STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 152, AFL-CIO, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT, Respondent.

Case 191
No. 58280
MP-3583

Decision No. 29846-A

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Timothy Hawks**, 700 West Michigan Street, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Douglas Witte**, Ten East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 8, 1999, Service Employees International Union, Local No. 152, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission which alleged that the Racine Unified School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats., by failing to bargain with the Union about installing and utilizing hidden video cameras to monitor unit employes. On March 1, 2000, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. On May 4, 2000, the District filed its Answer to the complaint. The hearing on this matter was held on May 11, 2000 in Racine, Wisconsin, at which time the parties were given

full opportunity to present their evidence and arguments. The parties later filed briefs and reply briefs, whereupon the record was closed on July 20, 2000. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Service Employees International Union, Local No. 152, AFL-CIO, hereinafter referred to as the Union, is a labor organization whose mailing address for the purpose of this case is 8338 Corporate Drive, Suite 500, Racine, Wisconsin 53406. At all times material herein, Lou Schneider has been the Union's president.

2. The Racine Unified School District, hereinafter referred to as the District, is a municipal employer with its principal office located at 2220 Northwestern Avenue, Racine, Wisconsin 53404. The District's Department of Buildings and Grounds is responsible for the care, control and management of the property of the District. Gary Bishop is the Department's Director.

3. The Union is the certified bargaining agent for the District's building service employes. There are about 225 building service employes in the District.

4. The Union and the District have been parties to a series of collective bargaining agreements, the most recent of which is effective for the period from September 1, 1998 through August 31, 2001.

5. About a dozen building service employes are on the staff at Gifford Elementary School: two of them are engineers, four or five are sweepers, two are warehouse employes, and five are truck drivers. The warehouse employes receive and store all commodities for the District, while the truck drivers deliver and pick up goods.

6. In the Fall of 1999, District officials received complaints about the building service employes on the staff at Gifford Elementary School. The complaints were that the building service employes at the Gifford loading dock were taking extended lunches and breaks, that there was a lot of standing around, and that school lunches (which are distributed from Gifford) were being provided for free or taken by certain employes. These complaints came from food service employes, a clerical employe, a food service manager, and a principal. The District's Director of Buildings and Grounds, Gary Bishop, decided to investigate these allegations by installing hidden video cameras at the loading dock and in the break room at Gifford Elementary School for surveillance purposes. Bishop did not notify the Union about the installation of the hidden video cameras at Gifford School prior to their installation.

7. In October, 1999, Bishop arranged for hidden video cameras to be installed at Gifford School. The actual camera installation work was done by an outside contractor, Advanced Technologies. The cameras were installed in the evening after the second shift employes had gone home. Two cameras were installed: one in the dock area and one in the break room. The camera by the dock was installed near the refrigeration unit toward the trucks. The camera in the break room, also known as the receiving room, was installed near a table. The loading dock is at the back of Gifford School at the north side of the building. The break room is located just west of the dock. The break room is separated from the dock by two sets of double doors. A set of double doors also lead from the break room to the school corridor. The break room contains a table, the head engineer's desk, a refrigerator, stove, microwave, and sink. There are no snack machines in the break room. Most of the building service employes at Gifford School take their breaks in the break room. Supervisors are not usually present in the break room.

8. The hidden video cameras at Gifford School were utilized for six school days between November 4 through November 11, 1999. The videotaping began on Thursday, November 4, continued on Friday, November 5, ceased on the weekend, continued Monday, November 8 and ran through Thursday, November 11. Both cameras recorded continuously from 6:00 a.m. to 3:00 p.m. on those six days. The videotaping recorded the activities of various building service employes on the dock and in the break room. The building service employes were unaware that their activities were recorded on videotape.

