STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

COOPERATIVE EDUCATIONAL SERVICE AGENCY #3

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

CESA #3 EDUCATION SUPPORT PERSONNEL ASSOCIATION

Case 11
No. 63901
DR(M)-651

Decision No. 31292

Appearances:

Robert Butler, Attorney, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of Cooperative Educational Service Agency #3.

Mary Pitassi, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of CESA #3 Education Support Personnel Association.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On August 9, 2004, the Cooperative Educational Service Agency #3, herein CESA, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to CESA's duty to bargain with CESA Education Support Personnel Association, herein the Association, over certain matters.

On September 2, 2004, the Association filed a response to the petition which amended certain of the disputed proposals. On September 17, 2004, CESA advised the Commission that two proposals remained in dispute.

The parties waived hearing and filed initial written argument by November 1, 2004. In its initial brief, the Association amended one of the two proposals in dispute. By November 12, 2004, the parties filed reply briefs. In its reply brief, CESA advised the Commission that the Association's amendment had resolved CESA's objection to that proposal.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Cooperative Educational Service Agency #3, herein CESA, is a municipal employer.

2. The CESA #3 Education Support Personnel Association, herein the Association, is a labor organization that serves as the collective bargaining representative of certain employees of CESA.

3. CESA and the Association have a dispute over whether CESA #3 has a duty to bargain with the Association over the following Association proposal:

> Any evaluation conducted by a non-supervisory employee may not be used to support a disciplinary action against a bargaining unit employee unless agreed to, in writing, by the union.
>
> If the employer finds that an employee is not performing his or her job satisfactorily, the employer must attempt to provide appropriate remedial assistance prior to instituting disciplinary procedures unless circumstances make such assistance impossible.

4. Part of the disputed proposal set forth in Finding of Fact 3 is primarily related to conditions of employment and part of said proposal is primarily related to managerial prerogatives.

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

CONCLUSION OF LAW

The disputed proposal set forth in Finding of Fact 3 is a mandatory subject of bargaining in part and a permissive subject of bargaining in part.

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

DECLARATORY RULING

CESA has a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., with the Association as to that portion of the disputed proposal set forth in Finding of Fact 3 which is a mandatory subject of bargaining.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

CESA #3

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

Legal Framework

Before considering the specific proposals at issue herein, it is useful to set out the general framework within which we determine whether a matter is a mandatory or permissive subject of bargaining. Section 111.70(1)(a), Stats., provides:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employee to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employees under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employees in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employees by the constitutions of this state and of the United States and by this subchapter.

In WEST BEND EDUCATION ASS'N V. WERC, 121 WIS.2D 1 (1984), the Wisconsin Supreme Court concluded the following as to how Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d), Stats.), should be interpreted when determining whether a subject of bargaining is mandatory or permissive:

> Section 111.70(1)(d) … recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial

> decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY v. WERC, 81 WIS.2D 89.259; N.W.2D 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.
>
> In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d) as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "management and direction' of the school system" or to "formulation or management of public policy." UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY v. WERC, 81 WIS.2D 89 95-96, 102, 259 N.W.2D724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," BELOIT EDUCATION ASSO. v. WERC, 73 WIS.2D 43, 54, 242 N.W.2D 231 (1976).
>
> As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighted to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interests in wages, hours, and conditions of employment outweigh the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE CO. v. WERC, SUPRA, 81 WIS.2D AT 102; BELOIT EDUCATION ASSO., SUPRA, 73 WIS.2D AT 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them.

121 WIS.2d at 7-9 (footnotes omitted). As the Court observed, the balancing test is easier to state than apply. Notwithstanding that difficulty, WEST BEND requires the Commission to

"weigh and evaluate the conflicting interests of the District and the Association" in order to reach a conclusion about whether the parties must bargain over a particular proposal. ID. at 15.

Non-supervisory Employee Evaluations Proposal

CESA has challenged two portions of the Association's proposal. The first disputed portion states:

> Any evaluation conducted by a non-supervisory employee may not be used to support a disciplinary action against a bargaining unit employee unless agreed to, in writing, by the union.

On its face, this proposal is narrow in scope. It does not directly preclude CESA from using anyone to evaluate bargaining unit employees. What the proposal does prohibit is use of certain evaluations (those of non-supervisory employees) in disciplinary proceedings. In its written argument, the Association has indicated that the phrase "non-supervisory employee" includes: (1) managerial and executive employees and independent contractors; and (2) bargaining unit employees.

