

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant,

vs.

**MADISON METROPOLITAN SCHOOL DISTRICT and
THE BOARD OF EDUCATION OF THE MADISON
METROPOLITAN SCHOOL DISTRICT**, Respondents.

Case 295
No. 64514
MP-4132

Decision No. 31345-B

Appearances:

Lawton & Cates, S.C., by **Attorney Richard Thal**, 10 East Doty Street, Suite 400, Madison, Wisconsin, appearing on behalf of the Complainant, Madison Teachers, Inc.

Attorney Malina Piontek, Assistant Director of Labor Relations, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin, appearing on behalf of the Respondents, Madison Metropolitan School District and the Board of Education of the Madison Metropolitan School District.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On February 18, 2005, Madison Teachers, Inc., herein the Union, filed a complaint with the Wisconsin Employment Relations Commission against the Madison Metropolitan School District and the Board of Education of the Madison Metropolitan School District, herein collectively the District. The complaint alleged that the District committed prohibited practices under Sec. 111.70(3)(a)1 and 4 of the Wisconsin Statutes by directly conducting surveys and holding meetings with bargaining unit members to obtain input from them regarding the continued scheduling of a monthly Support Services Week without participation by the Union. The Commission appointed John R. Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On March 2, 2005, District filed a motion seeking an order to make

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the complaint more definite and certain. The motion was denied, but on June 22, 2005, the Union filed an Amended Complaint and, on September 8, 2005, the District filed an Answer. A hearing was conducted on September 22, 2005 in Madison, Wisconsin. The proceedings were transcribed and the transcript was filed on October 12, 2005. The parties filed their initial briefs by November 23, 2005 and filed their reply briefs on December 8, 2005, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. The Complainant, Madison Teachers, Inc., is a labor organization which maintains offices at 821 Williamson Street, Madison, Wisconsin.

2. The Respondent, Madison Metropolitan School District, is a municipal employer which maintains offices at 545 West Dayton Street, Madison, Wisconsin.

3. At all times pertinent hereto, a collective bargaining relationship existed between Madison Teachers, Inc. and Madison Metropolitan School District, wherein the Union was the recognized bargaining representative for:

“All regular full-time and regular part-time certificated teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by Madison Metropolitan School District including psychologists, psychometrists, social workers, school nurses, attendants and visitation workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, guidance counselor, project assistant, principal investigators, researchers, photographer technician, teachers on leave of absence, and teachers under temporary contract, but excluding supervisor – cataloging and processing, on-call substitute teachers, interns and all other employees, principals, supervisors and administrators.”

4. The bargaining unit referenced in Finding #3 includes a classification of employees referenced in the collective bargaining agreement as Speech and Language Clinicians. The Speech and Language Clinicians are part of the District’s Department of Educational Services and provide therapy and consulting services to students with special speech and language needs, as well as their parents and teachers.

5. The Speech and Language Clinicians are supervised by the Executive Director of the Department of Educational Services, Dr. Jack Jorgensen, and Special Education Coordinator Ted Szalkowski.

6. In 1986, the District implemented a program referred to as Support Services Week in response to concerns regarding the workload of Speech and Language Clinicians. The effect of Support Services Week is to release the Speech and Language Clinicians from their normal student contact duties one week out of four in order to provide them with protected time to do their necessary paperwork. The Union was involved in negotiating the development of Support Services Week.

7. Over the years the Union has bargained with the District over a number of other workload issues, including class sizes, additive pay and special education duties.

8. The management rights clause of collective bargaining agreement states, in Article I, Section A., Paragraph 3:

“The Board further recognizes the unique value of the teaching staff and the administrative officers of the Board of Education to advise the Board on matters of policies relating to pupils, the building construction and maintenance of schools, and especially the instruction of pupils; and instructs the Superintendent to seek the advice and counsel of the teaching staff and the administrative staff whenever the Superintendent deems the advice and counsel pertinent.”

9. During the 2004-2005 school year, Dr. Jack Jorgensen undertook an examination of the way in which instruction/therapy services were provided to students with speech and language needs, including an assessment of the future utility of Support Services Week. On December 3, 2004, he communicated his intention to the District’s Speech and Language Clinicians, as follows:

TO: Speech and Language Clinicians

FROM: Jack Jorgensen, Executive Director
Department of Educational Services

RE: Speech and Language Support Services Week

I have asked Ted Szalkowski, Special Education Coordinator for Speech and Language, to put together a committee to assist with examining the value and cost effectiveness of speech and language Support Services Week. As you know, Support Services Week has been in place for many years and during these fiscal times, it has become necessary to reexamine this practice and determine its’ future as part of speech and language service delivery.