9. Sometime after November 11, 1999, the head engineer at Gifford School, Rick Lenzke, learned about the hidden video cameras at Gifford. Lenzke then called Union President Lou Schneider and told him about same. In response to that call, Schneider confronted Bishop and asked him if hidden video taping had occurred at Gifford School. Bishop replied in the affirmative. When Schneider asked the reason for the videotaping, Bishop replied that it was because of possible theft. Schneider then asked Bishop if he (Schneider) could get copies of the videotapes, to which Bishop replied in the affirmative. Bishop subsequently turned six videotapes (one for each day) over to Schneider, who viewed them. The videotapes showed, on a split screen, the dock and the break room at Gifford School. In Bishop's opinion, the videotapes did not confirm any allegations of theft of time or food.

10. Sometime after the videotaping at Gifford School had occurred, Bishop appeared before the Board of Education and reported to them about same. He reported to the Board that the reasons for the video surveillance at Gifford School were accusations of employe theft, employes taking extended breaks and lunches, and employes standing around. He told the Board that he decided to use videotape surveillance to investigate these allegations and determine if they were true. He also told the Board that the videotapes did not confirm any allegations of theft of time or food.

11. The District's use of video cameras at Gifford School referenced in Findings 7 and 8 was not the first time the District has used cameras in a District school. The District currently utilizes external video cameras at 12 schools as part of its security systems. The video cameras are located in plain view in the main entrance of each school. In addition, at two high schools, video cameras are installed throughout the buildings. The external video cameras at Case High School have been in use there for ten years. Aside from the District's use of external video cameras, the District has also used hidden video cameras at various schools on five prior occasions. The specifics of those five instances are as follows. In the first instance, which occurred prior to 1991, the District utilized hidden video cameras at Park High School. No further details concerning same are contained in the record. In the second instance, which occurred in 1991, the District utilized hidden video cameras at Starbuck Middle School in response to allegations of theft of food. In neither instance was any disciplinary action or other action taken by the District as a result of the use of the cameras. In the third instance, which occurred in 1994, the District installed hidden video cameras at Case High School in a home economics room in response to thefts occurring from that room. The cameras were installed there to aid the District in investigating allegations of theft of money. In that instance, a camera set up over a desk recorded a building service employe breaking into the desk and stealing money from same. The employe resigned after being told what the videotape showed. In the fourth instance, which occurred in 1996, the District again installed hidden video cameras at Case High School in the kitchen storage area in response to allegations that a building service employe was taking food from that area. In that instance, the cameras did not verify any theft or confirm any illegal activity. In the fifth instance, which occurred in 1997, the District installed hidden video cameras at Horlick High School in the equipment storage room near the field house in response to allegations of theft of equipment out of the equipment storage room and inappropriate conduct by certain District employes. In that instance, the cameras did not verify any theft or inappropriate conduct.

12. Union President Schneider was aware of at least two of the instances referenced in Finding 11 where the District used hidden video cameras. Specifically, he was aware of the instance at Case High School in 1994 and the instance at Horlick High School in 1997 because he was shown the videotapes of same after the taping occurred.

13. The Union never requested that the District bargain over either its decision to install and utilize hidden video cameras, or the impact of the District's decision. Instead, the Union filed the instant complaint.

14. The District's decision to install and utilize hidden video cameras in the workplace to investigate allegations of employe misconduct primarily relates to the management and direction of the District's workforce.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The District's decision to install and utilize hidden video cameras in the workplace to investigate allegations of employe misconduct is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

2. By installing and utilizing hidden video cameras in the workplace to investigate allegations of employe misconduct, the District did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 or 1, Stats.

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

ORDER

The complaint of prohibited practices is dismissed.

Dated at Madison, Wisconsin this 1st day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges that the District violated Secs. 111.70(3)(a)1 and 4, Stats., when it used hidden cameras to monitor unit employes. The District denies it committed any prohibited practices by its conduct herein.

POSITIONS OF THE PARTIES

Union

The Union argues that the District's actions constituted prohibited practices. It makes the following arguments to support this contention.

First, like the District, the Union sees the issue herein as whether the District's decision to utilize hidden video cameras to record bargaining unit members at work is a mandatory subject of bargaining within the meaning of the Municipal Employment Relations Act. The Union answers that question in the affirmative. Thus, it believes that the use of hidden video cameras is a mandatory subject of bargaining.