It is evident that the proposal is directly related to employee discipline and thus to employee job security. The proposal also directly relates to managerial prerogatives as to how evidence of unsatisfactory employee job performance warranting discipline can be acquired and utilized.

As to the prohibited use of evaluations by managerial and executive employees and by independent contractors, we conclude that relationship to managerial prerogatives is stronger than the relationship to employee discipline. While employees have an interest in being judged by trained and competent evaluators, some employees could also (at least hypothetically) have an interest in lax, loose, or incompetent supervision. Consistent with the general managerial right of the public employer to determine the quality of performance it wants its employees to provide, it is the prerogative of a public manager to decide whether any particular individual is a trained and competent evaluator of the desired quality of performance. While the instant proposal limits management's choice of evaluators only for disciplinary purposes, correction is surely the central purpose of performance evaluation and discipline is surely one of the most fundamental methods of achieving such correction. In many instances, evaluation is a necessary and important supervisory prelude to discipline. Management's right to select its own agents for carrying out such a supervisory function (and management's accountability to the public for doing so) is quintessentially related to the management and direction of the

employer's operation and less directly related to employee working conditions. Accordingly, we conclude that CESA cannot be compelled to bargain over whether it can use information acquired through evaluations by management/non-unit employees or independent contractors for disciplinary purposes, as this confines management's ability to select its agents for supervision and discipline. The proposal is to this extent a permissive subject of bargaining.

As to the prohibited disciplinary use of evaluations by fellow bargaining unit employees, we reach a different conclusion. We have long held that if a municipal employer wishes to have employees perform duties that are not fairly within the scope of the employee's responsibilities, the municipal employer must acquire that right at the bargaining table. OAK CREEK SCHOOLS, DEC. NO. 11827-D (WERC, 9/74); CITY OF WAUWATOSA, DEC. NO. 15917 (WERC, 11/77); MILWAUKEE SEWERAGE COMMISSION, DEC. NO. 17025 (WERC, 5/79). As we held in SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84) at 50, evaluating fellow employees for potential discipline is not fairly within the scope of a unit employee's job responsibilities and hence a union proposal that would limit such assignments is a mandatory subject of bargaining. Following JANESVILLE, then, we find the instant proposal to be a mandatory subject of bargaining to the extent it seeks to preclude CESA from using fellow bargaining unit members to evaluate each other for potential discipline.

Remedial Assistance Proposal

The second disputed portion of the proposal provides:

> If the employer finds that an employee is not performing his or her job satisfactorily, the employer must attempt to provide appropriate remedial assistance prior to instituting disciplinary procedures unless circumstances make such assistance impossible.

We agree with CESA that the foregoing language is likely to be interpreted as requiring the employer to provide remedial assistance in most circumstances. CESA also correctly points out that the Commission and the Wisconsin Supreme Court have previously deemed certain proposals requiring employers to assist employees with performance deficiencies to be permissive subjects of bargaining. In CITY OF BELOIT, WERC DEC. NO. 11831-C (WERC, 9/74), the Commission concluded that the following proposal was not mandatory:

Teacher Supervision and Evaluation

. . .

E. 1. Definite positive assistance shall be immediately provided to teachers upon recognition of 'professional difficulties.' For the purpose of this article the term 'professional difficulty' shall apply to deficiencies observed in classroom management, instruction skill, and/or professional preparation.

2. Beginning immediately with the conference after the classroom observation, specific approprite (sic) direction shall be offered to guide the individual toward the solution of his particular professional problem.

Suggested actions shall include at least three of the following:

(a) Demonstration in an actual classroom situation

(b) Direction of the teacher toward a model for emulation, allowing opportunities for observation

(c) Initiation of conference with evaluator, teacher and area coordinator or department chairmen to plan positive moves toward improvement of professional classroom performance.

(d) Guidance for the teacher toward professional growth workshops

(e) Observation, continued and sustained, by the evaluator to note the day-to-day lessons and their interrelationships.

(f) Maintenance and expansion of the collection of professional literature with assigned reading, designed to suggest possible solutions to identified problems.

. . .

