings will not be held between May 15th and the end of the school year. These meetings will also not be held between the start of the school year and September 15th. This applies to teachers assigned to teach during the regular school year.

Student Assistance sponsored workshops may be held during summer months for periods not to exceed three (3) days. A stipend of \$100.00 per seven (7) hour day will be paid in such case.

10. On June 10, 1999, Johnson sent Ennis the following letter:

Dear Mr. Ennis:

RE: Implementation

Listed below are proposals you have previously received.

	Individual Contact Periods	Extra Compensation Ratio * (1.00 = MA+24)
<u>Coordinator, Title 1 Parent/Family Involvement</u>	<u>10.5</u>	<u>.037</u>
<u>Title I/Standards Program Specialist</u>	<u>10.5</u>	<u>.037</u>
<u>Institute Day Inservice Presenter and After-School Mandatory Inservice Presenters</u> (Excluding Staff Development Teacher(s) and providing the request to speak has been submitted on behalf of the District's Administration.)		\$40.00
<u>Voluntary Inservice Presenter.</u> Voluntary inservice presenter outside of the school day (after school, Saturdays or other non-school day.)		<u>\$35.00/hr.</u>

Mandatory Inservice meetings may be held after regular school hours on
Thursdays or on Saturdays. No teacher will be required to attend more than
three (3) Saturday inservice meetings.

Bargaining group members attending these inservice meetings (excluding
inservice on early release days, Institute Day and special education inservice
designated as Section 10.5 meetings) will be paid a stipend of \$80.00 for

attending a Saturday inservice meeting and \$40.00 for attending an after-school inservice meeting. Saturday meetings will be approximately four (4) hours long and after-school inservice meetings will be approximately two (2) hours long. Student Assistance sponsored workshops that are held on Saturdays may be up to seven (7) hours long, including lunch, and the stipend for attending this length of meeting shall be \$100.00.

Bargaining group members who are required to be presenters at these meetings will be paid the same as Institute Day Inservice Presenters as specified in Section 18 of the collective bargaining agreement. This will be in addition to their stipend as an inservice attendee.

After-school and Saturday inservice meetings will not be held between May 15th and the end of the school year. These meetings will also not be held between the start of the school year and September 15th. This applies to teachers assigned to teach during the regular school year.

Student Assistance sponsored workshops may be held during summer months for periods not to exceed three (3) days. A stipend of \$100.00 per seven (7) hour day will be paid in such case.

These amounts of pay for the inservice training and presenter have been proposed to you earlier this year and we have met in an effort to resolve these amounts. Since we did not succeed and we reached impasse, the District is implementing its proposal. Pay, if different than proposed, will be retroactively adjusted after agreement. In addition, the District is exercising its option under Section 18.14 of the collective bargaining agreement and will implement such recommended pay subject to retroactive change, if necessary, after a new collective bargaining agreement is determined.

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

CONCLUSIONS OF LAW

1. The parties reached agreement over the wages, hours and working conditions of the position of Title I Parent/Family Involvement Coordinator, and after agreement was reached, the agreement was implemented. Johnson's reference to the Coordinator, Title I Parent/Family Involvement and Title I/Standards Program Specialist in his letter of June 10, 1999, has no effect as it merely restates the parties' agreement and thus does not violate any provision of Sec. 111.70(3)(a), Stats.

2. The District did not refuse or fail to bargain collectively by implementing its Inservice proposal after the parties reached impasse and thus did not violate Secs. 111.70(3)(a)4 or 1, Stats.

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

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 13th day of December, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

RACINE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating this proceeding, the Association alleged that the District violated Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally implementing two bargaining proposals before the parties reached impasse. The District answered said complaint denying that it had committed any prohibited practices.

ASSOCIATION'S POSITION

The Association contends that the parties were not at impasse on June 10, 1999, over the subjects of bargaining set forth in Johnson's June 10, 1999 letter. It argues that an impasse, by definition, is a stalemate between the parties and the evidence failed to establish any stalemate whatsoever. It states that the evidence establishes that Johnson was dissatisfied and impatient with the Association's decision to negotiate the subjects at issue only in the context of overall bargaining so Johnson declared impasse to circumvent the District's obligation to collectively bargain. Citing GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84), it notes that whether impasse exists depends on the facts of a particular case at a particular point in time and includes bargaining history, the good faith of the parties, the length of negotiations, the importance of the issues and the contemporaneous understanding of the parties as to the state of negotiations. It claims that each of these factors weighs against a finding of impasse.