The Union avers that under the primary relationship test established in BELOIT, the use of video cameras is primarily related to wages, hours, and terms and conditions of employment. According to the Union, the District offered little evidence to suggest that its decision to use hidden video cameras is a matter related in any substantial way to the formulation or management of public policy. The Union reasons that the converse must therefore be true, namely that the primary effect of hidden video cameras is upon wages, hours and conditions of employment. To support this premise, the Union calls attention to the fact that the District's proffered reason for its surreptitious employe surveillance was to determine whether the workers were in compliance with what the Union characterized as "generally accepted notions of appropriate work behavior." It further notes that the hidden video cameras were intended to record employe misconduct, and if they had recorded such a thing, then the employe would have been disciplined. The Union maintains that whatever relationship this has to the formulation or management of public policy, the "primary" effect is upon wages, hours and conditions of employment (particularly job security).

To buttress its position that using hidden video cameras is a mandatory subject of bargaining, the Union calls attention to the fact that in the previously-referenced BELOIT decision, the Commission held that "matters of length of observation period, openness of the observation, number of evaluations, and frequency of observations are also mandatory subjects of bargaining." Id., at 20. As the Union sees it, the decision to install video surveillance of employes for the purpose of observing their work behavior is a form of supervisory observation. The Union believes this decision requires the conclusion that any procedure which an employer uses to observe employe behavior, including hidden video surveillance, is a mandatory subject of bargaining.

To further buttress its position that installing and utilizing hidden video cameras in the workplace is a mandatory subject of bargaining, the Union calls attention to the fact that the NLRB so held in the case of COLGATE-PALMOLIVE, 323 NLRB 82 (1997). In that case, the employer installed hidden cameras in a variety of worksite locations, including the employes' restroom. The Union's reading of that decision is that the NLRB found that the employer's decision to install and use surveillance cameras was not a managerial decision related to entrepreneurial control; rather, since the surveillance of employes "has the potential to affect the continued employment of employes whose actions are being monitored", the employer's decision to install and use surveillance cameras was a mandatory subject of bargaining. The Union believes that while the setting for that case was the private sector, the same reasoning should be applicable to employes in the public sector. As the Union sees it, an employer's surreptitious and unilateral use of video cameras in the workplace for the purpose of attempting to record its employes in acts of theft or misconduct, whether it be in the public sector or the private sector, has a direct impact on the working environment.

Next, the Union opines that the use of hidden cameras at work raises privacy concerns which impinge on the employes' working conditions. As the Union sees it, the District does not confront the offensive nature of this surveillance or the intimate way in which it affects employes' conditions of employment. According to the Union, secret video recording is about much more than just enforcing a rule. The Union asserts that the District's three proffered reasons for the secret videotaping (i.e. food theft, time theft and production inefficiency) are an inadequate foundation upon which to base a conclusion that videotaping is primarily related to management of public policy. The Union concludes its argument on this matter by commenting that while "there may be a case where surreptitious surveillance enjoys factual support for a conclusion that the procedure bears a primary relationship to a managerial prerogative, rather than the employe's interest in job security," this is not that case.

Next, the Union disputes the District's assertion that the Union has waived its right to bargain over the installation of video cameras. The Union avers that it has not waived its right to bargain over that matter. The Union asserts that for the District to establish waiver by conduct, it must be demonstrated that the Union's waiver was "clear and unmistakable". The

Union believes that has not been shown herein. In support of this premise, the Union claims it was not sufficiently aware of the District's use of hidden video cameras because it was never notified of the surveillance before it (i.e. the surveillance) occurred. Additionally, the Union argues that it was unaware of the prevalence of the District's use of surveillance cameras because Union President Schneider was only told of two of the surveillance incidents after the fact. Finally, the Union contends that the reason it did not request bargaining with respect to this issue was because it did not have the opportunity to do so. The Union submits that since the District chose to act unilaterally, the Union's response was to file the instant complaint. The Union therefore urges the Examiner to reject the District's waiver argument.