To help guide my decisions, the following actions will be taken:

- Principals will be asked for their feedback regarding Support Services week.

- Each clinician will be asked to complete a survey regarding the tasks they perform during support services week and before submitting, to share their response with their principal.
- A committee will be formed second semester to review the input from principals and clinicians and to formulate recommendations.

It is my expectation that by the end of the 04-05 school year, the committee will have completed their work and forwarded to me their recommendations. These recommendations will be used to make a final decision regarding support services week prior to the 2005-06 year.

10. Jorgensen directed Ted Salkowski to create a work group to review the delivery of speech and language services to the District's students, which was comprised of Salkowski, two middle school principals and five Speech and Language Clinicians.

11. On January 10, 2005, John Matthews, Executive Director of Madison Teachers, Inc., corresponded with Jorgensen, as follows:

Re: Speech and Language Support Services Week

Dear Jack:

We write to advise that we have received and reviewed your December 3, 2004 communication addressed to District employed Speech and Language Clinicians, the subject of which is "Speech and Language Support Services Week". In said correspondence you state, *"As you know, Support Services Week has been in place for many years and during these fiscal times, it has become necessary to critically reexamine this practice and determine its' future as part of speech and language service delivery."*

The subject of your memo, Speech and Language Support Services Week, is a clear longstanding past practice well known to, and accepted by, both the District and the Union. As such, it is an established condition of employment, which is as binding on the parties as are all other written provisions of the MTI/MMSD Teacher Collective Bargaining Agreement.

Given the above, the Administrative Rules established by the Wisconsin Employment Relations Commission, and Wis. Stat. 111.70, the District cannot unilaterally terminate or change an established past practice. As you know, Speech and Language Support Services Week was formally discussed between the parties during negotiations for the 1999-2001 Teacher Contract. During these negotiations, you explained that the District was already accommodating the Union's workload proposal, by providing Support Services Week during

which Speech and Language Clinicians perform the paperwork associated with their responsibilities. That Agreement, and each successor Agreement, was executed by the parties with the knowledge that the practice of scheduling Speech and Language Support Services Week would continue.

Good intentions aside, of concern to the Union is the District's unilateral establishment of a committee consisting of MTI represented employees, for the purpose of formulating recommendations concerning matters which are by Statute, related to wages, hours and conditions of employment, as regards the impact of the above-referenced change in working conditions. Such matters are exclusively reserved to negotiations between MTI and the District. Please, therefore, promptly disband the referenced committee, and confirm your action to me.

Finally, we request to be provided copies of all future communication from the District addressed to MTI represented employees, as it relates to the instant matter. Should you have any questions as it concerns our request, please feel free to contact me.

12. On the same date, Matthews corresponded with the Speech and Language Clinicians, as follows:

TO: Speech and Language Clinicians
FROM: John A. Matthews, Executive Director
RE: Speech and Language Support Services Week

We write to advise that we have notified the District that the Administration's action unilaterally establishing a committee comprised of MTI members to review and make recommendations relative to the future of Support Services Week is not permitted by law. Please see my attached letter to Jack Jorgensen.

Speech and Language Support Services Week clearly meets the established standard to be defined as a "past practice". Arbitrators have consistently recognized the existence of a past practice when certain conditions are met. One often quoted phrase describes those conditions as follows:

"In the absence of a written agreement, "past practice" to be binding on both parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." (Elkouri and Elkouri, How Arbitration Works, 6th Ed., P. 608).

While we are unable at this time to provide specific answers as to what the future will hold for Speech and Language Programming in the Madison Metropolitan School District, rest assured that the Union will continue to do all possible to advance the cause of Speech and Language Clinicians.

Solidarity!

13. On February 2, 2005, Matthews again corresponded with Jorgensen, as follows:

Re: Speech and Language Support Services Week

Dear Jack:

We write relative to the above, in follow-up to our initial correspondence to you dated January 10, 2005. Our January 10 letter, copy attached, sets forth the Union's concerns regarding the change in working conditions for Speech and Language staff, given your action.