In BELOIT, issued only a few years after the passage of the Municipal Employment Relations Act (MERA), the Commission was confronted with numerous issues of first impression regarding mandatory and permissive subjects of bargaining. In that context, where the foregoing "assistance" proposal was only one of many under scrutiny, the Commission's analysis understandably was less exhaustive regarding some proposals than others. As to a number of issues, including "length of observation period, openness of observation, number of evaluations, and frequency of observations," and 'copies of observation reports and conferences regarding same, … teachers' objections to evaluations ...[and] complaints made by parents, students and others," the Commission held that they were mandatory subjects of bargaining. The Commission reasoned that such matters constitute the "techniques [that] comprise the procedural aspects" of a just cause standard, which earlier in the same decision

the Commission had found to be mandatorily bargainable. However, the Commission found that certain other proposals, including the foregoing assistance provision, were not mandatory, employing the following relatively conclusory reasoning:

> On the other hand, the proposals involving the selection and qualifications of 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. at 20 (emphasis added). On reconsideration, the Commission added, "The proposal of the Association regarding such 'assistance' would, in effect, pertain to the District's responsibility to improve the skills of the teacher. We deem that such a responsibility is not subject to mandatory bargaining ...." The Wisconsin Supreme Court upheld the Commission's determination regarding the assistance proposal in similarly abbreviated language: "While such assistance to teachers having professional difficulties is not unrelated to their continued employment or promotion, it is evident that the primary relatedness is to the 'management and direction' of the school system." BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS. 2D 43 (SUP. CT. 1976) at 67. Neither the Commission nor the Court differentiated for analytical purposes between the general concept of assistance to under-performing employees and the substantively more predominant element of the BELOIT proposal, i.e., confining the school district as to specific techniques in providing such assistance.[1]

The Commission again considered the mandatory/permissive nature of various elements of teacher evaluation proposals in JANESVILLE SCHOOL DISTRICT, DEC. NO. 21466 (WERC, 3/84). There the school district challenged in relevant part the following Union proposals:

> Section 1. Elementary and secondary teachers shall be evaluated pursuant to uniform evaluation criteria and written evaluation instruments, developed for their respective levels, to insure that teacher performance is measured consistently by all persons charged with the responsibility for the evaluation of classroom teachers. . . .

[1]We note that the Court in BELOIT qualified its approval of the Commission's decision on the assistance issue by stating, "On the record before it the commission acted properly in so concluding." BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS. 2D AT 67 (emphasis added). That record, of course, included the full actual language of the assistance proposal at issue there, including the detailed limitations on the techniques managers could choose in providing assistance.

Section 3. Classroom Visitation.

a. Classroom visitation shall be one phase of the evaluation process and shall be done on a planned, systematic basis.

. . .

c. The District shall conduct at least two (2) classroom visitations each school year, as part of the evaluation process for first and second year teachers. Teachers with three (3) years or more experience shall have at least one (1) classroom visitation each school year. All classroom visitations shall be for a minimum of thirty (3)) minutes. Evaluator(s) shall be physically present during the classroom visitation.

In challenging the foregoing proposal in JANESVILLE, the employer acknowledged that the BELOIT decision had held evaluation "procedures" to be mandatorily bargainable. However, the employer urged the Commission to narrowly construe the concept of "procedures" so that the procedural aspects would not "devour" the substantive aspects of evaluation, "to the detriment of the District's management prerogatives and educational policies." JANESVILLE at 44. The employer argued, for example, that the Section 1's uniformity-of-criteria requirement shackled the employer's flexibility to tailor evaluation criteria to the needs of any given situation. Further, the employer contended that requiring classroom observation to be part of the evaluation process was not "procedural," but "rather goes to the educational judgment of how to best determine, within the limited financial and professional resources available to it, whether the District is doing its best for the students." ID. at 45. Similarly, requiring that classroom visitations be "planned" and "systematic" rather than fluctuating in spontaneity according to the needs of the particular situation, intruded into the District's prerogative to determine and maintain a quality educational program. ID. Finally, according to the District, dictating the number and length of classroom observations would force the District to conduct observation that may be unnecessary and thus "expend resources currently devoted to other educational purposes."

The Commission rejected the foregoing arguments and held that the proposal was fully mandatory. As to the "uniform criteria" requirement, the Commission reasoned:

"As we conclude that consistency of evaluation is as much a part of the just cause standard as the matters of length of observation period, openness of observation, number of evaluations, etc., found mandatory by the Commission and the courts in Beloit, we find he first sentence of Section 1 to be mandatory. . . . [T]he proposal gives the district the flexibility to develop evaluation

> criteria and written evaluation instruments which differ from instruction level to instructional level. Thu, the District retains sufficient flexibility to measure the quality of education which is occurring in the classroom."