Next, building on the premise that the District's use of video cameras is a mandatory subject of bargaining, and the premise that the Union did not waive its right to bargain on this issue, the Union claims that the District's unilateral installation of video cameras and surveillance of bargaining unit employes without affording the Union the opportunity to bargain on this issue constitutes a prohibited practice. To support this contention, the Union again relies on a NLRB decision, namely GENESEE FAMILY RESTAURANT & CONEY ISLAND, INC., 322 NLRB 36 (1996). According to the Union, that case stands for the proposition that an employer who installs video cameras at work unilaterally changes working conditions, and therefore refuses to bargain in good faith. The Union submits that the Examiner should reach the same result here.

In sum, the Union asks that the Examiner find that 1) the District's decision to video record employes during working hours is a mandatory subject of bargaining, 2) that prior instances of video recording offered by the District were not sufficient in scope to conclude that the Union waived its right to bargain on this issue, 3) that the District refused to bargain in good faith when it installed and video recorded unit employes without any prior discussion or negotiation with the Union, and that the District thus committed a prohibited practice. As a remedy, the Union asks that the District be ordered to cease and desist from violating MERA and post the appropriate notices.

District

The District argues that its actions did not constitute prohibited practices. For background purposes, it notes that over the past 10 years, the District has used hidden video cameras in its schools on six occasions. It avers that when it did so, the hidden video cameras were used in response to reports about theft of District property or money, or possible employe misconduct. In the District's view, the Union's complaint herein is an effort to prevent the District from utilizing hidden video cameras as a legitimate investigatory or information gathering tool in an effort to safeguard District property or the health, safety and welfare of its employes and students. It makes the following arguments to support this contention.

First, like the Union, the District sees the issue herein as whether the District's decision to utilize hidden video cameras is a mandatory subject of bargaining within the meaning of the Municipal Employment Relations Act. In deciding this issue, the District avers that the legal standard is this: does the use of hidden video cameras primarily relate to the management, operation and control of the schools, and the health, safety and welfare of the District, its students and employes; or does the use of hidden video cameras primarily relate to wages, hours, and terms and conditions of employment. The former is permissive while the latter is mandatory. The District believes this question presents a case of first impression for the Commission.

The District submits that an analysis of the record evidence in this case demonstrates that the use of hidden video cameras is primarily related to the management and operation of the schools and the health, safety and welfare of the District's property, students and employes. Accordingly, the District believes the use of hidden video cameras is a permissive subject of bargaining. The District asserts that any concerns the Union has regarding hidden video cameras can be addressed through impact bargaining (i.e. bargaining over the impact of the District's decision). As the District sees it, the Union failed to demonstrate how the District's use of hidden video cameras is primarily related to wages, hours, or conditions of employment. In contrast, the District asserts it presented substantial testimony outlining the importance of the use of video cameras and the reasons and rationale for their use in each case. The District maintains that it has the right and obligation to take measures to safeguard taxpayer property, including "weeding out thieves". It also maintains it has an obligation to ensure that its employes are not engaging in inappropriate behavior on District property. As the District sees it, the facts involved here present no less of a compelling District concern, because the District was concerned about allegations of theft of food and time, and the efficiency of its truck drivers.

Building on this premise, the District maintains that hidden video cameras are a legitimate investigatory tool which, when used in conjunction with other investigatory tools, assist the District in carrying out its statutorily-mandated responsibilities to run the schools and protect property, safety and health. It notes in this regard that the parties' collective bargaining agreement contains no delineation of the types of investigatory tools the District may use in investigating possible disciplinary situations or in carrying out its other management functions. It further notes that the collective bargaining agreement does not contain any limitations on the methods the District may use. The District argues that if the WERC determines that the use of hidden video cameras is a mandatory subject of bargaining, then virtually every method or tool of investigation or information gathering used by employers would become a mandatory subject of bargaining. As the District sees it, such a ruling would set a dangerous precedent and would severely hamper, if not handcuff, the ability of municipal employers in Wisconsin to manage their operations. The District therefore asks the Examiner to find that the District's use of hidden video cameras is a permissive subject of bargaining.