In our prior letter, we explained that your appointment of Union members to discuss subjects reserved to the Union, as the bargaining agent violates Wis. Stat. 111.70. We await confirmation that you have disbanded said District Committee consisting of MTI represented employees. Additionally, it has been brought to our attention that District administration intends to survey Union members on this matter. We believe that such action also constitutes a violation of Wisconsin Statute 111.70. Your prompt attention please.

14. On February 3, 2005, Szalkowski corresponded with the Speech and Language Clinicians, as follows:

TO: Speech and Language Clinicians

FROM: Ted Szalkowski, Special Education Coordinator

RE: Speech and Language Support Services Week Committee

Thank you for your involvement in the process of reviewing the delivery of Speech and Language services to MMSD students. Madison has a rich history of staff involvement in analyzing the ever-changing ways in which to best provide instructional services to our students. To adequately address the questions and issues outlined in Jack Jorgensen's memo of December 3, 2004, I require your assistance. Information has already been gathered from principals. Input from both clinicians and principals will be incorporated into the recommendations that I will ultimately make to Jack. The next steps in the process include:

1. Conducting a survey of Speech and Language Clinicians to gather their input regarding support services week, and
2. Convening a series of meetings with our committee to examine the information that has been gathered, including the results of the surveys to both principals and staff, and to formulate recommendations to Jack Jorgensen for his consideration before he renders any decision about the delivery of speech and language instructional services including the future status of Support Services Week.

The four meetings I have scheduled are listed below. Please make plans to attend each meeting. I look forward to your participation and contributions. If you need help coordinating the time away from your principal please contact me.

February 14	1:00-4:00	Howard Johnson's Regent Room available	Parking
March 8	1:00-4:00	To Be Determined	
April 6	8:30-11:30	To Be Determined	
May 3	1:00-4:00	Howard Johnson's Regent Room available	Parking

15. On February 9, 2005, the Speech and Language Clinicians were surveyed regarding their workload, in which they were asked to breakdown their work activities according to the percentage of time spent on each.

16. The Support Services Work Group met on February 14, 2005, reviewed the responses to the initial survey, and determined that a second survey was necessary to obtain additional information. The Union was not invited to participate in the Work Group despite the expressed concerns of group members from the bargaining unit.

17. On February 16, 2005, Jorgensen replied to Matthews previous correspondence, as follows:

RE: Speech and Language Support Services Week

Dear John,

I am responding to your letters dated January 10, 2005 and February 2, 2005 in which you assert that I am violating the Teacher Contract and state law by initiating a review of Support Services Week for Speech and Language Clinicians.

You state in your letter that Support Services Week is a clear, longstanding past practice between the District and the Union. I understand you to be referring to "past practice" as it is used in the legal arena. I was not acknowledging any legal practice in my December 3, 2004, communication to staff, nor am I authorized on behalf of the District to make any agreements with MTI which are in effect, as you state in your letter, "as binding on the parties as are all other written provisions of the MTI/MMSD Teacher Collective Bargaining Agreement." That role is reserved to Labor Relations. When I refer to "this practice" in my memo, I am referring to management's decision to provide services to students in a certain manner. It is time to review that decision to determine whether it continues to be appropriate for today's students in today's schools.

In my role as Director of Educational Services, I am continuously examining our policies, procedures and instructional practices to determine their efficiency and effectiveness in accomplishing our work for the children of this District. My decision to examine the work that is being done by clinicians during the first week of each month is motivated by several factors:

1. A formal District-wide review of S/L Support Services Week has never before been initiated.
2. Conversations with clinicians and principals have led me to believe that we are no longer consistent across the District, if we have ever been, in how this week is being used by clinicians.
3. Lastly, my intent has been, and continues to be, that a thorough a systematic look at this week may be undertaken using data from both clinicians and principals to help inform our discussions. The advisory committee that has been formed will review, discuss and analyze this data and respond to a series of questions that I have forwarded to the committee chairperson, Ted Szalkowski, Coordinator for Speech and Language.

Your letter indicates that "Speech and Language Support Services Week" was formally discussed between the parties during the negotiations for the 1999-2001 Teacher Contract." While I recall using Support Services Week as one of

several examples of why the District was not interested in including IEP caps for speech and language clinicians in the contract, I did not state in bargaining that the District would continue to have Support Services Week as part of its instructional delivery model for all perpetuity. In fact, there was no commitment by the District to continue this model beyond the duration of the 1999-2001 Teacher Contract.