JANESVILLE, DEC. NO. 21466, at 50. As to the length and number of evaluations, the Commission wrote, "We are cognizant of the impact which the required length and number of evaluations may have upon District supervisory resources. On the other hand, as noted in Beloit, the length and frequency of formal observations by which employees will be evaluated are inherently and directly related to the employes' job security." ID. at 51. The Commission observed that, while hypothetical proposals on this subject could so unduly burden supervisors or be so infrequent as to undermine management of the school system and therefore fall outside the mandatory scope of bargaining, the proposal actually at issue in JANESVILLE did not exceed mandatory parameters. Finally, as to the requirements regarding classroom visitation, the Commission stated, "While it could be argued that it is an educational policy decision as to whether to utilize classroom visitation as any part of the evaluation process, we note that the District currently places primary reliance upon this mode of evaluation and that the job security concerns of employees overcome, on balance, any educational policy or management prerogative choice to evaluate the performance of teachers without viewing the teaching process in the classroom." ID.

The last time the Commission comprehensively reviewed the bargainability of proposals relating to school district evaluation procedures was in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 23208-A (WERC, 2/87). The relevant proposal provided as follows:

> N. TEACHER AND SCHOOL SOCIAL WORKER EVALUATIONS
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> . . .
>
> 4. The evaluator(s), when making his/her report, shall select from among the evaluation cards which most nearly characterizes the teacher for whom the evaluation is being made, and a complete written statement shall be submitted in support of his/her appraisal. This evaluation should be based upon and should include the following:
>
> a. sufficient number of classroom visitations, observations and personal conferences;
>
> b. an analysis of points of strength and weakness, with specific examples;
>
> c. definite suggestions for ways in which improvement may be made, if such be necessary; and
>
> d. a statement of what has been done by the teacher and the evaluator to strengthen classroom instruction."

MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 23208-A, at 40 (emphasis in original). The employer challenged subparagraphs (b), (c), and (d) of the above proposal as going beyond the procedural issues found mandatory in BELOIT and instead controlling the substance of the evaluation itself. The Board specifically attacked subparagraphs (b) and (c) in the proposal as "smacking of" providing assistance to teachers with professional difficulties – held permissive in BELOIT. ID. at 41.

The Commission concluded in MILWAUKEE that subparagraph (b) was mandatory, in that "notice of an employee's relative strengths and weakness allows the employee to act in ways which may insure continued employment." The Commission relied upon BELOIT's rationale, i.e., the integral relationship between the just cause standard, itself a mandatory subject of bargaining, and a requirement that an employee receive notice of how the employer perceives the employee's performance. ID. at 42. The Commission also held that subparagraph (c) was a mandatory subject of bargaining. Rejecting the employer's argument that requiring the employer to suggest ways to improve was simply another form of the "positive assistance" that the Commission had found permissive in BELOIT, the Commission limited the BELOIT holding to proposals that "determine 'management techniques'" and "mandate that the Board provide any of the assistance recommended." ID. Since subparagraph (c) allowed the employer to retain "total discretion to determine the 'management techniques' and Board resources, if any, to be utilized," the proposal "on balance primarily related to employee conditions of employment." ID. In contrast, the Commission determined that subparagraph (d) was permissive, because it implicitly required employer personnel "to take certain action to improve classroom instruction and thus mandates Board action to substantively provide assistance resources." ID.

In the instant case, CESA relies upon BELOIT, as interpreted in MILWAUKEE BOARD OF SCHOOL DIRECTORS, to argue that the Association's proposal is permissive because it essentially mandates that the employer use its resources to provide assistance to teachers who are experiencing performance difficulties before disciplining those teachers. This is certainly a reasonable interpretation/extrapolation of the Commission's precedent. However, we decline to broaden the BELOIT decision beyond its narrow holding on the assistance issue. A narrow application of BELOIT is appropriate on the assistance issue, because in our view the Commission's approach to that issue in BELOIT and subsequent cases was somewhat anomalous with the Commission's corresponding analysis of other closely-related elements of evaluation proposals. More importantly, the proposal that the Commission and Court held permissive in BELOIT was not a simple requirement that the employer provide remedial assistance, but confined the employer to specific and detailed methods for providing assistance. Such detailed methodology encroached significantly more upon managerial prerogatives and discretion than does an assistance requirement that leaves the employer in charge of deciding how and what assistance is appropriate. To the extent the Commission in the MILWAUKEE decision exceeded a narrow construction of the BELOIT decision on the assistance issue, we decline to follow suit here.