It notes that the bargaining history demonstrates that inservice has been an extremely longstanding issue for twenty years and was a "major feature" of the 1997-1999 agreement. It submits that in a four-year period prior to settlement of the 1997-1999 agreement, the parties had exchanged dozens of inservice proposals. It claims that the proposals unilaterally implemented by the District were the same issues the parties were negotiating for years. It asserts that the bargaining history shows an ongoing effort by each party to obtain their respective goals including resubmission of proposals, minor modifications and significant delays between proposal and response. Against this backdrop, the Association maintains that two meetings at which no written proposals were exchanged, as well as Johnson's proposal and Ennis' telling Johnson that the Association wanted to address this subject in negotiations for an overall contract, indicates only that the parties were not in agreement but were not stalemated.

As far as the Title I position, the Association maintains that Ennis reached an "accommodation," not an agreement over the implementation of the rate for the position, and the Association has historically objected to inclusion of positions in any agreement other than the overall contract.

The Association asserts that the timing of the District's actions indicates a lack of good faith in bargaining. It points out the first written proposal was received by the Association on March 19, 1999, which was renewed one month later and Ennis informed the District that the Association wanted to discuss the matter only in overall bargaining. The District modified its proposal on June 8, 1999, according to the Association, and declared impasse before the next scheduled bargaining session. The Association refers to the third factor, length of negotiations, and observes the two short meetings with only four to six hours of negotiations before impasse was abysmally short.

The Association takes the position that the issue of inservice was extremely important to it involving inservice on Saturdays and over summer vacation which the District's administrators could not recall any instance over the last 25 years as having occurred. It notes that the language used by the District allows it to extend the specified workday, add three days to the calendar and control summer vacations and the implemented proposal dropped language allowing for liberal consideration of excuses. It insists that such issues would be of the "highest significance" to the Association.

As to the last factor, the parties' contemporaneous understanding of the state of negotiations, the Association contends this factor more than any other, warrants a finding that no impasse existed. It notes that Johnson believed the parties were at impasse because Ennis did not respond quickly enough to his proposals of March 19 and April 19, 1999, that Ennis later told him he wished to address the issue in overall bargaining. It suggests there are fatal flaws in Johnson's reasoning because Ennis' reply on its face evinces a desire to continue bargaining. It claims that Johnson is announcing a "Racine rule," whereby a prior hiatus characterized by hard bargaining justifies implementation of subjects dear to the District. It argues that such effort must be rejected out of hand. It concludes that there is no factual basis to conclude that the parties were at impasse on June 10, 1999, and unilateral implementation constituted a refusal to bargain in violation of MERA.

The Association argues that even if the parties were at impasse, fair labor policy prohibits the District from implementing its proposals. It submits that the parties have had a historical practice of engaging only in "total package" bargaining when dealing with significant subjects and the Association made it clear that it wished to discuss the proposals only in the context of overall bargaining. It cites *VISITING NURSE SERVICES V. NLRB*, 161 LRRM 2326 (1ST CIR. 1999) for the proposition that "total package" bargaining prevents the employer from picking and choosing from its proposals those it wished to implement on the grounds of impasse. It submits that this rule should be applied to this case because the failure to do so would be manifestly unjust to the Association because it would allow the District to avoid bargaining over any issue it wished in its package proposal. It requests that the complaint be upheld and appropriate relief be awarded the Association.

DISTRICT'S POSITION

The District sets out the obligation of an employer with respect to mid-term bargaining to agreement or impasse. It insists that the parties reached agreement on Title I and there was no unilateral implementation. It argues that if all the evidence on Title I is ignored, then the parties were at impasse and the District was able to implement. It further asserts that Section 18.14 of the agreement covers the situation and the Association filed a grievance over it, so the issue should be deferred to arbitration. It also claims that the Association waived its right to bargain because it failed to request bargaining or make a proposal. It states that for these reasons there is no violation of MERA.