I do not intend to disband the advisory committee. The committee has already met once and will continue to meet as scheduled to consider the survey results already gathered from S/L clinicians and principals as well as other relevant data as they discuss matters of instructional policy, not wages, hours and conditions of employment. The committee will not be engaged in negotiations of any kind. The Teachers Contract, in Section I-A, specifically recognizes the value teaching staff has to offer administration in advising on matters of policy relating to the instruction of pupils and further instructs the District to seek the advice and counsel of teaching staff whenever the advice is pertinent. Thus, the committee, consisting of administration and teachers, fully meets the words and spirit of the Teacher Contract and your conclusion that the work of this committee is in violation of the contract or Wisconsin law is without basis.

The committee is only one part of a process of reviewing the way instruction is delivered to students with speech and language needs. This review process will ultimately conclude with a decision by *me* to continue, modify or eliminate this week. My hope is that clinicians will see the value of having their thoughts and input represented as part of this process. My expectation is that the process will go forward without impediment.

18. Additional meetings of the Support Services Work Group were held on March 8, 2005, April 7, 2005 and May 3, 2005. The group concluded that Support Services Week should be continued, which was shared with the administration.

19. On June 27, 2005, Jorgensen issued a report of the review process which recommended continuation of Support Services Week.

20. The creation of the Support Services Work Group to review and make recommendations regarding the future of Support Services Week, including Speech and Language Clinicians, but not including the Union, was an attempt to bargain individually with employees.

21. The District's action of surveying the Speech and Language Clinicians as to their opinions about the continuation of Support Services Week was an attempt to bargain individually with employees.

CONCLUSIONS OF LAW

1. For the purposes of this proceeding, the Complainant, Madison Teachers, Inc., constitutes a labor organization as defined in Sec. 111.70(1)(h), Wis. Stats.

2. For the purposes of this proceeding the Respondent, Madison Metropolitan School District, constitutes a municipal employer as defined in Sec. 111.70(1)(j), Wis. Stats.

3. In creating the Support Services Work Group to review and make recommendations regarding the future of Support Services Week, the District sought to bargain directly with individual employees represented by the Union in violation of Secs. 111.70(3)(a)1, and 4, Wis. Stats.

4. In soliciting the opinions of the Speech and Language Clinicians regarding the continuation of Support Services Week the District sought to bargain directly with individual employees represented by the Union in violation of Secs. 111.70(3)(a)1, and 4, Wis. Stats.

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

ORDER

To remedy its violation of Secs. 111.70(3)(a)1, 4 and 5, regarding bargaining with individual employees represented by Madison Teachers, Inc., the District shall immediately:

a. Cease and desist from:

(1) Organizing advisory groups, conducting meetings with employees and soliciting opinions directly from employees for the purpose of collectively bargaining with individual employees represented by Madison Teachers, Inc.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(1) Notify employees represented by Madison Teachers, Inc. by posting the attached "APPENDIX A" on a public bulletin board in the District Administration Building and on bulletin boards in the employees' breakrooms in all schools of the District. The notices shall remain posted and unobstructed for a period of thirty days.

(2) Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the City has taken to comply with this Order.

Dated at Fond du Lac, Wisconsin, this 24th day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

APPENDIX "A"

**NOTICE TO EMPLOYEES OF THE MADISON METROPOLITAN SCHOOL
DISTRICT REPRESENTED BY MADISON TEACHERS, INC.**

As ordered by the Wisconsin Employment Relations Commission, Madison Metropolitan School District notifies you as follows:

1. Madison Metropolitan School District will cease and desist from organizing advisory groups, such as the Support Services Work Group created in March 2005, and conducting meetings with employees or soliciting opinions directly from employees, for the purpose of collectively bargaining with individual employees represented by Madison Teachers, Inc.

2. Neither the Madison Metropolitan School District, nor the administrators or members of the Board of Education thereof will seek to collectively bargain with any individual employee represented by Madison Teachers, Inc., unless that employee has been designated by Madison Teachers, Inc. as its representative.

MADISON METROPOLITAN SCHOOL DISTRICT

By _____
Name Title

MADISON METROPOLITAN SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

BACKGROUND

This complaint arises out of an effort by the Madison Metropolitan School District to evaluate the delivery of speech therapy services during the 2004-05 school year, with a view toward making changes in the structure of the program if deemed appropriate. Specifically, the District wanted to review the efficacy of a program known as Support Services Week. Madison Teachers, Inc. (MTI), which is the exclusive bargaining representative for the District's represented professional employees, including the District's Speech and Language Clinicians (SLCs), objected to the District's activities and alleged that they constituted individual bargaining with represented employees, contrary to the Municipal Employment Relations Act.

