STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION

Requesting a Declaratory Ruling Pursuant to Section 227.46, Wis. Stats.,
Involving a Dispute Between Said Petitioner and

MILWAUKEE BOARD OF SCHOOL DIRECTORS

Case 433
No. 64753
DR(M)-657

Decision No. 31732

Appearances:

Richard Saks, Hawks Quindel Ehlke & Perry, Attorneys at Law, 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Milwaukee Teachers' Education Association.

Deborah A. Ford, Human Resources Director, Milwaukee Public Schools, 5225 West Vliet Street, P.O. Box 2181, Milwaukee, Wisconsin 53201-2181, appearing on behalf of Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On March 25, 2005, the Milwaukee Teachers' Education Association (MTEA) filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.46, Stats., as to whether teachers employed by the Milwaukee Board of School Directors have a right under the Municipal Employment Relations Act (MERA) to engage in certain activity.

Hearing was held in Milwaukee, Wisconsin on June 8 and 9, 2005, by Examiner Peter G. Davis. The parties filed post-hearing written argument and the record was closed on October 24, 2005, when the Board indicated it would not be filing a reply brief.

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

FINDINGS OF FACT

1. The Milwaukee Board of School Directors, herein the Board, is a municipal employer that employs teachers to educate children.

2. The Milwaukee Teachers' Education Association, herein the MTEA or Union, is a labor organization that serves as the collective bargaining representative of teachers employed by the Board.

3. During bargaining over a 2001-2003 contract between the Board and the MTEA regarding teachers' wages, hours and conditions of employment, the MTEA engaged in an "Attract and Retain" campaign designed to support its collective bargaining goal of retaining and/or improving existing wages and fringe benefits so that new teachers would be "attracted" to work for the Board and existing teachers would be "retained."

As part of the "Attract and Retain" campaign, the MTEA sought public and parental support for its bargaining positions through informational picketing, mass rallies and distribution of literature. The goal of the campaign was to bring pressure on school board members to reach a contract with the MTEA that met the teachers' needs and/or to replace existing school board members through the electoral process with new members who were more supportive of the teachers' needs.

On March 2, 2004, as part of the campaign, the MTEA distributed approximately 9,200 3-inch diameter "Attract and Retain" buttons to MTEA building representatives and encouraged all teachers to start wearing the buttons on Friday, March 5. Many teachers continued to wear these buttons in the classroom for the remainder of the 2003-04 school year and throughout the following (2004-05) school year, while negotiations continued. On April 26, 2004, the MTEA conducted a rally outside the Board's central office, in which approximately 2,000 teachers participated. At the rally the MTEA delivered petitions to the Board demanding a "fair settlement." The MTEA also distributed two-sided 11-inch by 14-inch "Attract and Retain" cardboard signs to participating teachers and asked them to place the signs inside their school buildings. On one side the signs stated "Attract & Retain with a FAIR CONTRACT NOW!" and the other side stated "Attract & Retain It's Time to DO THE RIGHT THING!"

4. Following the rally, teachers represented by MTEA placed the signs inside school buildings in ways that varied from teacher to teacher and building to building. Some signs were placed in classrooms at or near the teacher's desk, some in teacher offices and closet or locker areas, and some in the teachers' "lounge."[1] In some schools, the buttons and/or signs prompted questions from students to teachers about what the buttons/signs meant, which in turn generated a brief teacher response.

[1] Initially some of the signs were also placed in classroom windows, doorways, and school hallways. The MTEA subsequently directed its members to remove posters except in places where other personal items were permitted to be displayed.

5. After a handful of parental complaints, the Board distributed the following directive:

> In accordance with Board Policy 9.08, schools are directed to remove from the windows, doors, office counters, halls, and other public displays at MPS sites any literature that constitutes political advertising or advocacy. This includes, but is not limited to campaign literature, commercial and political advertising, political advocacy (i.e. "Attract and Retain" campaign). While students are present in the building, this also applies to literature provided to parents and other members of the public who enter MPS buildings on school business.
>
> The administrator or teacher leader in charge of the site is responsible for compliance with this directive. Please report compliance to our administrative specialist by the close of business today.

6. Board Policy 9.08, to which the Board's directive refers, provides as follows:

> (1) No one shall promote any religious or commercial advertising, nor shall any advertisement of such nature be displayed or distributed at any time in school buildings or upon school premises.
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> (2) Political advertising/advocacy shall not occur in school buildings or upon school premises during work hours in the presence of students or if the communication threatens to disrupt the work or educational environment or interferes with employees' duties. (This does not apply to bumper stickers of reasonable size on automobiles parked in school parking lots, unless the display disrupts the work or educational environment.) Any such advertising/ advocacy shall comply with state and federal election laws.
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> (3) The use in the schools of such aids as textbooks, supplementary books, reference books, charts, maps, calendars, blotters, rulers, posters, models, films, slides, or exhibits by teachers with the permission of their principals to explain or describe subjects, articles, machines, or processes already in use in the Milwaukee Public Schools, even though such aids bear the name, business, or purpose of the publisher or manufacturer, shall not be construed as commercial advertising within the meaning of this policy.

(4) The distribution of awards for students donated by commercial enterprise and approved by the principal shall not be construed as commercial advertising within the meaning of this policy.

(5) Additionally, no requests for privileges shall be granted which in any way or manner are likely to occupy the time and attention of teachers or students, or call for services on the part of school children, or are likely to give precedence or preferment of one student over another, or which involve any phase of commercialism.

(6) The principal shall have the authority to make decisions.

7. As a result of a lawsuit brought by the MTEA relating to Board Policy 9.08, the Board and the MTEA executed the "MTEA/MBSC Agreement Clarifying Political Activity Rights", which provides as follows:

Teachers may engage in protected speech consistent with their constitutional rights.

Teachers, like every other person, are subject to federal and state election laws.

It is understood that there are times when political candidacy and elections are appropriately a part of the curriculum. The following is drafted with the assumption that we are dealing with a teacher's personal views, not discourse that is part of the curriculum.

Teachers may not wear buttons for political candidates in school buildings during work hours in the presence of children. However, buttons for political candidates may be worn in the teachers' lounge or on student non-attendance days so long as the display is not in the presence of students and does not threaten to disrupt the work or educational environment.

Teachers may not distribute literature regarding political candidates in school buildings during work hours. However, literature regarding political candidates may be distributed by teachers during the duty-free lunch period and before and after school so long as the distribution is not in the presence of students and does not threaten to disrupt the work or educational environment. The MTEA shall be free to use teacher mailboxes for the distribution of its communications regarding political issues and candidates.

Teachers nay (sic) not verbally advocate for or against political candidates in school buildings during work hours if the communication is in the presence of students or if the communication threatens to disrupt the work or educational environment or interfere with the teacher's professional duties. However, teachers may verbally communicate about political candidates during the duty-

free lunch period so long as the communication is not in the presence of students and does not threaten to disrupt the work or educational environment.

Teachers may display campaign bumper stickers and posters of reasonable size on their automobiles that may be parked in school parking lots unless the display disrupts the work or educational environment. (Please note exceptions in Sec. 12.07, stats.)

Teachers may not use Board equipment to engage in political activity, including but not limited to, office supplies, public announcement systems, and e-mail.

8. In at least some schools, the Board historically has permitted teachers to use classroom space, particularly in, on, or near a teacher's classroom desk, for displaying personal, non-instructional items or materials, such as Beatles' posters, Green Bay Packer posters, travel memorabilia, family photographs, and other non-instructional materials related to a teacher's personal interests.

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

CONCLUSIONS OF LAW

1. Teachers who wore "Attract and Retain" buttons on their persons in classrooms were engaging in lawful concerted activity within the protection of Sec. 111.70(2), Stats.

2. Teachers who placed "Attract and Retain" signs in locations that students did not customarily occupy during the instructional day were engaging in lawful concerted activity within the protection of Sec. 111.70(2), Stats.

3. Teachers who placed "Attract and Retain" signs in locations within the school building, including classrooms, which students did customarily occupy, were engaging in lawful concerted activity within the protection of Sec. 111.70(2), Stats., subject to the same limitations in terms of number, size and location that the Board has applied to other personal, non-instructional displays.

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

DECLARATORY RULING

The Milwaukee Board of School Directors violated the Municipal Employment

Relations Act by prohibiting the placement of "Attract and Retain" signs in locations which students customarily occupied, including classrooms, where teachers otherwise were

permitted to display personal, non-instructional items or materials, but only to the extent that the "Attract and Retain" signs did not exceed the limitations in terms of number, size and location that the Board has applied to other personal, non-instructional items or materials.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

I concur in part and dissent in part:

Paul Gordon /s/
Paul Gordon, Commissioner

Milwaukee Public Schools

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

This petition for declaratory ruling asks us to determine whether teachers have a right under Section 111.70(2) of the Municipal Employment Relations Act (MERA) to place signs and/or wear buttons in their classrooms stating their union's position in an ongoing collective bargaining dispute with their employer.[2] We conclude that they do, provided the materials are located (a) on their persons, (b) in areas that students do not customarily occupy, or, (c) in areas (including classrooms) that students do customarily occupy, but only to the extent that the employer has permitted those areas to be used for other personal and non-instructional purposes.

Section 111.70(2), Stats., provides in pertinent part:

> (2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . .

Here, the MTEA asserts that the teachers were engaged in "lawful, concerted activities for the purposes of collective bargaining or other mutual aid and protection" when they wore "Attract and Retain" buttons in the classroom and when they placed "Attract and Retain" posters in certain areas of the school building, including certain classroom areas where teachers keep or display other personal memorabilia and posters. The Board primarily contends that there is no right to engage in any such activity in a classroom setting, because, in the Board's view, such activity is "political advocacy" that is proscribed by Board-promulgated Policy 9.08(2).

The Commission has long recognized that employees have a right to engage in concerted activity during the work day on the employer's premises, but that such right is not completely unfettered. In drawing the line between protected and unprotected activity in the work place, the Commission balances the interests of the employees against the interests of the employer. KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66). An employer may interfere with its employees' lawful concerted activity in the work place only to the extent justified by operational needs. UW HOSPITAL AND CLINICS AUTHORITY, DEC. NO. 30202-C

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[2] As originally posed, the issue in this case did not extend to buttons. The Board did not attempt to restrict teachers from wearing "Attract and Retain" buttons on their persons, whether inside or outside the classroom. However, both parties have argued, and we agree, that these two kinds of display are sufficiently similar in purpose and content to warrant a combined discussion. Ultimately, as discussed below, we reach a more limited conclusion regarding the teachers' right to display the signs. Similarly, the record also reflects that some teachers made literature related to the contract dispute available to parents during "Back to School" type events. The parties have neither fully litigated nor requested a ruling regarding that activity, and hence we do not reach that issue.

(WERC, 4/04) at 13. "It is inherent in this balancing test that the employer's legitimate

intrusion may not exceed the bounds of its legitimate interests." STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04) at 13. The balancing test requires us to consider both the nature and the weight of the parties' competing interests. UW HOSPITAL AND CLINICS AUTHORITY, SUPRA, at 14.

The first step therefore is to determine whether wearing the buttons and/or displaying the signs advances employee interests protected under MERA and, if so, the extent or weight of those interests. In UW HOSPITAL, SUPRA, the Commission held that an employer had unlawfully barred the union from using the employer's e-mail system to communicate with employees. The Commission emphasized the centrality of communication to concerted activity:

> As in any participatory enterprise, communication and information are elemental in the exercise of [concerted activity]. ... This right includes communication within the work place itself where, after all, employees most commonly encounter each other.

ID. at 13 (citation omitted). Similarly, in the instant situation, the buttons and signs serve a fundamental communicational purpose in promoting concerted activity. Symbols such as these send a strong and continual signal from employee to employee of a shared willingness to stand up and be counted as a supporter of the MTEA's efforts. Such symbols build collective confidence and at the same time communicate a message of solidarity to the employer and the community. As such, they reach the heart of MERA's policy and purposes, i.e., to protect *concerted* activity as an effective method for achieving work place harmony. This communicational purpose may be of special importance in an educational environment, where bargaining unit members often work in a relatively solitary fashion vis-à-vis other bargaining unit members during much of the work day. Such visible demonstrations of solidarity also facilitate the bargaining process, as they help a union weigh member support for bargaining proposals. See discussion in EAST WHITTIER SCHOOL DISTRICT, DEC. NO. 1727 (CA. PERB 12/04), at 11.

Hence, on the MTEA's side of the balancing test, there can be little doubt that the buttons and signs served weighty statutory interests and were powerful tools in a time of difficult negotiations. In recognition of these weighty interests, the Commission has long held, recapitulating U.S. Supreme Court decisions under the National Labor Relations Act (NLRA), that wearing buttons in the work place and on work time is lawful concerted activity and that rules prohibiting union buttons on-the-job are presumptively invalid absent "special circumstances." STATE OF WISCONSIN, DEC. NO. 29497-C (WERC, 8/00), and cases cited therein; REPUBLIC AVIATION CORP. V. NLRB, 324 U. S. 793 (1945). The "special circumstances" test is essentially a conclusory restatement of the balancing test, emphasizing the relative importance of the employees' statutory rights in wearing buttons and the correspondingly heavy interests the Commission will require of an employer if it wishes to prohibit or limit that activity. See, STATE OF WISCONSIN, SUPRA, at 21. See also, EAST WHITTIER, SUPRA, at 10 (stating, in reference to the traditional "special circumstances" test for union buttons, "What constitutes a 'special circumstance' necessarily involves a balancing of the various interests.")

The Board argues that the buttons and signs served purposes other than facilitating communication among MTEA members. The Board notes that the displays were also designed to publicize the MTEA's contractual dispute to the public and seek community support. The Board and our dissenting colleague contend that the "Attract and Retain" campaign was "political advocacy" because, taken as a whole, it was meant to bring public pressure to bear upon the politicians (Board members) who run the school district to offer a more generous settlement package to the MTEA in contract negotiations. They note that the ultimate pressure on public employers is electoral, and that part of the overall campaign (though, importantly, not the specific buttons or signs at issue here) included encouraging the election of favorable Board members.

This is as unremarkable as it is true. The buttons and signs were worn in public demonstrations on non-work time, where their target audience would include voters and parents, as well as in the school buildings, where they would be visible to students and visitors, along with administrators and fellow teachers. However, it is clear that publicizing a labor dispute and seeking thereby to bring pressure to bear upon an employer is "concerted activity," whether the employer is a private employer covered by the NLRA or a public employer covered by MERA. Just as private sector employees may picket to advertise their dispute to the public, hoping to encourage a customer response, public employees who picket, demonstrate, leaflet, and wear buttons hope that the "customers" of elected officials (the public employers) will voice support for union goals to the elected officials who employ the union members. In the public sector, encouraging customer support can take electoral form. As the Supreme Court recognized in ABOOD V. DETROIT BOARD OF EDUCATION, 431 U. S. 209, 228-231 (1977), and as the Board quotes in its brief, "There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities … may be properly termed political." In short, a great deal of union activity in the public sector is both *political* and *concerted* within the protection of MERA. Thus the mere fact that the union buttons and signs were in some sense "political" – or that the campaign in support of the contract had electoral as well as communicational elements – does not remove such concerted activity categorically from the protection of the law.

The question regarding Rule 9.08(2) (set forth in Finding of Fact 6, above), therefore, is not whether the messages on the buttons and signs were in some sense "political advocacy," but whether the Board's rule lawfully may be applied to prohibit the precise symbolic activity at issue here – activity that is concerted and entitled to statutory protection. It is a fundamental tenet of labor relations law that an otherwise valid work rule may be unlawful if it intrudes too far upon rights protected under MERA. For example, it is not uncommon in the private sector for employers to prefer that employees not disclose their hourly salaries to each other. Forbidding salary discussions could have a bona fide purpose of limiting work force resentment and disruption. However, such a rule would also inhibit employees' ability to engage in organizing to improve their wages and hence could not be applied lawfully to curb such concerted activity. See, e.g., LITTON MICROWAVE COOKING PRODUCTS, 300 NLRB 324 (1990), and cases cited therein.

Similarly, the Board rule against classroom "political advocacy" is not sufficient in and of itself to curtail the buttons and signs supporting the MTEA. Instead, under the balancing test, we must examine the purposes of the Board's rule and whether those purposes outweigh the employees' rights to display the buttons and signs that are specifically at issue here.

In assessing the Board's interests, the first question is what purpose is served by the Board's rule against political advocacy. The Board offered no evidence about the genesis or purpose of the rule, though invited to do so at hearing. The Union introduced one of its biweekly newsletters, The Sharpener, Vol. 2004-05 #8, in which it published a clarification of the Board's policy that had been mutually agreed upon by the Union and the Board as a result of a lawsuit brought by the Union. The clarification, set forth in full in Finding of Fact 7, above, refers almost exclusively to *electoral* advocacy, i.e., as related to candidates and elections. This suggests that the underlying rule has the same narrow focus as the subsequent clarification: advocacy surrounding candidates for office and other elections, rather than the much broader concept of political activity that might apply to the Union's "Attract and Retain" initiative. We also note that a major purpose of rules limiting public employee political activity is to ensure that public funds/facilities are not used to foster the electoral ambitions of incumbent political officials, on the one hand, and to ensure that the public does not get the impression that the public body is endorsing one candidacy or position over a competing one, on the other hand. Neither purpose seems to apply directly to the Union buttons and posters at issue here, which are not directed toward any specific candidate for office nor reasonably interpreted as indicating Board support of the Union's bargaining positions. CF. EAST WHITTIER, SUPRA, at 14-16, where the California PERB held that union buttons stating "It's Double Digit Time" in support of the teacher union's bargaining proposal regarding wages were not "political activity" within the state's regulation banning political activity by employees during school hours. The PERB noted that viewing such activity as political would blur the distinction between a public body's role "as the employer … and their activity as candidates for elected office or as incumbents seeking preservation of their offices or reelection." ID. at 14. The PERB's reasoning is directly applicable here.

If, however, the Board views its rule as applying broadly to any buttons, signs, or other activity that expresses or suggests a position regarding a "political" issue, this could be slippery territory. Has the Board prohibited buttons or other expression opposing the war in Iraq? What about buttons or posters with a peace sign or a button saying "Health care for all?" The record contains no evidence about whether the Board has applied its rule in the past to those situations or to other situations that would assist us in determining the nature, scope and importance of the Board's concerns about limiting "political advocacy," and/or whether the Board has applied that notion to advocacy other than union advocacy.

We can assume, however, that one of the interests served by the Board's rule is to limit any undue influence of teachers on the political viewpoints of their students and the potential manipulation of students to convey political viewpoints to their parents. Even if we further assume that this broad purpose does not offend the First Amendment and has been implemented in a uniform manner, the question remains, under the balancing test, whether that purpose is sufficient to outweigh the teachers' statutorily-protected interests in engaging in the specific concerted activity at issue here. We conclude it is not – largely because of the limited nature of the classroom activity at issue here.

Of crucial importance is that the activity in question did not generate more than minimal discussion with students nor any significant proselytizing in favor of the Union's bargaining position or against the Board's.[3] Importantly, the record is utterly devoid of evidence that anything occurred in the classroom addressing the candidacy of any School Board members or even the School Board elections in general. Had the Union's buttons and posters been directed specifically toward advancing or opposing the candidacy of Board incumbents or challengers, even if there were no ancillary discussions, such activity could open the District to a charge that it was improperly permitting its resources to be used for electioneering activity. Here, however, the message on the buttons and posters was clearly addressed to the Union's bargaining goals and not to any kind of electioneering, and took symbolic form not distinguishable from, say, wearing red shirts to show solidarity. As discussed earlier, such activity – including the activity of bringing pressure to bear upon the employer regarding the contractual dispute – carries a legitimate and statutorily-protected purpose, even if it can also be labeled "political."[4]

Accordingly, while the Board has a legitimate interest in limiting proselytizing or manipulation of students, in this case that purpose does not outweigh the employees' statutory rights to wear union buttons and display signs of the nature and to the extent at issue here.

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[3] Given the importance of focusing on the precise activity that is in contention, we must point out some references in the dissenting opinion that could be read to suggest that the scope of this dispute is broader than it is. The dissent states, "Some of the signs were placed in the windows of classrooms and other places in school buildings accessible to visitors to the school buildings. The dissent further states, "There was some teacher sentiment that in addressing student inquiries about the signs, discussing this labor situation with students would not be appropriate in a math or science class, but it would be appropriate in history, social science or business education." First, the MTEA does not claim a right to place posters in windows or in space that the Board itself has reserved for instructional purposes. In fact, the MTEA directed teachers not to do so. (Notably, the handful of complaints the Board received were probably engendered by these early and improper exhibitions that the MTEA subsequently disavowed.) Second, whatever "some teachers" may believe about the propriety of discussing the Union campaign as part of a lesson plan, the MTEA is not claiming that such activity is protected.

[4] Contrary to what the dissent suggests, there is an obvious and easy distinction between a button/sign saying "Vote for Joe" – electioneering activity on its face -- and a sign saying, "Attract and Retain/Fair Contract Now" – on its face a message supporting the Union's bargaining goals. The fact that one facet of the Union's "Attract and Retain" campaign involved soliciting public pressure on the School Board does not transform the Union's campaign in support of its contract proposals into an election campaign. Drawing this line is not only relatively easy but is necessary in order to protect legitimate symbolic/communicative union activity in the public sector work place.

While the Board has relied primarily upon the "political" content of the Union's buttons and signs as a basis for finding them unprotected under MERA, the Board also argues, at least tacitly, that it has another important interest in prohibiting these materials in the work place: to limit distraction and disruption in the educational process. This is unquestionably a legitimate and very powerful managerial interest. The Union notes that the Board has produced little evidence of *actual* disruption in the educational process – a handful of telephone calls to the Board's central office and a few passing questions or remarks by students. Contrary to the Union's argument, however, we would follow the reasoning of the California Public Employment Relations Board (PERB) in EAST WHITTIER, SUPRA, and apply an objective "reasonable person" test for determining the degree of disruption in an educational setting, rather than require evidence of actual disruption. The California PERB's reasoning is persuasive:

> … [T]he test must be an objective one based on an examination of the buttons at issue. Such a requirement is necessitated by the [PERB's] desire to avoid pulling students and other third parties into unfair labor practice proceedings. … Instead the [PERB] holds that where it is alleged that a button is distracting or disruptive, an objective examination of the button should take place. Buttons that contain profanity, incite violence, or which disparage specific individuals will always meet the special circumstances test. Otherwise, the trier of fact must examine the button in its given context to determine whether an objectively reasonable person would find it unduly distracting or disruptive. In determining whether a button is unduly distracting or disruptive … the trier of fact should also compare the buttons to other distractions prohibited or allowed by the employer.

ID. at 13.

In the WHITTIER decision, the California PERB examined the kinds of circumstances in which the NLRB has found distraction to be a special circumstance justifying a limitation on union paraphernalia, in particular FABRI-TEK, INC. V. NLRB, 352 F.2D 577 (8TH CIR. 1965). In that case, the employer manufactured magnetic memory devices by hand, which the NLRB and the court found to require "a high degree of concentration" where "distractions of any kind might very well lead to inefficiency, work slowdown and costly errors." Similarly, the California PERB noted that it could "envision a classroom setting where a highly focused environment must be maintained." However, PERB concluded that such a special setting was not suggested by the record in WHITTIER, and in fact the record showed that the school district employer in that case permitted "articles of clothing and activities which are as distracting, if not more, than the buttons at issue," including other kinds of buttons. WHITTIER, SUPRA, at 12 and 12 n.5.

We agree with the WHITTIER decision that union buttons and signs are not categorically disruptive in every educational setting, and that the test for determining whether they are so disruptive as to outweigh the employees' statutorily protected rights requires an examination of the particular message, the particular form and location where the message is displayed, and

the extent to which the employer has permitted other non-instructional materials to be displayed in similar ways. In this regard, it is necessary to distinguish analytically between the buttons and the signs at issue here, since they differ in size, manner, and location of display.

Looking first at the buttons, we note that they are a standard size for a button of their type and contain a simple message ("Attract and Retain") that is not vulgar, demeaning, or otherwise *per se* disruptive. The buttons are brightly colored and likely to be noticed and perhaps elicit inquiry from students, but nothing suggests that such commentary would be likely to lead to emotional confrontation, lengthy discussions, or otherwise invade or undermine the educational program.[5] Even in a prison context, where unions were hotly competing for the allegiance of correctional officers and the employer proffered concerns that the conflict could jeopardize security and safety within the institution, the Commission found no special circumstances that would justify prohibiting buttons. STATE OF WISCONSIN, SUPRA, at 20. Like the California PERB, we recognize the possibility of scenarios where the characteristics of the students or the subject matter might present an objective likelihood of significant disruption, but this record does not evince such. Accordingly, the Board has not established an objective basis for concluding that the buttons would tend to disrupt the educational environment so as to justify prohibiting them.

The signs pose a more difficult issue. While the tone and content of the signs is similar to that of the buttons (if anything, the signs more clearly link the "Attract and Retain" slogan to the contract dispute), the signs were considerably larger than the buttons and perhaps even less likely to escape student notice. Nonetheless, a decorous display of such signs alongside other personal items in a space normally reserved for such personal displays does not seem any more likely than the buttons (or a large sports or music poster) to cause more than a passing colloquy between teachers and students. Just as students can be expected to quiz teachers about their family photos, students may also inquire about the union signs when they first notice them. If the resulting conversations are equally limited and equally non-intrusive into the educational program, the Board has no more legitimate basis for prohibiting the union posters than it does the other personal items. While at first blush a union poster might seem inherently more controversial than a Beatles poster, that impression would only be correct from the perspective of the Board, but not from the perspective of the students. The Board and its managers naturally would harbor greater sensitivity to union posters than students would. Indeed, students could easily find the Beatles poster or a partisan sports team poster much more worthy of comment or controversy than a union sign. Accordingly, we cannot conclude that the content of the signs was likely to cause any significant disruption in the educational program so as to justify a categorical prohibition.

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[5] The record indicates that student-initiated discussions were kept to a brief response by the teacher, and that the MTEA directed its members not to initiate discussions with students related to the Attract and Retain campaign. Prolonged discussions with students, parents, or other employees about union activity during instructional time would very likely be unprotected, and the Union does not contend otherwise in this case.

Of more concern is the degree to which signs, unlike buttons worn on an employee's person, might intrude upon the *space* available for instructional purposes. Presumptively, a classroom is space that the Board has dedicated to instructional purposes. Thus a classroom's bulletin boards and chalk boards traditionally are reserved for materials relevant to the instructional experience. Most likely the Board has condoned no more than a minimal use of such space for a teacher's purely personal materials – and, in some schools, perhaps none. Nonetheless, the record reflects that the Board, at the discretion of its building principals, has permitted some limited classroom areas to be used for non-instructional purposes, including the display of employees' personal effects. Such areas might include a teacher's desk and nearby environs. Prohibiting a union poster in those locations, while allowing family photographs, rock music posters, or Green Bay Packer posters, is inherently discriminatory against activity that carries statutory protection. As the Commission said in UW HOSPITAL, SUPRA, "Where an employer claims an interest in safeguarding its property, but has only selectively or sporadically paid heed to that interest except where union activity is involved, doubt arises as to the genuineness of the asserted interest. In our view, this doubt largely accounts for the virtual maxim that a facially valid rule will be unlawful if it is discriminatory in application." ID. at 16.

A cautionary note is in order. As just discussed, displaying a single union poster, along with other personal items, may fall within the parameters of what the Board has permitted on or near a teacher's desk. A display within such customary modest parameters is not objectively or inherently so controversial as to be disruptive. On the other hand, papering a classroom area, including a desk, with multiple signs could so augment the effect of the display as to create disruption or distraction and thus exceed the pale of the law's protection. Such a display could well become the visual focal point of the classroom, thus overwhelming the educational effects of the instructional materials that may be on display. It seems unlikely that the Board would permit such an overwhelming display of any non-instructional materials, and the record does not reflect that the Board has done so. We wish to emphasize, therefore, that the right to display these MTEA signs in the classroom is limited to the same level that has been permitted in any particular building for other forms of non-instructional displays.[6]

Accordingly, after balancing all of the interests in play here, we conclude that the Board has not established a sufficient managerial purpose for excluding Union signs from being displayed in the classroom, within the same parameters that apply to the display of other materials not related to school district business. Since the Board's prohibition extended beyond these legitimate parameters, the Board violated the rights of employees represented by the MTEA under Section (2) of MERA, in violation of Sec. 111.70(3)(a)1, Stats.

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[6] Like the parties in this case, we have approached the issue in this Declaratory Ruling in a generic manner, rather than examining any or all of the specific displays in some classrooms as depicted in the photographic exhibits in this case. We note, however, that some of the photographed displays could well exceed the protected boundaries we have articulated in this decision.

Response to Dissenting Opinion

Our dissenting colleague would hold that the "Attract and Retain" signs are not protected activity under Section 2 of MERA, while at the same time acknowledging that the Union buttons with essentially the same message – worn in the classroom as part of the same campaign – are protected and may not be prohibited. While, at first blush, the two forms of display might appear readily distinguishable, upon full consideration we have concluded that there is no legally viable principle that warrants categorically prohibiting signs while categorically permitting the buttons. This is especially so to the extent the dissent seems to rest its distinction principally upon the "political" content of the signs, since in this case the political content of the buttons is substantively identical to that of the signs.

First, as is apparent from the preceding discussion, we agree on one issue discussed at length in the dissenting opinion, i.e., that the Union's Attract and Retain campaign was "political" in some sense and included electoral elements. The campaign was aimed not only at solidarity among the bargaining unit members, but also at pressuring the Board, an elected and political body. While in footnote 10 the dissent characterizes the Union materials at issue in this case as "political advertising," in our view these are no different than the materials unions routinely use to publicize and support their negotiations efforts. Such materials are "political" only in the very broad sense that the employer is a publicly elected body and any public pressure against a public employer in some ultimate sense would carry implicit electoral pressure. In that very broad sense, there is nothing a union could do to publicize its contract dispute and its solidarity that would not be "political." However, in this case, we also agree that the overall campaign adopted some explicit electoral tactics on occasion – most notably, in the Union newsletter urging members and the public to register to vote and elect Board members favorable to the Union's bargaining position.

However, the Union is not seeking to engage in that sort of electoral politics in its classroom displays. Neither the buttons nor the signs referred positively or negatively to any candidate for political office. For reasons discussed earlier in this opinion, such explicit electoral advocacy in the classroom might very well implicate important Board interests that would outweigh the employees' rights under Section 2 of MERA. Indeed, as noted above, Board Policy 9.08, especially in light of the subsequent clarification agreement with the MTEA, seems to focus on such *electoral* activity, rather than the narrower bargaining-directed messages contained on these buttons and signs. By failing to distinguish between the actual messages displayed in the classroom and other elements of the Union's drive that took place elsewhere, our dissenting colleague strays from the issue that is actually presented here.[7]

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[7] Footnote 10 in the dissenting opinion, in discussing the Union's signs and buttons as "political advertising," cites some concepts from the campaign finance laws. We think it important to point out that nothing in this case interprets, affects, or depends upon campaign finance laws. The dissent also states, "There is no practical way to differentiate the political nature of the signs that were displayed in the classrooms on teachers' desks from the signs used throughout the community." We do not know whether there were community signs that carried a different message, but, to the extent the signs were the same both outside and inside, our opinion does not attempt to distinguish them from each other. What we have distinguished from the signs is the occasional electoral element in the Union's campaign that appeared in the Union's *newsletter*.

Second, we agree with the dissent that the Board has potential legitimate interests in prohibiting "Attract and Retain" symbols in the classroom, whether in the form of buttons or signs. However, under the traditional balancing test, those legitimate employer interests must be balanced against the employees' interests in engaging in such solidarity and communicative strategies. Only if the Board's interests outweigh those of the employees – and if the Board's prohibition is narrowly drawn to accommodate those interests – can the Board lawfully interfere with the activity. The dissent suggests that the Board's primary legitimate interest is in "keeping students from being involved in the political campaign through classroom signs."[8] Further the dissenting opinion asserts, "I am satisfied that classroom signs did indeed involve students in the campaign – at least as a conduit of information to parents." This begs the question: what information was thus being transmitted to parents, beyond the fact that the teacher supported the Union? And how does this information cause harm to the Board as an educational enterprise, rather than as an employer? And finally, how is this "involvement" any different on its face than the "involvement" that would be induced by any other symbolic show of solidarity, such as wearing red shirts or, indeed, the union buttons with the same message? By not delving more deeply into whether the message on the signs actually "involved" students in a "political campaign" of the type implicated in Board Policy 9.08, or whether the degree of student involvement objectively could be said to override the teachers' interests in engaging in the concerted activity, the dissent does not appear to have engaged in the necessary balancing of interests.

Third, to the extent the dissent has concluded that the Board's interest in avoiding "political" advocacy in the classroom overrides the teachers' interest in symbolically communicating messages of solidarity, we can perceive no reasonable basis for placing the buttons within the law's protection, but not the signs. The dissent points to the long line of cases upholding employees' rights to wear buttons in the work place, even in such prickly atmospheres as prisons. By implication, it seems, the dissent is suggesting that signs can be distinguished from buttons because there is no similar bundle of cases involving signs. But surely the mere fact that there are fewer cases involving signs than those involving buttons does not create a legally viable distinction. After all, union buttons have garnered such historic protection precisely because, as communicational symbols, they serve purposes so central to the purposes of the labor laws. In this respects they are indistinguishable from the signs. The dissent also suggests that the signs were more "likely to engage students" than the buttons. However, using the objective "reasonable student" standard that we have adopted, we see no reason to assume that the signs would evoke a significantly different or more disruptive reaction from students than the same message on the buttons.

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[8] The dissent asserts that the MTEA, by directing its members to refrain from discussions with students and to limit the signs to areas where other non-instructional materials are displayed, has itself recognized the Board's strong interest in "having a non-political atmosphere in the classroom." Both the Commission and the MTEA have indeed acknowledged the Board's right to limit proselytizing about the MTEA contract dispute. However, a *limit* is not the same thing as a *ban*. We think limiting the concerted activity as the MTEA proposes here, i.e., to symbolic displays that are non-disruptive to the educational program, properly balances the teachers' statutory rights to display their support for the Union and the Board's important and undisputed right to maintain and control the educational program.

Finally, the dissent suggests that signs are different from buttons because signs implicate the Board's "property use interest," whereas buttons are worn on an individual's person. Leaving aside the fact that buttons could also adorn desks or bulletin boards, we agree that signs, unlike most of the buttons, occupy classroom space and that this is an important distinction. We have acknowledged the Board's important interest in reserving classroom space for instructional purposes and, for precisely this reason, we have applied a different standard to signs than to buttons. However, unlike our dissenting colleague, we defer to this Board interest only to the extent the Board itself has actually exercised its interest by reserving classroom space for instructional purposes. As explained above and set forth in our conclusion of law, if and only to the extent that the Board has permitted some classroom space (typically on or near a teacher's desk) to be used for personal displays, the Board cannot reasonably take a different tack simply because the personal use is union-related.[9]

Dated at Madison, Wisconsin, this 3rd day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan Bauman /s/
Susan Bauman, Commissioner

[9] The dissent disagrees that the Board has treated union materials differently, asserting that the Board has prohibited all *political* displays, not just union political displays. We first point out that the record does not reveal anything about how the Board has treated buttons or signs that contain a similar type of "political" content as the union buttons or signs. More importantly, however, the dissent's point is an exercise in circular logic. If the political content of the Union's signs were a permissible basis for prohibiting them, then it would not matter how the Board has treated other similarly political displays. By the same token, if – as we have held – the content of these signs does not remove them from the protection of MERA, then the fact that the Board may prohibit other types of political advocacy does not matter. In other words, the majority opinion on the political content issue does not depend upon any consideration of discrimination, but simply finds the Board's interests in limiting political advocacy to be insufficient to outweigh this particular union activity. In contrast, the Board's "property use interest," i.e., its interest in restricting classroom space for instructional purposes, is a compelling counterpoint to the Union's MERA rights – one that we believe would override those rights if the Board has really acted to protect this interest by reserving all classroom space for instructional purposes. On the property use issue, therefore, it becomes important whether the Board has discriminated, i.e., permitted non-instructional uses of any of the classroom space. Because we find that the Board has done so to at least some limited extent in some schools, we hold that the Board's "property use" interest does not outweigh the Union's MERA rights, but only to that extent. Accordingly, it is the discrimination between the union materials and other non-instructional materials that matters to the majority's analysis, and not any purported lack of discrimination between union political material and other political materials.

Milwaukee Schools

DISSENTING AND CONCURRING DECISION OF COMMISSIONER PAUL GORDON

I dissent from that part of the Majority opinion which would allow the Attract and Retain signs to be displayed in classrooms but concur that the wearing of Attract and Retain buttons cannot be banned.

The signs were part of an MTEA campaign that involved both concerted activity under the Municipal Employment Relations Act (MERA) and political advertising/advocacy within the scope of Board Rule 9.08. The MTEA campaign was concerted activity to the extent it sought a positive response from the School Board as to the MTEA positions in contract negotiations and political advocacy to the extent the campaign sought to bring political pressure on the Board both generally and in the specific context of upcoming Board elections. The political component of the MTEA campaign does not make it any less concerted. The concerted component of the campaign also does not make it any less political. The signs were a very visible tool used as part of a very public, political effort. There is no practical way to differentiate the political nature of the signs that were displayed in the classrooms on teachers' desks from the signs used throughout the community.

The signs at issue in this case are only the signs on teachers' desks and immediate work areas. However, it is important to understand the larger context into which they were placed in discussing their political nature. The MTEA Attract and Retain campaign theme was communicated to the public in a number of ways. The MTEA distributed Attract and Retain buttons, 1350 Attract and Retain signs with additional statements such as Fair Contract Now or Do The Right Thing, other yard signs, postcards, and informational letters or flyers to parents. The signs were used at informational picketing and rallies on public property such as public sidewalks near schools and the administration offices. Some signs were placed in some teachers' car windows. For a short time, some of the signs were placed in the windows of classrooms and other places in school buildings accessible to visitors to the school buildings. The signs were later removed from such publicly accessible portions of school buildings and placed by some teachers on or near their classroom desks and/or classroom work areas where personal items such as family photos were displayed. The students saw these signs everyday in the classroom. The signs were clearly related to support for the MTEA position on the status of the ongoing contract negotiations. Some teachers also wore Attract and Retain buttons in the classroom.

The target audience for the MTEA campaign included parents of students, local officials and the general public. Parents were urged to contact community officials and school board members on the contract negotiations. The MTEA goal was to have the public and community leaders (church officials, local congressmen, the Mayor, etc.) put pressure on the

School Board to resolve the contract. To convey their message to the public, the MTEA also hired an advertising agency and initiated an ad campaign in The Milwaukee Journal and several weekly community newspapers. One of the MTEA publications stated:

> The premise for our actions is simple: **numbers speak louder than words –** especially to politicians. (emphasis in original)

The same publication referenced voting and absentee voting instructions for City residents as to upcoming Board elections. Other MTEA publications made mention of how the lack of a contract settlement may impact upcoming Board elections.

After the signs were placed in the classrooms, students in a number of classrooms did have questions about them and were given brief answers by the teachers. There was some teacher sentiment that in addressing student inquiries about the signs, discussing this labor situation with students would not be appropriate in a math or science class, but it would be appropriate in history, social science or business education classes.

The District then began receiving a limited number of complaints from parents about the placement of the signs in the classrooms and MTEA letters and flyers that had been available at parent-teacher conferences, and allegedly given to students to take home. There were also some parents who contacted teachers and wanted to get some of the signs in support of the teachers' contract efforts.

The District then directed teachers to remove the signs from their classrooms.

Some MTEA witnesses contended it was not their intent to involve students in the campaign. However, one teacher testified to the effect that obviously the students go home to parents and they are the customers. Thus, I am satisfied that classroom signs did indeed involve students in the campaign -- at least as a conduit of information to parents.

MTEA argues that the Attract and Retain campaign was completely unrelated to political or electoral activity, and was undeniably a union campaign to build support and solidarity amongst bargaining unit members for the union's negotiating team and members' effort to obtain a contract. This is a central MTEA argument. It is simply not credible and not persuasive. The above demonstrates that the MTEA campaign, including the Attract and Retain classroom signs, was a political effort (with overt school board election implications) to

affect contract negotiations. Such political campaigns are inevitably and appropriately part of collective bargaining in the public sector. As the Supreme Court stated in ABOOD V. DETROIT BOARD OF EDUCATION:

> Finally, decision making by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters – taxpayers, users of particular government services, and government employees. Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. Whether these representatives accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service. . . . There can be no quarrel with the truism that because public employee unions attempt to influence governmental policy making, the activities . . . may be properly termed political. 431 U.S.209 at pp. 228-231 (1977).

However, the question posed by this case is whether the use of Attract and Retain signs[10] in the classroom as part of such a political campaign can legally be prohibited by the Board despite the fact that it also represents concerted activity under MERA.

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[10] The display of the signs is political advertising/advocacy. Direction can be taken from the Wisconsin Supreme Court decision, ELECTIONS BOARD OF THE STATE OF WISCONSIN V. WISCONSIN MANUFACTURERS & COMMERCE , ET. AL., 227 WIS.2D 650 (1999) wherein the nature of express advocacy was discussed. "We also determine that the definition of the term express advocacy is not limited to the specific list of 'magic words' such as 'vote for' or 'defeat' found in Buckley footnote 52." At p. 4, ". . .we hold that no particular 'magic words' are necessary for a communication to constitute express advocacy." At p. 659. The Court went on to state "It may well be appropriate to consider context in determining whether a communication constitutes express advocacy." At p. 673. The issue in ELECTIONS BOARD OF THE STATE OF WISCONSIN, had to do with statutory requirements for campaign financing, reporting and express advocacy in elections. The Board policy at issue in this case is broader, including political advertisement/advocacy, without distinguishing between issue advocacy and express advocacy or other forms of political activity. The circumstances here demonstrate that the Attract and Retain signs are political advertising and advocacy. See also, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 16635-A (WERC, 5/82) as to the legislative and political nature of a labor organizations activities designed to influence agency or other governmental action which has a direct or indirect effect on the terms and conditions of employment of employees, or secure the necessary funding or financing to support the administration of a collective bargaining agreement by the appropriate governmental unit.

Board Policy No. 9.08 provides that "political advertising/advocacy shall not occur in school buildings or upon school premises during work hours in the presence of students or if the communication threatens to disrupt the work or educational environment or interferes with employees' duties. . . ." The record does not demonstrate that the presence of signs in the classroom was communication that caused any actual or threatened disruption of work or interference with employees' duties. Rather, the issue presented in this case is whether the Board violated MERA by enforcing the first part of the rule by prohibiting the display of the Attract and Retain signs in the classroom.

Because the signs are both political activity and concerted activity, it is necessary to apply the balancing test from KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66) to determine whether the interests of the employees/MTEA in engaging in concerted activity outweigh the interests of the Board in prohibiting political advertising/advocacy in the classroom. In applying that balance, I find that the interests of the employees/MTEA are outweighed by those of the Board. Thus, I conclude that the display of signs in the classrooms, although concerted activity, can be limited or banned by Board Policy 9.08.

The MTEA contention that it did not want to involve the students in the campaign is a clear admission that there is a very strong and weighty interest in having a non-political atmosphere in the classroom. This is the interest furthered by the Board policy. Indeed, the teachers were instructed by MTEA not to engage in substantive discussions with students about the signs or campaign. MTEA has, by its actions, clearly recognized that the Board's interest in keeping students from being involved in the political campaign through classroom signs is a very important concern. MTEA's actions in removing signs from hallways and student teaching areas, such as blackboards, and limiting placement to teacher desk areas is further evidence that MTEA recognizes that the employees'/MTEA's interests in engaging in concerted activity have limits in the classrooms and hallways of the school. But, the Board is correct when it argues that limiting the sign placement to desks and personal areas in the classroom does not change the character of the signs as tools of political advocacy.

I acknowledge that the employees/MTEA have a legitimate concerted interest in fostering solidarity and support among employees and that the Attract and Retain signs in classrooms further that interest. However, it is important to balance the opportunities for that support to be generated (presumably when one teacher visits another teacher in a classroom before or after school or during lunch) against the constant impact on students in the classroom who see the signs the entire time they are present. It is also noteworthy that Attract and Retain signs are allowed in teacher lounges or other places students usually are not present. Thus, there are other school-based outlets for the employees to show support which do not directly involve students.

Considering the Board of Education's interests in avoiding political advocacy in classrooms, the scope of Policy No. 9.08 can legitimately be enforced beyond a ban on partisan political electioneering in the classroom. The Board has an interest in not allowing the

school/government resources/property to be used to (or perceived by the public as being used to) support one side or the other in the political activity related to the contract negotiation – or in any political activity for that matter. There was no Board negotiation-related activity in the classroom. The Board has a related interest in avoiding confusion in the student body and among parents and the general public as to whether the political message in the signs is that of the employer or the individual teacher(s). The Board policy recognizes and protects students, who are vulnerable, from such political messages. The Board policy protects against the abuse of the impressionable relationship between a teacher and student. MTEA has not suggested any credible reason or fact as to why these are not legitimate interests and purposes for Policy 9.08. Thus, contrary to the MTEA's argument, the Board's interests are much greater than "marginal."

It also bears emphasis that the classroom is not a normal employee workplace in the context of placing signs therein. This is so because students are required by law to attend school. The signs are seen by students everyday whether placed on desks or personal areas. The special nature of the teachers' workplace must be recognized in striking the balance between concerted activity and activity that can be prohibited.

Policy 9.08 does not eviscerate or unnecessarily limit the concerted interests of the MTEA because the policy is limited to areas in the schools where students are present. The policy of the Board goes no further than needed to protect and address the interest and purposes for the policy, and accommodates the legitimate interests of MTEA. On the other hand, MTEA's position would continue to subject students, parents and the general population to the political advertising/advocacy in the classrooms which the Board has a legitimate interest in preventing. On balance, while displaying the signs in the work areas furthers the legitimate concerted interest of the MTEA, it does unnecessary and overriding injury to the interests of the Board. In contrast, Policy 9.08 furthers the legitimate interests of the Board but goes no further than necessary and accommodates MTEA's interests by allowing political advocacy in areas where students are not present.

Enforcing Policy 9.08 in this case is not discriminatory. I acknowledge that the display of personal items is allowed on teachers' desks and personal classroom areas and that it can be argued that this would require that Attract and Retain campaign items also be allowed to avoid a violation of MERA. However, the Policy does not refer to union materials, but rather political materials. If no other political advertising or advocacy is allowed (and there is no evidence it is), then the MTEA's political advocacy materials are not being discriminated against.[11]

[11] It is important to note that MTEA communications or materials that are not associated with and part of a political campaign fall outside the scope of Policy 9.08 and, in any event, could not be banned vis-a-vis the allowed display of personal items without violating MERA.

In closing, I note that the majority decision raises practical questions such as exactly where in the classroom can signs be placed, how many signs are allowable, how large can the signs be, are there restrictions on the message that can be expressed on the signs, etc. In my view, a clear line between classroom and other appropriate sign locations is not only compelled by the law, but also avoids future disputes between the parties.

As to the question of whether Attract and Retain buttons could be banned, I initially note that the Board did not ban the wearing of such buttons in the classroom. Thus it appears the Board believes such buttons do not fall within the scope of Policy 9.08. Further, to the extent the buttons are much smaller and carry only the Attract and Retain message (as opposed to the additional Fair Contract Now and Do the Right Thing message on the signs) they are less likely to engage students. In addition, because they are worn on the employee's person and not placed on District property, the District's property use interest that is part of the balancing test as to signs is not present. Lastly, as the majority notes, there is a long and strong recognition in labor law of employees' general right to wear buttons, pins and insignia which adds weight to MTEA's side of the balance here. See, e.g. REPUBLIC AVIATION CORP. v. NLRB, 324 U.S. 793 (1945). Thus, although it is a close question, I conclude that employees had a MERA- protected right to wear Attract and Retain buttons in the classroom.

Dated at Madison, Wisconsin, this 3rd day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

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