With respect to the inservice proposal, the District states that it appears that the parties did not reach agreement. It contends that the parties were at impasse when Ennis told Johnson that inservice would be taken up in the next contract. It submits that the WERC has recognized that an employer may lawfully implement its proposal upon reaching impasse after good faith bargaining over a mandatory subject arising during the term of the agreement. It also lists the same factors as the Association when determining whether an impasse exists. Citing EAU CLAIRE AREA VOCATIONAL DISTRICT, DEC. NO. 23944-B (McLAUGHLIN, 5/87), the District observes that there is no evidence that further bargaining would have produced an agreement, much less movement, and even after the District declared impasse, the Association never requested further bargaining or made a proposal. Additionally, it notes that the Association never disputed that the parties were at impasse.

The District argues that in addition to impasse there was waiver. It points out that the Association made no proposal in response to the District's November 16, 1998 and January 13, 1999 letters, never made a proposal in response to the January 28 and April 19 letters and the only response was Ennis' condition that an overall agreement be reached. It submits this is waiver, pure and simple. The District acknowledges that Johnson's June 10, 1999 implementation mistakenly left out the first paragraph and the last sentence, but a mistake cannot be taken to have legal effect when the other side does not even point it out. It submits that the absence of these two sentences limits the proposal actually implemented to provisions which were previously offered to the Association. It concludes that the complaint should be dismissed.

ASSOCIATION'S REPLY

The Association contends that Ennis' statement to Johnson that he wanted to discuss inservice and the Title I issues in the context of overall bargaining does not establish that the parties were stalemated but, contrary to the District's theory of impasse, establishes that the Association desired to continue bargaining and thus the parties were not at impasse. The Association asserts that few of the District's arguments address the issue of impasse. It disputes the District's assertion that the Association was stalling through the term of the

agreement to take advantage of the no-implementation-hiatus rule because impasse must be assessed on its particular facts and if the District believed the Association was not bargaining in good faith it was free to file a prohibited practice but not to implement its proposals under the guise of an impasse. It insists that the District's belief that the Association seeks to create law extending the "hiatus roadblock" has no basis in the facts of this case. The Association states that the District has refused to piece-meal bargain inservice issues and would not finalize agreement until the contract was resolved as a whole so the Association's position cannot be viewed as creating an impasse justifying unilateral implementation. It claims the District's self-serving one-sided view offends fair labor policy. It maintains that the Association can reject an employer's proposal and such rejection is not tantamount to impasse. It espouses a balance that recognizes an employer's right to implement upon impasse during a contract term but the right must be one not easy to exercise. It insists that the District must prove impasse very clearly before unilateral implementation can be condoned.

The Association takes issue with the District's argument that either party may insist on package or individual proposal bargaining. It insists that the District does not control bargaining procedures and merely because the Association does not agree to certain District procedures does mean the District can unilaterally implement the proposals discussed within those procedures. As to Title I, the Association claims it did not agree to this because it wanted to package bargain instead of piece-meal bargain because the District required the Association to package bargain its proposals. It asserts that it wished to continue bargaining in the same manner as in the past, and the District altered this past method without notifying the Association it was doing so. The Association claims that the District has opposed any attempt by the Association to reach agreement with anyone other than Johnson so the District, to be consistent, would have to acknowledge the understanding between Ennis and Lawson was not binding on either party. It claims the only issue is whether the parties were at impasse on Title I issues but now the District is stating there was an agreement but agreement is not impasse as stated in Johnson's June 10 letter. Thus, the facts do not support either agreement or impasse.

As far as the inservice proposal is concerned, the Association submits that the District added to the record facts by supplementing or rewording Ennis' remarks which indicates the weakness of its own position. It takes issue with the District's claim that Ennis had "foreclosed further timely bargaining" according to Johnson's testimony as Johnson never so testified. It notes that had Ennis foreclosed bargaining and Johnson had so testified, the District's justifying its implementation would be easier, but neither of these things happened.