Support Services Week has been a feature of the delivery of speech therapy services in the Madison Metropolitan School District since approximately 1986. At that time workload concerns were raised by the Speech and Language Program Support Teachers (PSTs). After considering a number of alternatives, the Board of Education and the Director of Special Education approved a plan creating Support Services Week - one week per month within which the SLCs would perform their planning and support activities, leaving the remainder of the month for direct contact with students.

In late 2004, Dr. Jack Jorgensen, the District's Executive Director of the Department of Educational Services, notified the school principals and SLCs that he had directed Ted Szalkowski, Special Education Coordinator for Speech and Language, to survey the SLCs about their workload and duties during Support Services Week, and to form a committee to review the survey results and formulate recommendations about the future of the model. Subsequently, Szalkowski formed a work group comprised of himself, two school principals and five SLCs to conduct the review. MTI Executive Director John Matthews wrote to Jorgensen in January 2005 expressing his position that the future of Support Services Week was a subject for negotiation and that any unilateral change in the program by the District would be viewed as a prohibited labor practice in violation of Sec. 111.70, Wis. Stats. Matthews also objected to the formation of the review committee as being a violation of MTI's rights as exclusive bargaining representative for the SLCs. Matthews likewise advised the SLCs of the Union's position. Jorgensen responded on February 16, 2005 and indicated that he did not consider the committee or review to be violative of either the contract or statute and that he would make a decision on the future of Support Services Week after the committee's review was completed.

On February 9, 2005, at a regularly scheduled Speech and Language Large Group meeting, the SLCs were given the Support Services Week survey. The Support Services Work

Group reviewed the survey results and determined that additional data was necessary. A second survey was developed and administered to the SLCs and the additional information gathered was incorporated into the work group's review. Ultimately, the work group recommended continuing with Support Services Week and, based in part upon that recommendation, Jorgensen determined to maintain the program.

On June 22, 2005, MTI filed a prohibitive practice complaint against the District, alleging that the surveys directed toward the SLCs and the formation of the Support Services Work Group constituted individual bargaining with Union members, in violation of Secs. 111.70(3)(a)1 & 4, Wis. Stats. The District answered, denying the complaint and the matter was heard on September 22, 2005.

POSITIONS OF THE PARTIES

The Union

MTI maintains that the District committed prohibited practices by surveying the SLCs about Support Services Week and by forming an advisory committee without Union representation to make recommendations about the future of Support Services Week. MTI contends that the employer may not directly deal with Union members when the effect thereof would be to erode or undermine the Union's position as exclusive bargaining representative. CITY OF MILWAUKEE, DEC. NO. 26354-A, (McLaughlin, 4/92), DEC. NO. 26354-B (WERC, 5/92). Unilateral action may be a violation of law if it involves a mandatory subject of bargaining, but direct dealing with employees is unlawful even as to permissive subjects. In cases where the employer has the right to act unilaterally, it still may not deal directly with employees as if they had no representation.

Soliciting input directly from the SLCs about Support Services Week was a violation of MERA. It is immaterial that the District ultimately did not abolish Support Services Week. In fact, it is more insidious because it tends to suggest to employees that desired results are best obtained by dealing directly with the employer, rather than through the Union. It is also immaterial that MTI did not originally participate in the creation of Support Services Week. MTI has bargained with the District over a number of issues regarding the workload of SLCs over the years. In 1999, MTI sought to cap the number of Individualized Education Plans that could be assigned to an SLC, but dropped its proposal only after the District reaffirmed its commitment to Support Services Week. Thus, there is a long history of Union involvement in workload issues affecting the SLCs.

The SLCs were surveyed on February 9, 2005 and were asked, among other things, for their opinions about whether Support Services Week should be continued. The surveys were conducted at the time the Union was forming its bargaining proposals for the 2005-07 contract negotiations. This usurped the Union's prerogative to solicit information and opinions from its members on workload issues and had the potential effect of undermining the Union's position with its members.

The District also unlawfully bypassed MTI when it established an advisory committee, which included bargaining unit members but which excluded MTI. Jorgensen created the committee to provide the District with recommendations about the future of Support Services Week. This unlawfully excluded MTI from a committee designed to address an issue over which the Union wished to bargain. Jorgensen justified his action on the grounds that the committee was to advise on instructional policy, which is not a mandatory subject of bargaining, and that the District was authorized to establish the committee under the powers reserved to it in the management rights clause of the contract. Neither of these explanations is adequate.