Having decided that BELOIT does not squarely address the proposal before us, we undertake the task of balancing the instant proposal's effect upon employee interests, on the one hand, and managerial prerogatives on the other. As to the effect on conditions of employment, we believe that requiring an employer to provide assistance to an employee in overcoming identified performance difficulties is "inherently and directly" related to job security to the same extent as are length and frequency of job observations. JANESVILLE at 51. Requiring an employer to provide skills training/remediation to address identified deficiencies is as much a traditional element in the "just cause" standard as are notice of deficiencies, the number, length, and type of work observations, and consistency/ uniformity of performance standards, all of which have been held to be mandatory because of their relationship to the just cause standard. SEE, E.G., THE COMMON LAW OF THE WORKPLACE, ST. ANTOINE, ED. (BNA 1998) at 165. Indeed, it is axiomatic that a "just cause" standard is essentially corrective in nature, focused on opportunities to improve and thereby remain employed. UNIF. JT. SCHOOL DIST. NO. 1, CITY OF TOMAHAWK, DEC. NO. 18670-D (WERC, 8/86) at 36. We see little to distinguish assistance/training from the other procedural components of just cause, all of which require affirmative effort on the employer's part to help the employee recognize and overcome deficiencies.

On the other side of the balancing test, we recognize that requiring an employer to provide assistance also affects managerial interests. In particular, such a requirement would mandate or influence the expenditure of employer resources. Requiring assistance "unless circumstances make such assistance impossible" also infringes on an employer's discretion to decide that assistance, even if possible, simply may not be worthwhile in a given situation. The proposal also interferes to some extent with management's unfettered discretion to determine whether, when, and how to assist employees in overcoming performance difficulties.

Having identified the factors on each side of the balancing test, our task is to determine which of those sets of competing interests "predominates" or "outweighs" the other. WEST BEND, 121 WIS.2D at 9. We conclude that the assistance proposal at issue here affects job security more than it affects managerial prerogatives. As to mandating employer resources, we note that this was not one of the factors that influenced either the Commission's or the Court's decision in BELOIT. More to the point, few mandatory subjects of bargaining do not explicitly or implicitly dictate the expenditure of management resources. Wages, insurance benefits, and even most evaluation procedure requirements (including number of observations and length of observation periods) also directly affect the employer's resources – either its payroll or the deployment of its supervisors or both. While we agree with CESA that the assistance proposal at issue here would come into play in nearly all situations of performance deficiency (notwithstanding the "unless ... impossible" caveat), the proposal does not on its face dictate an extraordinary, excessive, or burdensome expenditure of resources. Thus, we believe the Commission strayed from the BELOIT rationale when, in the MILWAUKEE decision, the Commission cited the mandatory expenditure of management resources as a basis for finding an assistance proposal similar to the instant one to be a permissive subject of bargaining.

CESA also correctly points out that the instant proposal affects managerial prerogatives by interfering with management's unfettered discretion to determine whether, when, and how to assist employees in overcoming performance difficulties. Discretion to determine the standards for acceptable performance and techniques for improving such performance, is an important managerial interest to weigh in the balancing test. However, as is true of the resource issue, many typical contractual provisions limit to some extent management's discretion regarding fulfillment of its mission but nonetheless are mandatory subjects of bargaining. For example, layoff by seniority limits management's discretion to select the employees it views as most qualified when retrenchment occurs. Similarly, as the Commission noted in JANESVILLE, requiring supervisors to observe classroom performance for a specified length of time and at a specified frequency also interferes with management discretion to decide how much observation, if any, is appropriate in a given situation. ID. at 51. Indeed in JANESVILLE, SUPRA, the Commission found a proposal to be a mandatory bargaining subject where it required a school district to utilize "uniform evaluation criteria" for specific "instructional levels," rejecting the employer's argument that a school district with its variety of educational and development needs must retain the unfettered discretion to determine the criteria by which their teachers – and hence their instructional programs – would be judged, as well as the instructional groupings to which those criteria should apply. Instead, the Commission concluded that the proposal left the district with "sufficient flexibility to measure the quality of education which is occurring in the classroom," and that "consistency of evaluation is as much a part of the just cause standard as the matters of length of observation period, openness of observation, number of evaluations, etc. found mandatory by the Commission and the courts in Beloit." ID. at 50. By the same token, we conclude that remedial assistance is primarily related to employee job security and the just cause standard, so long as the employer retains discretion to determine what and when performance difficulties need to be addressed and what type and amount of assistance is appropriate under the circumstances.