Next, the District responds as follows to the Union's argument that the National Labor Relations Board has held that using hidden video cameras is a mandatory subject of bargaining. First, it avers that the standards used by the NLRB and the WERC are different with respect to determining whether a particular issue is a mandatory or permissive subject of bargaining. The District asserts that the NLRB uses a test of determining whether a matter is "plainly germane to the working environment" and not "among those managerial decisions which lie at the core of entrepreneurial control", while the WERC, on the other hand, uses the "primarily related" test first formulated in the BELOIT case and which it has applied over the years. Under that test, issues concerning mandatory or permissive subjects of bargaining are decided on a case-by-case basis, after looking at the proposal and the record in each case. Second, the District maintains that the WERC is not bound by NLRB precedent. Third, it argues that the NLRB's decisions on this matter are not consistent and the COLGATE-PALMOLIVE case holding hidden cameras to be a mandatory subject of bargaining is factually and legally distinguishable from the present situation. The District's reading of that decision is that the NLRB found that the installation of surveillance cameras in restrooms was analogous to physical examinations, drug and alcohol testing and polygraph testing (all of which the NLRB has found to be mandatory subjects of bargaining). The District submits that the NLRB's conclusion that those four situations are analogous is flawed. The District therefore asks that the WERC not reach the same result as the NLRB did.

Finally, the District argues that the Union waived its right to bargain over the use of hidden video cameras in this case. To support this contention, the District notes that Union President Schneider was aware of at least two instances where the District used hidden video cameras (i.e. at Case High School in 1994 and at Horlick High School in 1997). In the District's opinion, these two incidents put the Union on notice that the District utilized hidden video cameras from time to time. The District contends that if the Union wished to bargain over the decision or any impacts related to the use of the cameras, it was incumbent upon the Union to make such a request. It specifically notes that did not happen, namely that the Union did not ever request bargaining over either the decision or impacts of the District's use of hidden video cameras. The District therefore maintains the Union waived its right to bargain in this case.

Based on the foregoing, the District requests that the complaint be dismissed.

DISCUSSION

The complaint alleges that by unilaterally installing and utilizing hidden video cameras to monitor unit employes, the District violated its duty to bargain in good faith. My analysis of this duty to bargain case begins with a review of the applicable legal standards. The MERA duty to bargain is enforced by Sec. 111.70(3)(a)4, Stats., and derivatively by Sec. 111.70(3)(a)1, Stats. Pursuant to that duty, a municipal employer must bargain with the

employes' bargaining representative during the term of a contract on 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 langauge. 1/ Thus, an

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1/ SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82).

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employer may not normally make a unilateral change during the term of a contract to a mandatory subject of bargaining without first bargaining on the proposed change with the collective bargaining representative. 2/ Absent a valid defense then, a unilateral change to a

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2/ CITY OF MADISON, DEC. NO. 15095 (WERC, 12/76) at 18 citing MADISON JT. SCHOOL DIST. NO. 8, DEC. NO. 12610 (WERC, 4/74); CITY OF OAK CREEK, DEC. NO. 12105-A, B (WERC, 7/74); and CITY OF MENOMONIE, DEC. NO. 12564-A, B (WERC, 10/74).

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mandatory subject of bargaining is a per se violation of the MERA duty to bargain. 3/

3/ SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85).

Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 4/ If a matter is not mandatorily bargainable (i.e. is permissive), a party does not violate

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4/ CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) at 12 and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/94) at 18-19.

MERA by refusing to negotiate upon it. Thus, it is not generally a prohibited practice for a municipal employer to unilaterally implement changes in nonmandatory (i.e. permissive) subjects of bargaining.

In BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis. 2D 43 (1976), the Wisconsin Supreme Court agreed with the WERC's adoption of the "primarily related to" test to determine which proposals for bargaining are mandatorily bargainable. The WERC's decision had construed MERA to require mandatory bargaining (1) for matters primarily related to

wages, hours, and conditions of employment, and (2) over the impact of establishing of educational policy affecting the wages, hours and conditions of employment. In the UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 Wis. 2D 89 (1977), the supreme court extended BELOIT's "primarily related to" test for mandatory subjects to determining whether matters are permissive. In doing so, it applied as a criterion whether governmental or policy dimensions of a decision by a public body predominate. The balancing test which emerged from these decisions can be stated thus: if a matter is primarily related to wages, hours, and conditions of employment, it is a mandatory subject of bargaining; if a matter is primarily related to governmental or public policy making, then it is not a mandatory subject of bargaining, but permissive. In WEST BEND EDUCATION ASSOCIATION V. WERC, 121 Wis. 2D 1 (1984), the supreme court again referred to BELOIT and RACINE as the foundation of the "primarily related to" balancing test for determining whether subjects are mandatory or permissive. Despite various legislative changes to MERA over the years, the legal framework for classifying subjects of bargaining has remained unchanged since 1976, when the supreme court first set forth the standard in BELOIT.

Stating the balancing test is far easier than applying it. The latter involves evaluating the competing interests on a case-by-case basis.

In this case, the Union contends that the District's use of hidden video cameras is a mandatory subject of bargaining, whereas the District takes the opposite position and claims it is not mandatory (i.e. permissive). Given the foregoing, it is obviously necessary to determine the mandatory/permissive nature of the District's decision to use hidden video cameras.

Insofar as the Examiner has been able to determine, this is an issue of first impression for the WERC because the Commission has not previously decided whether a municipal employer's decision to use hidden video cameras in the workplace is a mandatory or permissive subject of bargaining. That being so, it is necessary for the undersigned to make that call.

The Union relies on two cases to support its contention that using hidden video cameras is a mandatory subject of bargaining. One is a WERC decision and the other is an NLRB decision. Each is addressed below.

In CITY OF BELOIT, DEC. NO. 11831-C (WERC, 9/74), the Commission addressed the mandatory/permissive nature of numerous bargaining proposals which were categorized into a dozen different subject areas. One of the subject areas was denominated as "(a) the manner in which supervision and evaluation of teachers will be conducted", Id. at p. 2. The Commission found that all the proposals in that subject area were mandatory except for the proposals which

dealt with who was to evaluate teacher performance and who was to provide assistance to teachers whose evaluations were poor. The Commission's entire discussion of that subject area follows:

> Teacher Supervision and Evaluation:
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> Inasmuch as the evaluation of a teacher may affect the retention or non-retention of that teacher, or the level of compensation received by that teacher, certain aspects of the Association's proposal regarding teacher evaluation and discipline are mandatory subjects of bargaining. On the other hand, other aspects of said proposal are not so subject to mandatory bargaining.
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> We hold that the matters of orientation of new teachers as to evaluative procedures and instruments is a mandatory subject of bargaining because it directly relates to the teacher's ability to perform as required by the employer, in that it involves informing the teacher of how such performance is measured, and thus to the teacher's ability to maintain employment.
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> Likewise, the matters of length of observation period, openness of observation, number of evaluations, and frequency of observations are also mandatory subjects of bargaining. It would indeed be specious to determine, as we do subsequently herein, that the Association's proposal of a "just cause" standard is a mandatory subject of bargaining, but not require bargaining over such techniques as comprise the procedural aspects of said standard.
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> Similarly, the matters of copies of observation reports and conferences regarding same, and teachers' objections to evaluations reflect the aspect of "just cause" which requires that, where appropriate, a teacher be allowed a fair opportunity to learn of his or her jeopardy, and possibly to defend his or her position. Thus, these matters are also held to be subjects of mandatory bargaining, as are matters concerning complaints made by parents, students and others.
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> On the other hand, the proposals involving the selection and qualifications of the evaluators, assistance to teachers having professional difficulties, and the techniques to be employed in dealing with teachers found to be suffering professional difficulties, reflect efforts to determine management techniques rather than "conditions of employment." As such, they are not subjects of mandatory bargaining.