It notes that the Association's desire to bargain later contrasts with the District's desire to bargain "now," and this difference in timing of negotiations does not establish stalemate on the substance of the proposals. It points out that the District had modified the inservice proposals in its June 8, 1999 proposal for the next contract and yet it failed to mention that it felt the parties were at impasse and on June 10, 1999, it asserted impasse. However, there is no proof to support the District's argument.

The Association contends that the District gave it no chance to dispute the existence of impasse prior to implementing its proposals and the instant proceedings are the only chance to protest the claim of impasse and there is no evidence of Association acquiescence in the District's assertion of impasse.

The Association argues that the District's claim of waiver must be rejected as the District failed to plead this affirmative defense and the District's assertion of waiver further illustrates just how baseless its position is.

The Association observes that the District argues that it could implement the proposal specified in its June 10 letter even though it differed from the April 19 proposal and the June 8 proposal. It takes the position that the one unilaterally implemented was not the one the parties bargained and implementation under these circumstances is patently unfair.

The Association concludes that there is no evidence of an impasse except in Johnson's mind, and the District chose to ignore its legal obligation to bargain and violated Secs. 111.70(3)(a)4 and 1, Stats., thus relief for the Association is in order.

DISTRICT'S REPLY

In reply to the Association's introduction, the District notes that Ennis insisted on addressing the matters only in the context of an overall 1999-2001 contract which is the same position taken by the union in EAU CLAIRE AREA VOCATIONAL DISTRICT, SUPRA, so the District was privileged to implement its mid-term bargaining proposals. It asserts that the mere fact it included such proposals for a successor agreement does not mean the District acquiesced in the delay by the Association. The District insists that it simply wanted to continue the items it was implementing in the next contract. The District also takes issue with the Association's assertion that the parties had historically engaged only in total package bargaining claiming there is no foundation for this assertion in the facts. It insists there were only two proposals, so there was no "total package" to discuss. The District rejects the Association's argument that it rejected the District's proposals as they did not reflect what the parties discussed in negotiations as there is no basis in the record to support this, and on Title I, what was implemented was not only discussed, but agreed to by Ennis, and on the inservice, the Association attempted to stall in order to stop all mid-term implementations.

The District's reply to the Association's statement of facts disputes the assertion that Saturday inservice has not been required referring to the testimony of Johnson and Ennis that in the 1970's there was Saturday inservice and there was an arbitration decision over it. The District argues that the bargaining history of inservice during the last hiatus is immaterial as there is no breach of contract claim. The District concedes that the Association has the right to bargain inservice for the next contract but it cannot take away the District's right to implement

mid-term after satisfying its bargaining obligation. The District points out that Ennis agreed to a change for the Title I position with Jetha Pinkson Lawson, and under Sec. 28.3, this agreement had to be incorporated in the contract. The District admits that the first and last sentences were left out of the March 19, 1999 proposal but nothing was added.

With respect to the Association's arguments, the District states that there are two, no impasse and a party should not be able to implement only parts of its proposals. The District contends the parties were at impasse as the Association would not consider any proposal except in total package bargaining for a successor which was an absolute precondition to further bargaining. As to Title I, the District finds the Association's argument that Ennis made an "accommodation" but not an agreement is specious. It argues that there was an agreement and the Association has no viable argument on Title I.

The District argues that the Association's view of the law was rejected in EAU CLAIRE AREA VOCATIONAL DISTRICT, SUPRA, and the Association does not have the right to do nothing during mid-term bargaining. It also notes that the Association's total package bargaining practice relates to bargaining during a hiatus but not during a contract. Furthermore, the District denies a practice of only total package bargaining and the parties have negotiated what is in their own interest whether single issue or total package. The District argues that VISITING NURSE SERVICES V. NLRB, SUPRA, cited by the Association, supports the District because an exception to refraining from implementing a change involves continually avoiding or delaying bargaining and the doctrine of impasse on the total agreement applies only when an existing contract has expired and negotiations for a new one are not concluded. It asserts that the 1997-1999 contract had not expired at implementation and the Association is not able to apply hiatus rules to the instant case and the complaint should be dismissed.