Section I-A-3 of the contract does not constitute a waiver by the Union of its right to bargain over Support Services Week. Such a waiver must be clear and unmistakable. Even if the Union did waive its right to bargain over Support Services Week, however, it did not thereby consent to direct dealing with bargaining unit members. CITY OF MILWAUKEE, *supra*. This also answers the argument that the committee was only created to advise on matters of instructional policy, a permissive subject of bargaining. Even if a subject is permissive, this does not give the District the right to bypass the Union and deal directly with the bargaining unit members. The Union members expected MTI to be involved in the process and by excluding MTI the District undermined its status as the exclusive bargaining representative. This constituted a violation of MERA and the District should be ordered to cease and desist from this practice and post appropriate notices to that effect.

The District

The District asserts that the Union bears the burden of proof and persuasion in this matter by a clear and satisfactory preponderance of the evidence, and that the Union has failed to meet that burden.

The Union claims that the District violated Secs. 111.70(3)(a)1 & 4, Stats. by establishing an advisory committee and surveying bargaining unit members, which the Union characterizes as bargaining directly with employees. The Union has not, however, shown that any bargaining took place. Individual bargaining involves direct negotiations between employer and employee. ST. CROIX COUNTY, DEC. NO. 28791-A (Crowley, 5/97).

The District contends that surveying its employees about their experience with an instructional delivery model and setting up an advisory committee does not constitute individual bargaining, especially since seeking the advice and counsel of the teachers is specifically contemplated by Section I-A-3 of the contract. This language has been in the contract for many years and to find the District to be in error in this case would render it meaningless. If the language is to be given meaning, the District's actions must be upheld.

The management rights clause in Section I-A-1 confers on the District the right to determine the program of instruction and the methods of delivery. The February 9 survey was intended to facilitate this function. The survey was not a form of bargaining. The SLCs were

asked how much of their time was spent on different job activities. The survey was prepared by SLCs from an article published by the American Speech and Hearing Association and did not solicit proposals or address mandatory subjects of bargaining. The District's actions in this case were consistent with its actions in the past in reviewing the speech and language program without input from MTI.

Sec. 111.70(3)(a)1 & (4), Stats. do not require the District to negotiate with the Union on non-mandatory subjects. The statute specifically states that the employer need not bargain over "...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 employes in a collective bargaining unit." *Id.* The Wisconsin Supreme Court has established a balancing test that requires a determination of whether a topic is primarily related to wages, hours and conditions of employment, as opposed to public policy or management of the district, in evaluating whether it is a mandatory subject of bargaining. *WEST BEND EDUCATION ASS'N V. WERC*, 121 WIS. 2D 1, 7-9 (1984). The study of Support Services Week was intended to review an instructional delivery model and dealt with educational policy more than wages, hours and conditions of employment. Teacher involvement in curriculum is a permissive subject of bargaining, as is allocation of planning and preparation time. Had the District decided to change Support Services Week, therefore, it could have done so without the Union's input. Since the matter was a permissive subject, therefore, the complaint should be dismissed.

The Union in Reply

The Union contends that the District did not have the right to deal directly with bargaining unit members by surveying them about Support Services Week, nor did it have the right to establish an advisory committee to address the subject without Union participation. The Union and District have a long history of bargaining over workload issues concerning the Speech and Language Clinicians and the District's action here had the effect of undermining the Union's position as exclusive bargaining representative.

The District is incorrect in asserting that its conduct was lawful because Section I-A-3 allows it to seek advice and counsel from the teachers and because the continuation of Support Services Week is a permissive subject of bargaining. Neither the contract language, nor the determination that the subject was permissive allow the District to bargain directly with the teachers.

Dr. Jorgensen made it clear that the impetus for the review was shrinking resources. Clearly this was not an instructional policy issue, but was driven by a desire to find a way to increase the Speech and Language Clinicians' workload. In recent years, many districts have faced these workload issues due to budget problems and governmental mandates. This is not dissimilar to other workload issues over which the parties have bargained over the years. Further, the Union does not dispute that there are matters the District could discuss directly with the clinicians without Union participation, but this is not one such.

The District argues that the Union waived the right to bargain over this issue, but such a waiver must be clear and unmistakable. The language of Section I-A-3 does not constitute such a waiver. ST. CROIX COUNTY, DEC. NO. 28791-A (Crowley, 5/97), cited by the District, holds that the employer's right to communicate with employees is limited and the employer cannot deal with the Union through the employees. Likewise, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093 (WERC, 2/28/83) is not on point. On the other hand, CITY OF MILWAUKEE, DEC. NO. 26354-A, (McLaughlin, 4/92), DEC. NO. 26354-B (WERC, 5/92) makes it clear that the employer cannot deal directly with the employees, even if a subject is permissive, where the effect is to undermine the Union. Thus, the complaint should be upheld.

The District in Reply

The Union's reliance on CITY OF MILWAUKEE, DEC. NO. 26354-A, (McLaughlin, 4/92), DEC. NO. 26354-B (WERC, 5/92) is erroneous. In that case, Examiner McLaughlin addressed a situation where the parties had specifically bargained language into the contract requiring them to negotiate over changes in the drug policy. There is no such agreement here. Also, the other cases cited by the Union involve mandatory subjects of bargaining, which this case does not. The Union also states that CITY OF MILWAUKEE prohibits the employer from information gathering from employees on matters subject to collective bargaining. There is nothing in that case forbidding employers from information gathering and, even if there were, this case does not involve a mandatory subject of bargaining. Further, the Union overreaches by suggesting that the District may only inquire about matters of instructional policy that have not been raised in bargaining.

The Union's position is contrary to public policy. The District cannot fulfill its function of properly educating children if it cannot communicate directly to the teachers about matters of instructional policy. Such communication may come through surveys or advisory committees and the law does not require Union participation in such discussions. The complaint should be dismissed.

DISCUSSION

The complaint alleges that the District violated Secs. 111.70(3)(a)1 & 4, Wis. Stats. when it undertook a review of its Support Services Week in 2005. Specifically, the Union alleges that by creating an advisory committee including bargaining unit members, but excluding the Union, and by surveying bargaining unit members about Support Services Week, the District engaged in individual bargaining with its employees. Sec. 111.70(3)(a)1 makes it unlawful for an employer to interfere with employees' rights guaranteed under Sec. 111.70(2), which includes the right to bargain collectively through representatives of their own choosing. Sec. 111.70(3)(a)4 prohibits an employer from refusing to bargain collectively with a representative chosen by a majority of the members of a collective bargaining unit. Individually bargaining with employees has been construed as a refusal to bargain under

Sec. 111.70(3)(a)4.¹

The District asserts that its conduct in forming the advisory committee and surveying the Speech and Language Clinicians was not individual bargaining, but was aimed at instructional policy. Instructional policy is not a mandatory subject of bargaining. It is asserted therefore, that the District was within its rights to address the SLCs on this matter without including the Union.

The Union relies primarily on CITY OF MILWAUKEE, DEC. NO. 26354-A (McLaughlin, 4/92), DEC. NO. 26354-B (WERC, 5/92) in support of its argument. In that case, the City was alleged to have violated Secs. 111.70(3)(a)1, 2, 4 & 5, Stats, by modifying its drug testing policy without bargaining the issue with the Milwaukee Police Association, the exclusive bargaining representative of the City's police officers. The parties had included language in their collective bargaining agreement specifying that any proposed changes in the policy would be collectively bargained. Of particular relevance to this case is the fact that before changing the policy the City scheduled a public meeting to solicit input about potential changes in the policy and had the notice of this meeting read to all officers in the Police Department at roll call to encourage their attendance and participation. The notice was also posted on all departmental bulletin boards. Examiner McLaughlin concluded that the Department's conduct did constitute individual bargaining, in violation of Secs. 111.70(3)(a)1, 4 & 5, Stats., because it solicited input directly from bargaining unit members on a matter the parties had agreed to bargain over under the terms of their contract. In so doing, the Examiner held that it was irrelevant whether the subject of the bargaining was permissive, noting, " That a subject is permissive does not act as a license for the City to circumvent the MPA as the majority representative of police officers for collective bargaining purposes." *Id* at 30. He further found that there was insufficient evidence that the Union had waived its right to bargain over the issue.

This brings us to the case at hand. Jorgensen's memorandum to the SLCs of December 3, 2004 (Jt. Ex. 5), which was not sent to the Union, reveals that he was seeking input regarding the present and future value of Support Services Week, that the SLCs would be surveyed regarding their workload and that their survey answers would be used by a committee to formulate recommendations about the continued use of Support Services Week. Thereafter, at Jorgensen's direction, Ted Szalkowski, the Special Education Coordinator, established a committee comprised of school principals and SLCs to conduct the surveys and formulate the recommendations. MTI was not invited to participate on the committee even though participating SLCs indicated they expected MTI to be involved. The committee surveyed the SLCs, tabulated the results and provided them to Jorgensen, who ultimately determined that Support Services Week should be retained.

¹ GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77).

The testimony of Union Representatives John Matthews and Edward Sadlowski indicated that, although Support Services Week is not directly referenced in the collective bargaining agreement, the Union and District negotiated over its creation and the Union collaborated in its development. Union Exhibit #1, along with Matthews' testimony, reveals that as recently as 1999 the Union had made a bargaining proposal regarding caps on Individual Education Plan evaluations for Speech and Language Clinicians, which it withdrew only after receiving assurances from the District that Support Services Week would be continued. There is substantial evidence in the record, therefore, that the Union had not waived its right to bargain over the subject. Certainly, there is nothing like the unequivocal evidence of waiver mandated by CITY OF MILWAUKEE.

Further, contrary to the District's assertion, the fact that Support Services Week may be a permissive subject of bargaining does not give the District carte blanche to consult with bargaining unit members about its continued existence without involving the Union. The District distinguishes CITY OF MILWAUKEE on the basis that in that case there was language in the contract addressing the drug testing program and the parties' agreement to bargain over it, whereas here the contract was silent regarding Support Services Week. That, however, was not the basis of the Examiner's decision. Whether a subject is mandatory or permissive is not the point. Neither is whether the parties have expressly agreed to bargain over the subject. Sec. 111.70(3)(a)4, Stats. makes it illegal for an employer to refuse to bargain collectively with a representative of a majority of its employees and specifically prohibits individual bargaining with represented employees without reference to whether the subject is mandatory or permissive. The focus of the statute is on conduct that undermines the Union's position as exclusive representative. Thus, even though the District may act unilaterally with respect to a permissive subject it cannot circumvent the Union and deal directly with the employees in addressing the subject.²

The District also suggests that the contract permits it to consult with employees directly, citing Section I-A-3. That section emphasizes the importance of staff input in "...policies relating to pupils, the building construction and maintenance of schools, and especially the instruction of pupils..." and directs the Superintendent to seek their advice and counsel where appropriate. That language, while emphasizing the importance placed on the input of staff members in matters of instructional policy, does not, however, authorize the District to deal directly with the represented staff members on matters bearing on their working conditions to the exclusion of the Union.

So, also, the surveys employed by the Support Services Work Group stepped outside the permissible bounds of inquiry. The initial survey given to the SLCs (Exhibit #10) principally sought statistical information regarding workload and time spent on various work related activities. This inquiry, in and of itself, was not objectionable because it sought only objective information and did not engage in advocacy or encourage the SLCs to do so. There

² In this context, as the Union points out, it is immaterial that the District did not ultimately eliminate Support Services Week and, in fact, the decision to continue it might have an even more pernicious effect by creating the impression that individual dealing can have beneficial results.

were, however, several additional questions calling for the SLCs to offer opinions as to the pros and cons of Support Services Week and their desires regarding its continuation or modification. Given that Jorgensen had made it clear that the results of the survey and the input of the committee would be significant factors in his decision, the message was clear that opinions of the SLCs could materially affect the ultimate outcome of the review process. By engaging the SLCs in this way in a conversation about their preferences with respect to a program that significantly affected their work schedule and structure, and by excluding the Union from that conversation, the District crossed into impermissible direct bargaining with the SLCs.

Given the significant role the Union has played in the past in the creating and development of Support Services Week, there can be no doubt that this is a matter in which the Union had an interest. This is buttressed by the correspondence from Matthews to Jorgensen and the SLCs after the District's plans became known (Exhibits 6-8). It is a subject, therefore, that the Union had not waived its right to bargain over. Under the circumstances, whether or not the District could have acted unilaterally, it could not directly solicit the opinions of the SLCs exclusive of the Union. To do so in this context constituted individual bargaining in violation of Sec. 111.70(3)(a)4 and, derivatively, Sec. 111.70(3)(a)1, Wis. Stats. Since the District did not ultimately change the program, the violation may be remedied by posting the required Notice as directed.

Dated at Fond du Lac, Wisconsin this 24th day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