Id, p. 20.

The Commission's decision was subsequently affirmed by the Wisconsin Supreme Court in the previously referenced and cited BELOIT decision. In the portion of that decision dealing with the teacher evaluation proposals, the Court commented that "these matters go to the right of teachers to have notice and input into procedures that affect their job security." BELOIT, supra, at 56. The Union relies on the third paragraph of the Commission's BELOIT decision quoted above wherein the Commission opined that "the matters of length of observation period, openness of observation, number of evaluations, and frequency of observations are also mandatory subjects of bargaining." According to the Union, this sentence requires the conclusion that any procedure which an employer uses to observe employe behavior, including hidden video surveillance, is a mandatory subject of bargaining. The undersigned does not read the decision to say that. The sentence just quoted from the Commission's BELOIT decision does say that "observations" are mandatory subjects of bargaining. However, the decision did not define that term. That being so, it is necessary to decide whether the word "observation" applies to all situations that could be envisioned where an employe is watched/observed by management, or whether it is more limited than that. Based on the following rationale, the Examiner finds it is the latter. It can be inferred from the context of the Commission's BELOIT decision that the word "observation" refers to classroom visits by a principal or other supervisor who would watch the teacher work for the express purpose of evaluating their teaching/work performance. Thus, the "observation" referenced in the Commission's decision was for the purpose of determining work performance. In this case, though, the District's use of hidden video cameras was not for the purpose of determining work performance *per se*. By that, I mean that the District did not use hidden video cameras to evaluate the work performance of the building service employes at Gifford School. Instead, it used them (i.e. hidden video cameras) to determine if employe theft and misconduct was occurring there, and if so, to record that theft and misconduct on tape and identify the wrongdoer. Since the employe "observation" involved in the BELOIT case was for the purpose of determining work performance, while the employe "observation" involved here was for the purpose of "weeding out thieves" (as the District put it in their brief), the nature and purpose of the "observations" were fundamentally different. Given this difference, the Examiner is persuaded that the BELOIT decision is inapplicable here. While the Commission's BELOIT decision seems applicable to a factual situation where an employer uses video cameras for the purpose of evaluating employe work performance, that is not the factual situation present here.

Next, the Union cites the case of COLGATE-PALMOLIVE, 323 NLRB 82 (1997). In that case, the employer installed hidden cameras in a variety of worksite locations, including the employes' restroom. The NLRB found that the employer's decision to install and use hidden surveillance cameras in the workplace was a mandatory subject of bargaining. In so finding, the Board applied the legal standard which the U.S. Supreme Court created for determining mandatory subjects of bargaining under the National Labor Relations Act, as amended. In FORD MOTOR COMPANY, 441 U.S. 488, 498 (1979), quoting from FIBREBOARD CORP. V.

NLRB, 379 U.S. 203, 222-223 (1964), the Supreme Court described mandatory subjects of bargaining as such matters that are "plainly germane to the working environment" and "not among those managerial decisions which lie at the core of entrepreneurial control." The Board found that the installation of surveillance cameras was analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing, all of which the Board has found to be mandatory subjects of bargaining. The Board said those three things were investigatory tools or methods used by an employer to determine whether any of its employes had engaged in misconduct, and since cameras were just another investigatory tool, it should also be considered a mandatory subject of bargaining.

Based on the following rationale, the undersigned finds that the COLGATE-PALMOLIVE decision is legally distinguishable from the present situation. First, the legal standards used by the NLRB and WERC are different with respect to determining whether a particular issue is a mandatory or permissive subject of bargaining. As previously noted, the NLRB uses a test of determining whether a matter is "plainly germane to the working environment" and "not among those managerial decisions which lie at the core of entrepreneurial control", while the WERC, on the other hand, uses the "primarily related" test first adopted in the BELOIT case and which it has applied over the years. Second, the NLRB found that the installation of surveillance cameras in restrooms was analogous to physical examinations, drug and alcohol testing and polygraph testing (all of which the NLRB has found to be mandatory subjects of bargaining). The WERC though has not made similar findings. Specifically, it has not yet squarely addressed whether any of those three items are mandatory or permissive subjects of bargaining. Third, one of the reasons the Board articulated for its decision was what it characterized as "privacy concerns." In that case, surveillance cameras were placed in the employes' restroom. Here, though, the District did not install cameras in the employes' restroom, but rather at a loading dock and the employe breakroom. In my view, this difference in the location of the camera is important because the expectation of privacy is greater in a restroom than it is on a loading dock or breakroom. Given the foregoing, it is held that the NLRB's COLGATE-PALMOLIVE decision is not dispositive here either.

Having found that neither of the cases which the Union relies on are dispositive here, the question remains whether the District's use of hidden video cameras in this instance to investigate allegations of employe misconduct is primarily related to wages, hours and terms and conditions of employment (i.e. mandatory), or whether it is primarily related to the management and operation of the schools and the health, safety and welfare of the District's property, students and employes (i.e. permissive). Based on the following rationale, I conclude that it is the latter (i.e. permissive). The record indicates that prior to using hidden video cameras at Gifford School, the District had used hidden cameras at other schools on five occasions. In those instances, the reason it did so was to investigate reports of suspected employe theft and employe misconduct. Similar allegations were raised about the building service employes at Gifford School. When an employer receives allegations about possible

employe theft and misconduct, it obviously has to investigate same because one of its obligations, as well as its legitimate management interest, is protecting and safeguarding its property and employes. There are several tools/methods an employer can use in investigating and gathering information regarding possible employe theft and misconduct. One of those tools/methods is hidden video cameras. While hidden video cameras certainly raise employe privacy concerns, it is nonetheless held that the District's legitimate management interest in protecting and safeguarding its property and employes from theft and employe misconduct predominates over employe privacy concerns. It is therefore concluded that in this particular case, the primary effect of the District's decision to use hidden video cameras to investigate allegations of employe misconduct is on the formulation and management of public policy, and thus is a permissive subject of bargaining.

Implicit in a finding that a subject is a permissive subject of bargaining is the conclusion that the employer may act without obtaining the prior agreement of the Union. 5/

5/ RACINE UNIFIED SCHOOL DISTRICT NO. 1, DEC. NOS. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78) at 45; CITY OF MADISON (POLICE), DEC. NO. 17300-C (WERC, 10/83) at 7. This is not to say though that an employer may take unilateral action which has an impact violative of an existing collective bargaining agreement. If the Union believes such change does have an impact violative of the agreement, of course the Union can seek to enforce the contract provisions through the grievance procedure.

To hold otherwise would be to reduce the distinction between mandatory and permissive subjects to a nullity. 6/ Inasmuch as the District was not obligated to obtain the prior

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6/ RACINE UNIFIED SCHOOL DISTRICT NO. 1, supra, at 46.

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agreement of the Union before it used hidden video cameras to investigate allegations of employe misconduct, the District could unilaterally use hidden video cameras for that purpose without bargaining over the decision itself with the Union.

While the District did not have to bargain over the implementation of its decision to use hidden video cameras to investigate allegations of employe misconduct, this decision still had an impact on employe working conditions which was bargainable. The District acknowledges same. However, the Union has not requested to bargain the impact thereof, and the complaint

does not allege a refusal to bargain on the impact of the District's decision to use hidden video cameras. That being so, no issues as to bargaining over the impact of the District's permissive decision are before me.

Having found that the District's decision to install and utilize hidden video cameras to investigate allegations of employe misconduct is a permissive subject of bargaining, the undersigned believes it is unnecessary to address the District's argument that the Union waived its right to bargain in this case over the use of hidden video cameras by its conduct. Consequently, no comment is made concerning same.

In summary then, it is concluded that the District's actions were not unlawful and did not violate Secs. 111.70(3)(a)4 or 1, Stats. The complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 1st day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

REJ/gjc
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