DISCUSSION

A municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. CITY OF MADISON, DEC. NO. 27757-B (WERC, 10/94); SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); EAU CLAIRE AREA VTAE DISTRICT, DEC. NO. 23944-C (WERC, 11/87); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82). An employer may, after bargaining with the union to an impasse, make unilateral changes that are in accordance with its last offer prior to impasse. JOINT SCHOOL DISTRICT OF WINTER, ET AL., DEC. NO. 14482-B (MCGILLIGAN, 3/77) AFF'D BY OPERATION OF LAW, DEC. NO. 14482-C (WERC, 4/77). The interest arbitration provisions of Sec. 111.70(4)(cm)6, Stats., are generally not applicable to bargaining impasses that arise during the term of a collective bargaining agreement. DANE COUNTY, DEC. NO. 17400 (WERC, 11/79) AFF'D DANE CO. CIRCT CASE NO. 80-CV-0097 (CURRIE, 6/80).

In the present case, the District, contrary to the Association, argues that the parties reached impasse after April 19, 1999, and it was free thereafter to implement its proposals on inservice. Whether an impasse exists must be determined on a case-by-case basis upon an examination of the particular facts as they exist at a particular time. The factors considered include:

. . . The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations . . .”

TAFT BROADCASTING CO., 163 NLRB 475, 64 LRRM 1386 (1967).

There were basically two issues in dispute: Title I and inservice. Whether the collective bargaining history or the language of the contract applied is not relevant to this proceeding as the District offered to bargain these issues and the Association agreed and the parties met in negotiations on February 18 and March 11, 1999.

As to the issue of the Title I Parent/Family Involvement Coordinator, the issue of impasse is not applicable because the parties reached agreement on this issue. Mr. Ennis testified that the Title I positions were worked out with the Human Resources Department, but they were never consummated in any way in bargaining (Tr. 22) and on cross testified as follows:

By Mr. Walker:

Q. So the answer to my question is no, you haven't made any proposal whatsoever regarding Title 1 Standards Program Specialist through this morning. Am I right about that?

A. Proposal or reaction to the District's proposal? I don't know the difference.

Q. "Proposal" I think was what I asked.

A. We made no proposal to pay those people anything or create the positions.

Q. And you did not accept the District's proposal?

A. In bargaining, not yet.

Q. And is that also true with respect to Coordinator Title 1 Parent/Family Involvement, the REA has made no proposal whatsoever on that subject through this morning?

A. That's wrong.

Q. That's wrong. You have made a proposal?

A. No, we settled it, as I testified in my direct, at the human resources assistant superintendent's level.

Q. So that matter is settled; is that correct?

A. As far as the wage, yes, and as far as the placement of the person, yes.

Q. Okay. And what is the wage that you and the assistant superintendent agreed upon?

A. I think it's the District, but I believe it's 37, and it's 10-and-a-half, and I believe the person who's there is Dorothy Goines. (Tr. 51-52)

Mr. Ennis simply disagreed that they could be added to the existing contract and they would be added in the next contract.

By Mr. Walker

Q. Exhibit 6 is a letter from Frank Johnson to you and it does say, among other things, as we agreed, "All three of these positions would be 10.5 individual contracts and receive an extra compensation ratio of .037."

A. I read that.

Q. Do you disagree that you agreed with Mr. Johnson on those things?

A. No. I agreed that we needed to add these to the contract. I don't disagree with that at all. (Tr. 60)

Richard Fornal, Supervisor of Curriculum Instruction, testified that he attended the February 18 and March 11, 1999 negotiating sessions where the Title I, Parent/Family Involvement Coordinator position was discussed. Initially, the District took the position that