The instant proposal on its face meets the foregoing standard, by allowing the employer discretion to decide in the first instance what assistance is "appropriate" as well as when "circumstances make such assistance impossible." CESA points out, however, that such a provision could be subject to interpretation by an arbitrator if CESA disciplined a bargaining unit member and the Association, in connection with grieving the discipline, disputed the appropriateness of the assistance that management had provided. According to CESA, the possibility that an arbitrator may construe the term "appropriate" differently than CESA renders illusory the discretion that CESA retains under this language. We recognize that arbitral review does not leave CESA's discretion completely unfettered However, the Commission has firmly held that the possibility of arbitral review cannot in itself render a proposal permissive. For example, rejecting a similar argument in JANESVILLE, the Commission stated:

> To the extent that the District focuses upon arbitral review of the 'reasonableness' of the qualifications it establishes or the 'uniformity' of their application, we recognize the potential for an arbitrator determining that a

> qualification is unreasonable or was not uniformly applied to all unit personnel . . . [B]alanced against this limitation upon management action is the Association's interest in ensuring that the District does not render assignment procedures a sham by developing qualifications which are tailored to only one individual or by treating equally qualified individuals differently. The relationship of these limitations on employer action to wages, hours and conditions of employment in our judgment predominates.

JANESVILLE, DEC. NO. 21466 at 107l. See also, CITY OF MILWAUKEE, DEC. NO. 30427 (WERC, 7/02) at 11.

While CESA's discretion would be subject to arbitral review and hence not totally unfettered, a contractual standard such as "appropriate" or "reasonable" still leaves the employer a full panoply of options, methodologies, and "management techniques" (BELOIT at 20 and MILWAUKEE at 42) from which to choose in its own judgment in the first instance.[2] In this respect, the language at issue here is markedly different from that which the Commission and Court found to be permissive in BELOIT. The proposal in BELOIT itemized six remedial methods, at least three of which the employer would have been compelled to utilize. Given the variety of performance problems that could arise the variety of available remedial options, and the unpredictable resource limitations (both financial and personnel-related) that employers face, managers need the flexibility to decide how best to remedy performance difficulties in any given situation – albeit that judgment may be subject to arbitral review. We think that the managerial interest in flexibility is sufficiently safeguarded in the instant proposal and hence does not outweigh the predominant effect of the proposal on employee job security.[3]

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[2]As the Commission noted in CITY OF MILWAUKEE, DEC. NO. 30427 at 11 n. 2, "because the arbitral review of management action will occur well after the [action taken], there is no 'prior restraint' on any management action and there is no realistic potential for any reversal of management action to occur within a timeframe that would negatively impact on the management's need to respond quickly to changing … needs."

[3]Prior Commission decisions regarding the bargainability of on-the-job training or "in-service programs" support the distinction we have drawn between a requirement that assistance be provided, on the one hand, and restrictions on how that assistance will be provided, on the other. The issues of whether or not the employer will provide such programs and how many/which days will be devoted to such programs affect employee job security (knowledge of performance expectations and training to meet them) more than they interfere with managerial prerogatives. SEE, E.G., BELOIT, DEC. NO. 11831-C at 20. On the other hand, the precise content of those programs (e.g., the providers, the materials, the subject matter) is less related to working conditions and more quintessentially a matter of managerial judgment. OAK CREEK-FRANKLIN JT. SCHOOL DIST. NO. 1, DEC. NO. 11827-D (WERC, 9/74), AFF'D DANE CO. CIR. CT. (11/75). While the Commission in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 17504 - 17508 (WERC, 12/79) states that the decision whether or not to provide in-service training is permissive (ID. at 22), the Commission provided little insight into that conclusion. Indeed, the Commission in that case relied somewhat obscurely upon an Examiner's decision in UNIFIED SCHOOL DIST. NO. 1 OF RACINE COUNTY, DEC. NO. 13696-C, 13876-B (FLEISCHLI, 4/78), where the Examiner stated (in dicta) that the "content of the in-service program" was not a mandatory subject of bargaining – a proposition with which we essentially agree. ID. at 70. Accordingly, we decline to take contrary guidance from the 1979 MILWAUKEE decision.

For the foregoing reasons, we hold that (1) the non-supervisory employee evaluation proposal is a mandatory subject of bargaining to the extent it prevents the employer from unilaterally utilizing evaluations performed by bargaining unit employees to support disciplinary action; (2) the non-supervisory employee evaluation proposal is a permissive subject of bargaining to the extent it prevents the employer from unilaterally utilizing evaluations performed by non-supervisory individuals other than bargaining unit employees to support disciplinary action; and (3) the remedial assistance proposal is a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 29th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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