the position should be compensated as a regular teacher (Tr. 143-146). At the first bargaining session, the parties agreed that there should be some extra compensation for the position (Tr. 161). The Title I Standards Specialists were brought up because they were getting extra compensation (Tr. 162). These positions had been around since the late 1980's (Tr. 148). On March 1, 1999, Fornal, along with Jetha Pinkston Lawson, met with Ennis and reworded the job description (Tr. 164, 166). Fornal testified the parties reached agreement on extra duty compensation at the March 11, 1999 negotiation meeting (Tr. 164). The incumbent was paid in accordance with the agreement reached at the meeting (Tr. 168). Mr. Fornal was a credible witness whose testimony stands un rebutted. The employee was paid in accordance with this agreement and it seems logical that if no agreement was reached, why would the District increase the employee's compensation. The evidence establishes that the parties reached an agreement on the Title I position. Although Johnson in his June 10, 1999 letter stated that he was implementing the 10.5 and .037 individual contract periods and extra compensation ratio, this was meaningless because all these had been in effect or agreed to so there was no basis to include them in the letter of June 10, 1999. The fact that they were included carries no significance whatsoever. Thus, the issue of Title I has been resolved and there is no violation of MERA with respect to it.

As to the inservice proposal, the parties did not reach agreement and the only issue is whether they reached impasse. The undersigned concludes that they did based on the following reasons:

- 1) The District notified the Association in November, 1998, that it was proposing inservice pay and by letter of January 13, 1999, indicated that because it was scheduling workshops for March, 1999, it offered to bargain pay for the workshops.
- 2) The parties met on two occasions in February and March, 1999, and bargained over the inservice proposal. There is no evidence of any bad faith or perfunctory bargaining by the parties.
- 3) The District drafted what it thought was the result of these negotiations and sent this proposal in writing to the Union on March 19, 1999. There was no response by the Association. There was a second letter sent on April 19, 1999. Again there was no response by the Association. Ennis testified that the Association gave up and did not respond (Tr. 29). The District allowed ample time and opportunity for the Association to respond before any implementation.
4. Sometime after April 19, 1999, Johnson met Ennis and asked where they were on inservice and Ennis stated his intention not to agree until the parties got the whole contract resolved, which would be the successor contract. Neither party made any further proposals except those for a successor agreement.

5. Nothing in the record suggests that any further negotiation after the Ennis/Johnson meeting would result in agreement on the inservice proposal of March 17, 1999. No further meetings were scheduled. There were no counterproposals or any indication of any flexibility.

These factors establish the parties were at impasse, and the District was free to implement its last proposal. The Association's proposals for a successor agreement plays no role in the impasse definition adopted by the Commission. EAU CLAIRE VTAE DISTRICT, SUPRA. Additionally, the length of negotiations was greater than in CITY OF APPLETON, DEC. NO. 18171 (PIERONI, 10/80) AFF'D DEC. NO. 18171-A (WERC, 1/82). The Association argues that even if the parties were at impasse, the parties had a practice of total package bargaining which precluded implementation. The practice referred to by the Association relates to bargaining for a total contract and not to mid-term bargaining. Furthermore, what "package" was there? The parties agreed to negotiate on two separate items albeit on the same dates. The parties reached agreement on one of the proposals, Title I. This left only one item and one item is not a package. The Association's argument is simply not persuasive.

Having reached impasse, the District was authorized to implement a change in accordance with its last offer prior to impasse. The last offer prior to impasse was the proposal dated March 17, 1999 (Ex. 6). The Association points out that the District's proposal it referenced in its implementation letter of June 10, 1999, did not include the first and last sentences of the March 17, 1999 proposal (Ex. 8). The District argued that the omission of these two sentences does not mean the proposal was not negotiated but merely limited. This argument is not persuasive and could be held to be bad faith bargaining. The District also argues that the omission was merely a mistake. Johnson testified credibly that the omission was inadvertent (Tr. 318). If the \$40.00 amount for attending an after-school inservice meeting was mistyped as \$04.00 and the District actually paid \$40.00 per meeting, the error would have no effect on the implementation. Sort of a no harm, no foul. The District, upon notice of the typographical error would be obliged to correct it.

Although Johnson in his letter of June 10, 1999, inartfully dropped the two sentences, there is no evidence that the District did not apply the March 17, 1999 proposal as written. Thus, Johnson's error too would have no effect on the implementation. However, once the error has been pointed out to the District, it has an obligation to correct its error. Thus, the District must correct its proposal to reflect its March 17, 1999 language.

Inasmuch as the parties reached impasse on mid-term bargaining of the inservice proposal, the District's implementation of its last proposal prior to the impasse did not violate any provisions of MERA. Therefore, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 13th day of December, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner