STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., involving a Dispute Between said Petitioner and THE MILWAUKEE BOARD OF SCHOOL DIRECTORS.	Case 167 No. 35462 DR(M)-381 Decision No. 23208-A

Appearances:

Perry, First, Lerner, and Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 1219 North Cass Street, Milwaukee, Wisconsin 53202-2770, appearing on behalf of the Milwaukee Teachers Education Association.

Mr. Grant Langley, City Attorney, by Mr. Stuart S. Mukamal, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Milwaukee Teachers Education Association, herein the MTEA, having on August 8, 1985 filed a petition and having on January 31, 1986 filed an amended petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether certain proposals made by the MTEA and the Milwaukee Board of School Directors, herein the Board, during collective bargaining over a successor to the 1982-1985 teacher contract are mandatory subjects of bargaining; and hearing having been held in Milwaukee, Wisconsin on March 6, 7, 17, 18, 27, 1986 and April 7, 1986 and December 10, 1986, before Peter G. Davis, a member of the Commission's staff; and written argument having been submitted by the parties on August 11 and September 5, 1986 and again on January 8 and 9, 1987; and Commission having reviewed the record and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee Board of School Directors is a municipal employer operating a public school system in Milwaukee, Wisconsin and having its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

2. That the Milwaukee Teachers Education Association is a labor organization functioning as the collective bargaining representative of certain employes of the Board and having its principal offices at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

3. That during collective bargaining between the Board and the MTEA over a successor agreement to the 1982-1985 teacher contract, a dispute arose between the parties as to whether the following 49 provisions from the 1982-1985 contract which the MTEA proposed be included in a successor agreement were mandatory subjects of bargaining:

(.) PART II, Section F

2. FAIR SHARE.
b. The MTEA further agrees to hold the Board harmless for any damages arising out of any legal action by any employe contesting the above set forth deduction

from his/her salary. The Board and the MTEA agree to jointly defend against any such action.

(2) PART IV, Section B

1. HIGH SCHOOLS.

a. Teachers, beyond those needed for study hall, supervision, attendance counseling, and hall supervision, shall be assigned to projects dealing with curriculum improvement within their area of teaching. Normally, one (1) teacher and such aides as are necessary may be assigned to hall supervision. Additional teachers may be assigned where essential due to the structure of the building and special problems. Volunteers shall first be assigned, and where there are insufficient volunteers, assignments shall be made with available teachers on a rotating basis by semesters.

(3) PART IV, Section B

3. ADDITIONAL ASSIGNMENTS.

a. Pupils admitted to secondary buildings before 7:45 a.m. shall be required to have a pass. Early admission will be allowed only through a limited number of entrances to be determined by the physical structure of the building. On days of inclement weather, exceptions will be allowed to the above. If a school has unique needs requiring exceptions to the above, the time for entrance to areas in the building by students will be determined by the principal only after meaningful involvement of the faculty.

(4) PART IV, Section D

1. To the extent possible, exceptional education students who are scheduled to be reassigned from elementary schools to middle schools or from middle schools to high schools at the beginning of a school year shall be identified to the receiving school by March 15 of the school year preceding the change in school assignment.

(5) 2. Exceptional education students shall be moved from elementary to middle schools or from middle schools to high schools previous to the end of the third grading period unless, through unusual circumstances, such a move could not be made or anticipated by that time and a later move would be deemed necessary and in the best interest of the student and/or class involved.

(6) PART IV, Section B

8. ROTATION OF DUTIES. Study halls, hall duty, lunchroom duty and attendance service shall be assigned so that individual teachers do not have to perform these duties year after year without being relieved when specially requested.

(7) PART IV, Section D

7. When it becomes necessary to release the regular teacher or diagnostic teacher to meet with the multi-disciplinary team during the regular school day, provision shall be made to relieve such teacher from classroom responsibilities in accordance with Part IV, Section B(5).

(8) PART IV, Section D

11. When special equipment is ordered for hearing impaired classes and the person making the order feels that substitution should not be made, he/she should state that fact on the requisition and inform the program administrator. The Purchasing Division shall consult the program administrator, who in turn shall notify the teacher ordering the equipment, before any substitutions are made.

(9) PART IV, Section E

Reading research teachers may be used as reading resource teachers, reading center teachers or both.

(10) PART IV, Section I

1. In the employment of teachers, full credit for outside experience, up to five (5) years, shall be granted. Outside experience credit will be given equal to one Division B service increment for each of the five (5) years of experience.

(11) PART IV, Section D

8. Teachers to whom students with exceptional education needs have been assigned shall be provided multi-disciplinary team reports and educational assessments that are meaningful to the teacher developing the classroom program for the child.

(12) PART IV, Section N

2. New teachers shall be employed on probation for three (3) years pursuant to the terms of a one (1)-year individual contract. Said contract shall automatically be renewed unless terminated, in accordance with the provisions of this section. Upon attaining their fourth contract, teachers shall achieve tenure status. All nontenured teachers shall receive a written evaluation at least once per year during the first three (3) years of employment.

3. After permanent tenure status has been reached, evaluation shall be made as follows:

a. annually for the first two (2) years under such status; and

b. at three (3)-year intervals thereafter.

(13) PART IV, Section J

1. INSERVICE.

a. The Board and the MTEA agree that annual inservice needs exist for the professional staff. As part of developing an annual inservice training program, teachers once every other year shall be surveyed as to suggestions for courses for inservice training. Where teachers are hired to teach the courses, they will be paid their individual hourly rate.

b. Where inservice is deemed to be necessary, teachers will be paid for inservice as follows: . . .

(14) PART IV, Section U

7. PHYSICAL CONDITIONS OF BUILDINGS. Where physical conditions in a building may not allow the continuation of classroom instruction and such is brought to the attention of the MTEA, a representative of

the Division of School Services and MTEA shall confer in the building as to whether school should continue. If necessary, the City Health Department may be consulted.

Where physical conditions within a classroom are such, that they may preclude its continued use as a classroom for the particular type of instruction, representatives of the administration and the MTEA will confer within a reasonable period of time to determine if the room's usage should be continued.

PART IV, SECTION N

N. TEACHER AND SCHOOL SOCIAL WORKER EVALUATIONS

. . .

4. The evaluator(s), when making his/her report, shall select from among the evaluation cards, the card which most nearly characterizes the teacher for whom the evaluation is being made, and a complete written statement shall be submitted in support of his/her appraisal. This evaluation should be based upon and should include the following:

a. a sufficient number of classroom visitations, observations and personal conferences;

(15) b. an analysis of points of strength and weakness, with specific examples;

(16) c. definite suggestions for ways in which improvement may be made, if such be necessary; and

(17) d. a statement of what has been done by the teacher and the evaluator to strengthen classroom instruction.

. . .

6. In the event a teacherr receives a satisfactory evaluation card with an attachment where the evaluator(s) recommends a transfer should be taken under advisement, the teacher shall specify in writing whether he/sher concurs in the recommendation for transfer. Where the teacher does not concur and upon request of the evaluator(s) or teacher, the MTEA and the Division of School Services shall confer in the building with all parties to resolve the problem. If, as a result of the conference, the Division of School Services concurs in the recommendation of the evaluator(s) and before any action is taken in the matter, they shall:

a. Notify the teacher and the MTEA within ten (10) working days in advance that a conference has been scheduled with the Division of Human Resources involving the teacher, MTEA, the evaluator(s) and the Division of School Services. The notice will include a
(18) statement of (18) the problem. The purpose of the conference shall be to explore possible areas of assistance necessary to overcome the difficulties which have been referred to in the evaluation report.

b. The decision of the Division of Human Resources shall be reduced to writing and, together with the reasons, furnished to the teacher and MTEA. If the MTEA and/or the teacher are not in agreement with the decision, the MTEA may proceed through the final step of the grievance procedure, starting at the third step.

. . .

12. Day-to-day assignment of teachers may only be used during that period necessary to find another appropriate, professional assignment, except as to teachers who have not been initially assigned to a particular building. When a period of time exists in which it is necessary to make day-to-day assignments of appointed teachers, the following procedures shall be implemented:

a. The substitute dispatch office shall make every effort to place appointed teachers in appropriate assignments of a longer duration, especially assignments which may develop as vacancies.

(19) b. The evaluator(s) at a school to which an appointed teacher is assigned shall be notified. The evaluator(s) shall evaluate the teacher on each assignment in accordance with the provisions of the contract.

(20) c. An evaluation in a long-term assignment, forty-five (45) days or longer, shall comply with the procedures established for regularly assigned teachers.

(21) d. A teacher in a short-term assignment may be evaluated after one (1) day of service but shall be evaluated after three (3) days of service. A yearly evaluation based upon a compilation of the individual short term evaluations shall be made by the Division of Human Resources. Any adverse short-term evaluations shall be made known to the teacher and the teacher shall have an opportunity to have a conference with the evaluator(s) to discuss the evaluation.

(22) PART IV, Section S

1. BUILDING REPRESENTATIVE AND SCHOOL REPRESENTATIVE COMMITTEE. The MTEA may, in each school, have a building representative and a school representative committee. The principal shall recognize such committee and shall meet with such committee, together with such other persons as he/she deems proper to be at the meeting. Such meetings must be conducted once a month, where a meeting is requested by either the principal or the MTEA committee, for the purpose of discussing school matters. More frequent meetings will be held where the situation warrants. School social workers shall be represented by the MTEA building representative in the building to which they are assigned or by an MTEA staff member.

(23) PART IV, Section S

2. RECOMMENDATIONS OF BUILDING CHANGES. Representatives of the MTEA will meet with the proper department and division personnel of the administration office to make recommendations as to basic facilities in new buildings or major remodeling of buildings. Such recommendations may include specific requests for particular buildings relating to concerns of individual departments or programs.

(24) PART IV, Section U

3. PREPARATION PERIODS DURING ASSEMBLY PROGRAMS. If the method of organizing auditorium seating for assembly programs is according to homerooms, the periods chosen for assembly programs will be rotated.

(25-26) PART IV, Section U

8. PARENT OR LEGAL APPEALS UNDER CHAPTER 115. In parent appeals or legal actions arising in connection with Chapter 115, Wisconsin Statutes, which involve individuals in the MTEA bargaining unit, the following shall apply:

a. The MTEA shall be furnished notice of such appeal once a hearing is scheduled. The teacher, if he or she wishes, may have representation.

b. In the event that legal action is brought against a teacher arising out of the performance of duties related to Chapter 115, Wisconsin Statutes, as amended, shall apply.

(27) J. ASSIGNMENT TO A PARTICULAR SCHOOL

1. Teachers shall be assigned to a particular building where a vacancy exists, as long as the teachers are qualified within their teaching certificates issued by the Department of Public Instruction or their major or minor field of certification and specials skills and training needed. 1/ Where teachers have left an assignment, pursuant to a specific provision of this contract, they shall be reassigned in accordance with the following order of priorities.

a. Teachers displaced from a particular building due to a reduction in enrollment in accordance with Part V, Section G(1), teachers requested reassignment in accordance with Part V, Section G(3), teachers requesting reassignment in accordance with Part V, Section G(2), teachers returning from a leave of absence, and teachers being reassigned in connection with the section on evaluation. Exceptions to this section may be made to provide meaningful assignments to those teachers being transferred as a result of evaluation.

b. Unassigned teachers as a result of premature curtailment of leave and unassigned teachers as a result of overhiring.

c. New teachers in the system who have not as yet taught in the Milwaukee Public Schools system.

2. Whenever there are two (2) or more qualified teachers to fill a vacancy in any one (1) of the above categories, preference shall be given to the teacher or teachers with the greatest system-wide seniority. The MTEA recognizes that there may be an occasion where departmental, extracurricular, kindergarten, primary, intermediate,

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1/ For example, a physical education teacher position in one particular school may require the services of a teacher with life guard training and water safety skills. Qualified applicants for this position must express interest in this vacancy by filing an application, have the basic Department of Public Instruction physical education certification for the secondary level, and must either have acquired life guard training and water safety skills or will have acquired the above skills before actually beginning said assignment.

upper grade level or counseling needs cannot be met in a specific instance through the provisions of this section. In such instance, the administration will give the teacher, upon request, reasons for the departure from these provisions. If the teacher requests, such reasons shall be reduced to writing.

(28) K. STAFFING OF SPECIALTY SCHOOLS

1. EXISTING TOTALLY SPECIALIZED BUILDINGS.
In any school which has a program in a special mode of instruction such as but not limited to open education, fundamental education, continuous progress multi-unit individually guided education, teacher pupil learning center, gifted and talented, and creative arts, vacant positions will be filled from a list of qualified applicants.

A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has the basic Department of Public Instruction certification required, and who meets at least one (1) of the following conditions:

a. Previous experience in the particular specialty.

b. Has taken or completes before the beginning of the next semester, college courses in the specialty, or vocational-technical courses where applicable, or inservice training in the particular specialty. When the necessary college courses, vocational-technical courses or inservice training are not reasonably available to the teachers wishing to participate, the school administration will establish inservice programs that fulfill the training requirements.

For elementary specialties or modes of instruction, a qualified applicant is a teacher who has the applicable qualifications set forth above. For secondary specialties, the applicant must also have the applicable qualifications set forth in the paragraph above, but in particular instances may also be required to have specific training or a specific skill. 2/

Teachers assigned to a specialty school during the 1976-77 school year are qualified for that specialty in terms of the above criteria. One (1) inservice program designed for that specialty and offered for the teachers in the specialty may be required. Said programs shall not exceed sixty (60) hours over the three (3) years of the contract, the dates of said programs to be negotiated with the MTEA.

In any school which has a Montessori program, vacant positions will be filled from a list of qualified applicants.

A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has both the basic Department of Public Instruction and American Montessori Society or American Montessori International certifications required and is willing to participate in inservice programs designed for teachers in the specialty, if such inservice is deemed to be necessary.

2/ See Footnote 1.

In any elementary school which is a second language proficiency school, vacant positions will be filled from a list of qualified applicants. A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has the basic Department of Public Instruction certification required for the grade level and subject, and can speak, read and write the school's second language.

For paragraph 1, assignments will be made in accordance with system-wide seniority to vacancies known by July 1, or by the date on which the general assignment of students to schools occurs, whichever date comes later.

(29) 2. EXISTING SPECIALTY PROGRAMS WITHIN BUILDINGS. In any school which has specialized courses, programs or modes of instruction in addition to the regular program, vacancies shall be filled in the following order:

a. Qualified applicants currently at the school;

b. Other qualified applicants.

For elementary specialties or modes of instruction, a qualified applicant is a teacher who has the applicable qualifications set forth in paragraph 1. For secondary specialties, the applicant must also have the applicable qualifications set forth in paragraph 1, but in particular instances may also be required to have specific training or a specific skill. 3/

In any school which has a bilingual program, vacant positions requiring the second language will be filled from a list of qualified applicants. A qualified applicant is a teacher who has expressed an interst in the vacancy by filing an applicantion, has the basic Department of Public Instruction certification required for the grade level and subject, and can speak, read and write the school's second language.

Assignment of qualified applicants to vacancies will be made first from applicants within the school in the order of system-wide seniority and secondly from other applicants on the basis of system-wide seniority to vacancies known by July 1, or by the date on which the general assignment of students to schools occurs, whichever date comes later.

(30) 3. NEW SPECIALTY SCHOOLS AND PROGRAMS. When a new specialty school or program is created, notice of the program and teacher qualification criteria will be publicized at the earliest possible opportunity. Teacher positions shall be filled in the following order:

a. From qualified applicants currently at the school in order of system-wide seniority;

b. From other qualified applicants in order of system-wide seniority.

For an elementary program or school, a qualified applicant is a teacher who has the applicable qualifications set forth above in paragraph 1. For secondary programs or schools, the applicant must also have the applicable qualifications set forth in paragraph 1, but in particular instances may also be required to

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3/ See Footnote 1.

have specific training or a specific skill. 4/ In any school which has a bilingual program, a qualified applicant for vacant positions requiring a second language will be the same as that set forth in paragraph 2. The cut-off date for the use of the seniority provision is the same as that described in paragraph 2.

In the special case of Rufus King College Preparatory School to be opened for the 1978-79 school year, teacher qualifications (as defined in (1) with the exception of inservice training) based upon curricular needs, will be used. In all other respects paragraph (3) applies.

(31) PART XII - REDUCTION IN WORK FORCE

6. QUALIFIED. Wherever the term qualified is used in Part XII, Sections D and F it shall have the same meaning as found in Part V, Sections J or K of the contract.

(32) PART V, Section M

FILLING VACANCIES. Teacher vacancies occurring after November 15 and March 15 may be filled by long-term substitutes for the duration of the first and second semester, respectively. These substitutes are to be paid in accordance with the regular teacher salary schedule and are to receive full fringe benefits except for pension.

(33) Application
SCHEDULE E - APPENDIX "C" FOR JULY 1, 1982 through June 30, 1985.

11. ****Vocational counselors coordinating the work experience program will be allowed ten (10) days above the school year at their daily rate of pay.

(34) Application
SCHEDULE E - APPENDIX "C" for July 1, 1982 through June 30, 1985.

15. Learning coordinators may, on a voluntary basis, work one (1) day beyond the end of the school year and two (2) days prior to the beginning of the school year compensated at their individual daily rate.

(35) Application, Appendix "C"

10. ***Limited to:
40 hours per school of 1,200 enrollment or less;
64 hours per senior high school of 1,201-1,500 enrollment;
80 hours per senior high school of 1,501 enrollment and above.

(36) Appendix "F", Driver Education Instructors

8. Where all four (4) phases of driver education are conducted at a school, the chairperson shall be released from homeroom to permit time to set up all necessary equipment and prepare automobiles.

(37) Appendix "F", Driver Education Instructors

10. Driver education shall be given departmental status

4/ See Footnote 1.

in the same manner as other Board departments with appropriate release time for department chairpersons.

(38) Appendix "F", Guidance Counselors

3. To be eligible for selection as a guidance director, a guidance counselor shall be subject to the following requirements:

a. an "A" or professional license;

b. a minimum of two (2) years experience in guidance in which at least half of the time was spent in guidance;

c. a minimum of two (2) years in teaching in the Milwaukee system; and

d. seniority in the system and in the building should be considered.

(39) Appendix "F", Vocational Counselors

1. The vocational counselor coordinating the work experience program will be allowed an additional seven (7) days prior to the commencement of the school year to conduct job development activities, interview potential candidates for the program, interview parents of potential candidates, and place selected enrollees in specific employment positions and three (3) days following the close of the school year for placement of graduating seniors and follow-up activities.

(40) Appendix "F", Coordinating Teachers of Cooperative Programs

3. As in the past, coordinating teachers of cooperative programs shall receive an additional twenty (20) days prior to the beginning of the school year to plan and conduct the necessary preschool program.

(41) Appendix "F", Audiovisual Building Directors In Middle and High Schools

2. Audiovisual building directors shall receive a minimum of two (2) released periods for audiovisual work in the high school. Middle school audiovisual release time is set forth in Board policy.

(42) Appendix "F", Audiovisual Building Directors In Middle and High Schools

4. The Board shall require all high school audiovisual building directors who have been appointed in the same manner as department chairpersons to have the following requirements:

a. Each audiovisual building director shall have a four (4) year degree or be eligible to hold a regular Wisconsin teaching license under 118.19(7) of the 1971 Wisconsin Statutes.

b. Each audiovisual building director shall have a minimum of four (4) semester hours in audiovisual instruction, one (1) of which shall be a basic audiovisual methods course.

All present audiovisual directors who do not have the required hours shall earn the hours within the length of the contract.

(43) 5. The Board shall require all middle school audiovisual building directors to have the following requirements:

a. Each audiovisual building director shall have a four (4) year degree or be eligible to hold a regular Wisconsin teaching license under 118.19(7) of the 1971 Wisconsin Statutes.

b. Each audiovisual building director shall have a minimum of four (4) semester hours in audiovisual instruction, one (1) of which shall be a basic audiovisual methods course.

All present audiovisual directors who do not have the required hours shall earn the hours within the length of the contract.

(44) Appendix "F", Band Directors

2. Band directors shall be allowed to report to their respective schools one (1) day early to perform duties necessary for preparation. They shall receive their daily rate of pay.

(45) Appendix "F", Industrial Education Teachers

1. When a shop teacher, working under an eight (8)-period day cannot be released from a homeroom assignment, his/her equivalent period shall be assigned to him/her for shop maintenance.

(46) Appendix "F", Industrial Education Teachers

2. Where a new teacher is assigned to a shop or where a present teacher is assigned to a new shop in a different school or where a new teacher is hired and assigned to a shop during the school year, the teacher shall be allowed to start five (5) days prior to the beginning of school in order to acquaint himself/herself with the shop and prepare such equipment as needs preparation. Such teacher shall be paid 1/191 of his/her salary for each additional day. In addition, where a present teacher feels that the shop to which he/she is assigned requires additional work prior to commencement of school, he/she may apply through the principal to the central office for authority to start either prior to the beginning of the school year or continue on after the end of the school year.

(47) Appendix "F", Interscholastic Academics
Chess, Math, Debate, and Forensics

2. TRANSPORTATION - A sum of five thousand eight hundred dollars ($5,800) will be allocated for transportation for debate, forensics, chess, and mathematics competition. The sum will be administered by the director of transportation. Coaches of the events may request, as an option to the charged to this amount, carchecks for students engaging in activities. Any request for transportation service for carchecks must reach the Director of Transportation one (1) week before the scheduled event.

3. AFFILIATIONS - One (1) check for schools interested in association in the Wisconsin High School Forensics Association and the Debate Judges Association would be issued. Schools which were active and members of these associations last year would have the dues paid upon notification of interest. Schools which were not members last year would have to present a program for activity outside of the individual school, and to qualify for affiliation in the Wisconsin High School Forensics Association, would have to demonstrate an interest in participating in the district tournaments sponsored by the Wisconsin High School Forensics Association. It was

agreed that a lack of interest in such participation in district contests would preclude a school from being included in this sum.

A central check for ten dollars ($10) per interested middle and high school will be issued to schools interested in becoming associated with the Milwaukee High School Chess League. Middle and high schools which have demonstrated an interest in debate will be allowed membership in the Wisconsin Debate Coaches Association and the Wisconsin Forensics Coaches Association. Schools which have not participated in the past will have to demonstrate a program of planned participation in order to qualify for this sum.

4. HANDBOOKS, LITERATURE, AWARDS, REGISTRATION FEES, AND NECESSARY LUNCHES -
These amounts would be grouped together and transferred into the activity account at each high school. The amount of one hundred sixty dollars ($160) would be transferred into the activity account of debate and one hundred ninety dollars ($190) to be the activity account of forensics for schools which have not participated outside the school level must present a plan for participation in the coming year. The maximum amount to be allocated to any middle school will be one hundred dollars ($100) upon certification of a program of activity outside of the individual school. For schools with an active chess program, fifty dollars ($50) will be transferred to the school activity account of each high school. Middle schools will not be included at this time. The administration will explore supplying of chess sets to schools with an active chess team. The chess coach shall bear the responsibility of accounting for the materials.
5. MATH COMPETITION - A sum of one thousand five hundered dollars ($1,500) will be administered by the curriculum specialist in charge of mathematics, which would cover awards, registration, and necessary lunches for mathematics competiton. Students participating in competitions within the City of Milwaukee would not have their lunches paid.

(48) Appendix "F", Kindergarten Teachers

Kindergarten classes shall be organized by the principal with kindergarten teacher(s) involvement.

(49) Appendix "F", Traveling Music Teachers

4. Traveling music teachers who work twenty-five (25) class periods per week or more shall receive five (5) hours preparation time at the end of each semester.

4. That during collective bargaining between the Board and the MTEA over a successor agreement to the 1982-1985 teacher contract a dispute arose between the parties as to whether the following 66 MTEA proposals for new contract language were mandatory subjects of bargaining.

(50) A/31

f. Students who pose a threat to teachers by possession, threat or use of a dangerous weapon on school property shall be considered by the school board for expulsion.

(51) A/32

g. Students who are suspended for serious breach of discipline, such as a threat of assault or assault on a

teacher shall not be reinstated until a parent conference is held at the school.

(52) A/33

h. In those schools where the physical safety of teachers has been threatened by outsiders, security aides shall be hired to protect teachers from this danger.

(53) A/58

*Add: "or subject area resource rooms," to existing contract at Part IV, Section B (See proposal 2 herein).

(54) A/59

As the impact for the increase in the length of the elementary pupil day, provide elementary teachers, including preschool, kindergarten and exceptional education teachers, with daily, duty-free preparation time by hiring art, music, physical education teachers and librarians to provide all instruction in these areas.

(55) A/65

e. Teachers will not be asked to cover the class of absent teachers unless substitutes have been called and none are available.

(56) A/66

a. Teachers shall be entitled to a duty-free lunch period equal in length to a normal class period in high school, no less than fifty (50) minutes in the middle school, and no less than one (1) hour in the elementary school. When an elementary teacher moves from one school to another, he/she shall receive travel time in addition to the lunch period. Where travel time is restricted between an a.m. and p.m. assignment, teachers shall be released fifteen (15) minutes prior to dismissal time. Kindergarten teachers in lieu of being released fifteen (15) minutes prior to dismissal time shall be paid one-fourth (.25) of the part-time certificated hourly rate for each day traveled. When hazardous conditions exist, kindergarten teachers who must travel to reach their afternoon school shall be released up to fifteen (15) minutes. One (1) teacher per lunchroom, supported by lunchroom aides within the limitations of the allocation, shall be used to supervise elementary school lunchrooms. However, if the principal, after consultation with the teaching staff, determines that the safety of the children requires additional supervision, he/she may assign an additional teacher per lunchroom for supervision. In the elementary school, where voluntary noon paid supervision is not in effect, noon supervision shall be by non-bargaining unit employes.

(57) A/68

substitute: One (1) release period shall be provided if a department has twenty-six (26) to fifty (50) sections, two (2) release periods if the department has fifty-one (51) to seventy-five (75) sections and three (3) release periods if the department has seventy-six (76) or more sections.

(58) A/70

Exceptional education and reading shall be recognized as departments. Department chairpersons shall be selected by a vote of department members.

(59) A/71

10. No senior high school teacher shall be required to teach more than three (3) different subjects/grade level preparations.

(60) A/72

11. The present time allocation at the middle school level for student exploratory shall include academic enrichment and remedial skill strengthening classes. Students shall receive a letter grade for work done in these classes. A budget shall be provided at the school level to provide for curriculum materials in these classes.

(61) A/73

13. Establish the Designated Vocational Instructor position as a full time release position to carry out the assigned duties.

(62) A/74

14. Provide early childhood MR classes, generic pre-school classes and secondary exceptional education classes with child care attendant services where such services are necessary.

(63) A/75

15. The age in wide range classes shall not exceed four (4) years.

(64) A/76

16. Establish a full time exceptional education coordinator at each high school to facilitate the exceptional education program.

(65) A/77

17. Provide LD resource teachers with classrooms.

(66) A/78

18. Reduce the age span in MR, LD and ED classes.

(67) A/79

19. Increase the number of diagnostic program support personnel.

(68) A/80

20. The Board shall take the following steps to safeguard teachers against communicable diseases such as cytomegalovirus, aids and herpes:

a. The medical records of students should be available to teachers to determine if there are any health risks for which employes need to take precautions to safeguard the health of their students and themselves.

b. Employes should be notified if any child in the building is known to be a carrier of a communicable disease which poses a health threat.

c. Each classroom used by students with such a communicable disease should be equipped with soap, a sink and toilet to facilitate proper hygiene.

d. Arrangements should be made to insure that the classrooms (including contents, such as toys, tables, mats, etc.) used by students with such a communicable disease are thoroughly cleaned before each school day.

e. Inservice training in hygiene techniques, including hand washing, should be provided to employes who have contact with a student who has such a communicable disease.

f. Employes who request to be tested to determine the presence of herpes group antibodies in the blood should receive such testing at board expense.

g. Employes who are at risk should be afforded the opportunity, on a voluntary basis, to be reassigned from contact with students known to have a communicable disease which poses a health threat.

(69) A/81

21. ED classes should not be placed in buildings without assistant principals.

(70) A/82

22. Provide one day per month for primary exceptional educational education classroom teachers to make home visits, where the teacher feels the home visits are necessary.

(71) A/83

E. CLASS SIZE GENERAL PROVISIONS. Effective September, 1985 and for the remainder of the term of this contract the following formulas shall be used.

1. Class size at all levels will be established at the following maximums:

a. Senior high clases shall be limited to a maximum of twenty-five (25) students, unless otherwise specified.

b. Middle school classes shall be limited to a maximum of twenty-five (25) students, unless otherwise specified.

c. Elementary classes (1-3) shall be limited to a maximum of fifteen (15) students, unless otherwise specified.

d. Elementary intermediate classes (4-6) and (7-8) classes in K-8 schools shall be limited to a maximum of twenty (20) students, unless otherwise specified.

e. Five (5)-year old kindergarten classes shall be limited to a maximum of fifteen (15) pupils for each half day session or full day class.

f. Four (4)-year old kindergarten classes shall be limited to a maximum of fifteen (15) pupils each half day session. To the extent possible, classes shall be established in the afternoon on a daily basis, and be taught by the teacher who teaches the five (5)-year old kindergarten classes in the morning.

g. Pre-school classes shall be limited to a maximum of ten (10) in three (3) year old classes and fifteen (15) in four (4)-year old classes. Multi-age classes will have an average of the class sizes of each age class.

h. There will be no split grade classes.

i. Study halls shall be limited to a maximum of thirty (30) students per teacher.

j. Physical education classes in secondary schools shall not exceed twenty-five (25) students in any single class.

k. English teachers assigned classes in remedial English, composition, creative writing, fundamentals of English and journalism shall have a maximum of one hundred (100) students and two (2) preparation periods daily.

l. Science teachers utilizing laboratory methods and materials on a regular basis shall not have more than four (4) classes and shall have two (2) preparation periods daily. Classes shall not exceed one hundred (100) students per day and the number of lab stations per class.

m. Home Economics classes and Industrial Education classes shall not be organized to exceed facilities equipment and the regular class size of twenty-five (25). Each class will not have more than one course or level per class period.

n. Computer concepts mathematics classes and mathematics resource rooms shall be limtied to twenty (20) students per class.

o. Class sizes for general music or music appreciation shall not exceed the rgular class size.

p. Reading classes at the secondary level shall have a limit of fifteen (15) students per class period.

q. Chapter I Reading teachers shall have a maximum of thirty-six (36) students per day.

r. Class sizes for art, music physical education shall not exceed the maximum of regular classroom.

s. Unit leaders should not be counted in the class size formula.

t. Adaptive physical education classes shall be established for students that cannot handle large class settings and/or activities and for exceptional education students that have such needs. Classes shall not exceed a maximum of fifteen (15) students.

u. Where extenuating circumstances prevail, the staffing formulas noted above may need to be revised downward to protect the interest of the individual pupil and the total student program.

(72) A/81

F. MAINSTREAMING.

1. In order to reduce class size for non-exceptional education teachers receiving mainstreamed exceptional education students, the following provisions shall be implemented:

a. At the end of each school year, each school will determine the mainstreaming anticipated for the next school year based on Multidisciplinary Team (M-Team) recommendations and Individualized Education Programs (IEP's).

b. Each exceptional education student to be mainstreamed will be assigned a weighted value in accordance with the individual student's needs based on the chart below:

EXCEPTIONAL EDUCATION NEED	EQUIVALENCY
Early Childhood	
Self-contained modified	4
Self-contained integrated	3

Mild/Borderline Mentally Retarded	
Self-contained modified	4
Self-contained integrated	3
Moderate/Severe Mentally Retarded	
Self-contained modified	4
Self-contained integrated	3
Physical Handicapped	
Self-contained modified	4
Self-contained integrated	3
Vision	
Self-contained modified	4
Self-contained integrated	3
Hearing	
Self-contained modified	4
Self-contained integrated	3
Emotionally Disturbed	
Self-contained modified	5
Self-contained integrated	4
Learning Disabilities	
Self-contained modified	5
Self-contained integrated	4

2. Exeptional education students shall be part of the original list and class load of techers.

3. Appropriate adjustments to the allocations provided to each school shall be made based on the Teacher Needs Reports in September to reflect actual student enrollment and mainstreaming.

4. The total number of student equivalents based on the weighted values of each mainstreamed student shall be computed for each school and reported as part of the Teacher Needs Report. Based on the class size maximums, an additional teacher position shall be allocated to the school for each teacher position, or major fraction thereof, needed to maintain the class size maximums. In secondary schools, the allocation would be proportional to the level of mainstreaming in each subject area.

(73) A/85

G. RELEASE TIME FOR IEP's. Preparation of Individual Education Programs (IEP's) for all exeptionalities shall be handled as follows:

1. Each exceptional education teacher shall be allowed up to four (4) days annually for which a substitute teacher will be provided. These days shall be taken in one (1) day minimums as they are needed for preparation, writing and attending conferences related to IEP development.

2. Regular education teachers who are significantly modifying their curriculum for exceptional education students will be provided release time of up to one-half (1/2) hour per child for IEP writing and up to one-half (1/2) hour per child for parent conferences.

3. The Board shall offer exceptional education teachers inservice training annually for IEP's.

(74) A/86

Twice (2) per year reading resource teachers shall meet to exchange ideas, puruse new curriculum goals and to discuss problems or subjects identified by the reading teachers.

(75) A/87

Add the following to underlined language to paragraph 6 below:

G. Discipline

1. When student conduct presents a threat to the physical safety of teachers, administrators shall take appropriate steps including the immediate removal of the students from the classroom to protect the physical safety of the teacher in accordance with the Board's legal obligation and responsibility.

2. When a teacher who has been physically assaulted recommends the suspension of the student assailant, the student will normally be suspended. If the principal elects not to suspend the student, the teacher who was assaulted may appeal the principal's decision to the Division of School Services.

When the teacher recommends a particular disciplinary action for a student who poses a physical threat to the teacher's safety and the administrator processing the referral does not concur, the administrator shall communicate with the teacher in writing why he/she did not follow the recommendation.

3. Students who are or have been suspended from school for posing a threat to the physical safety of a teacher(s) shall be excluded from the building and prohibited from attending all classes and all other activities held at school. The student(s) shall remain under immediate administrative supervision until the parent is contacted and the student can be sent home or until the end of the school day (whichever comes first). In all suspension cases, the suspended student(s) shall be escorted out of the building. If the student(s) refuses to leave the school and/or grounds, and administrative means exclusive of the use of teacher(s), or aide(s) proves inadequate to remove the student(s), other appropriate assistance shall be utilized. Prior to the reinstatement of the student(s), the teacher and the administrators handling the matter shall confer with regard thereto.

4. Where necessary, appropriate personnel shall be available to escort students referred for disciplinary action to the office when the student's conduct poses a threat to the teacher's physical safety.

5. The administrator shall exclude from a particular class, any pupil whose threatening conduct has proven to be a constant discipline problem and has not been corrected through previous referrals until a conference can be conducted with the pupil, teacher, principal, and/or other

administrator under his direction and any other specialist dealing with the problem student.

6. If the problem is not resolved by the previous steps, the matter shall be referred to the Division of School Services for appropriate disposition. . . after a conference with the MTEA and the involved teacher(s), if so requested. (Emphasis Added)

7. Any reasonable and appropriate means including the use of physical force may be used by school personnel to prevent a threatened breach of discipline or to stop a continuing breach of discipline. It is expected that physical force will be used only when other means for preventing a breach of discipline or stopping its continuance have been ineffective. Any reasonable and appropriate means, but not including the use of physical force (corporal punishment) may be used in relation to any breach of discipline which has been completed. Corporal punishment may not be used; however, reasonable force may be used in self-defense. Self-defense is permissible where a teacher finds it necessary to defend himself/herself of a third person, where the teacher reasonably believes that such action is necessary for the safety of himself/herself or a third person. Self-defense means the use of such force as is necessary to protect oneself. It does not mean that any additional force may be used or that force may be used after the individual is no longer in danger.

(76) A/89

10. The Board of Review shall meet monthly to review employe credit appeals, unless no appeals are pending.

(77) A/101

4. A committee shall be established to determine the feasibility of computerizing the elementary report card.

(78) A/102

Provide a more basic Scott Forseman Program for the students who are marginal achievers and are moved to the next reading level without the ability to handle it.

(79) A/103

6. Provide computer curriculum guides with simple step by step instructions on use and presentation to students, plus in-building inservice to help put the computers to meaningful use.

(80) A/157

15. Learning coordinators may, on a voluntary basis, work two (2) days beyond the end of the school year and five (5) days prior to the beginning of the school year compensated at their individual daily rate.

(81) A/161

4. The Board shall establish a job description for guidance counselors which shall be negotiated with the MTEA.

(82) A/162

5. Full time secretarial help shall be provided in secondary schools.

(83) A/163

6. Guidance counselors shall be full time in guidance.

(84) A/164

7. Guidance counselors shall not have a homeroom.

(85) A/166

9. Do not include the guidance director in the staffing ratio.

(86) A/167

10. Middle school guidance directors should have a released period.

(87) A/169

12. Provide guidance services for secondary summer schools.

(88) A/171

5. Librarians shall be staffed on the basis of one per each four hundred (400) students at elementary, middle and high school level.

(89) A/172

6. Provide a minimum of six (6) hours of clerk-typist time for each library.

(90) A/173

7. Librarians will receive a floating preparation period that will be utilized on a different period each day.

(91) A/174

8. Librarians in the middle schools shall not be responsible for text books.

(92) A/176

Audiovisual building directors in middle schools shall receive a minimum of two (2) released periods for audiovisual work.

(93) A/177

8. Industrial education teachers shall be allowed to report one (1) day prior to organization day and remain one (1) day after the record day for the purpose of opening and closing the shop and performing shop maintenances.

(94) A/178

1. JUDGES' EXPENSES - A central fund shall be set aside for judges' expenses in debate forensics sufficient to fund the activities.

(95) A/178

Judges will be paid the certified part-time rate, with a maximum payment of four (4) hours for any one (1) day of judging.

(96) A/178

2. TRANSPORTATION - A central fund will be allocated for transportation for debate, forensics, chess, and mathematics competition sufficient to fund the activities. The sum will be administered by the director of transportation. Coaches of the events may request, as an option to be charged this amount, carchecks for students engaging in activities. Any request for transportation service or for carchecks must reach the director of transportation one (1) week before the scheduled event.

(97) A/178

4. HANDBOOKS, LITERATURE, AWARDS, REGISTRATION FEES, AND NECESSARY LUNCHES -
These amounts would be grouped together and transferred into the activity account at each high school and middle school. The amount of five hundred dollars ($500) would be transferred into the activity account of debate and six hundred dollars ($600) to the activity account of forensics for schools which have participated in a program of outside competition last year. Schools which have not participated outside of the school level must present a plan for participation in the coming year. For schools with an active chess program, one hundred dollars ($100) will be transferred to the school activity account of each high school and middle school. The administration will explore supplying of chess sets to schools with an active chess team. The chess coach shall bear the responsibility of accounting for the materials.

(98) A/178

5. MATH AND ENGLISH COMPETITION - A central fund will be administered by the curriculum specialist in charge of mathematics and English which would cover awards, registration, and necessary lunches for competition sufficient to fund such activities. Students participating in competitions within the city of Milwaukee would not have their lunches paid.

(99) A/180

1. The Board shall take steps to provide more equipment for computer science instruction since the number of students per piece of equipment far exceeds the number than can be effectively instructed.

(100) A/181

1. Senior high school science teachers shall be allowed to report one (1) day prior to organization day and remain one (1) day after the record day for the purpose of packing and unpacking equipment and supplies, taking inventory and performing other necessary duties to prepare the science laboratories.

(101) A/108

11. Teachers assigned to more than one school will be assigned duties consistent with the amount of duties that

the teacher would receive if they were assigned to one school.

(102) A/109

12. Outdoor recess will not be held when the wind chill factor is 0 degrees Fahrenheit or below.

(103) A/110

13. A system-wide task force shall be established covering all grade levels to determine which paper work can be combined, reduced or eliminated.

(104) A/111

14. Allow each school a sum of money sufficient to contract with a private plowing service so that school parking lots and/or portions of playgrounds are plowed before teachers arrive.

(105) A/112

15. All teachers assigned to elementary schools shall share equally in duty assignments. This provision does not include members of M-Teams.

(106) A/113

16. Increase the amount budgeted for supplies, prepared materials, equipment, computer programs and field trip funds on a system-wide basis.

(107) A/114

17. If students are released from school to celebrate an event like winning the state basketball championship the teachers shall also be released.

(108) A/116

19. Teachers should have access to photo copy machines in each school.

(109) A/117

20. Reduce report cards to four (4) per year and two (2) report cards per year for MR students.

(110) A/118

21. Elementary teachers shall not be required to supervise playgrounds before or after the student day and at recess.

(111) A/119

Teaching sex education should be done by teachers who volunteer to do so.

(112) A/120

23. Art teachers shall be provided release time to deliver exhibits and put away stock.

(113) A/121

24. Release one man and woman in the physical education department from homeroom to set up equipment in secondary schools.

..14) A/122

V. SCHOOL AIDES AND PARAPROFESSIONALS
1. School Aides and Paraprofessionals. Each elementary school shall continue to receive a base allocation of one hundred twenty (120) hours per week. During the term of this contract the Board shall increase school and program aide hour allocations to the level authorized for the 1980-81 school year. It is recognized and agreed that school aides are employed to supplement and assist teachers in the performance of their professional duties. It is further recognized that a school aide shall not be used to replace or supplant the teacher as the instructional leader.
2. Temporary Substitute Aides. The Board shall provide temporary substitute aides when the regularly assigned aide is absent from Head-Start, kindergarten, pre-school and exceptional education classes.

(115) A/190

The Board shall establish a "Homework Hotline" from 3:00 p.m. Monday through Thursday for students to call and receive help with their homework from teachers. Teachers will be hired, on a voluntary basis, to man the phone for homework help. Teachers will be selected by seniority if more than enough volunteer. Teachers shall be paid at their individual hourly rate.

5. That during collective bargaining between the Board and the MTEA over a successor agreement to the 1982-1985 teacher contract, a dispute arose between the parties as to whether the following 2 Board proposals were mandatory subjects of bargaining:

(116) 1. Bargaining unit employes who temporarily assume on a voluntary basis, the duties of acting principal, assistant principal, assistant in administration or other supervisory positions, shall have a qualified replacement assigned to relieve them of their bargaining unit duties after the first day of assignment. Such temporary administrative assignment may be made by reason of any administrative vacancy or a temporary absence and will be exempt from the application of Part IV, Section M. Upon conclusion of the temporary administrative assignment, the bargaining unit employe shall return to his/her regular bargaining unit assignment. No temporary administrative assignment shall continue beyond the end of the school year in which the assignment was accepted.
2. Bargaining unit employes who temporarily assume the duties of acting principal, assistant principal, assistant in administration or other suervisory positions shall be paid, in addition to their regular salary, at the rates set forth in Appendix "A" application.

(117) As a condition of eligibility to receive health insurance benefits, each participant (including the subscriber on his/her own behalf and on behalf of his/her dependents under the age of 18 and subscriber's dependents over 18) agrees to execute a waiver of confidentiality to the employer which authroizes the employer to examine for auditing purposes only, all individual claims documentation, excluding treatment records and operative reports prepared by the provider. Auditing procedures will be conducted in a manner which maintains the confidentiality of parties' medical record(s) and condition(s).

6. That during collective bargaining between the Board and the MTEA over a successor agreement to the 1982-1985 teacher contract, a dispute arose between the parties as to whether the Board would be obligated to bargain with the MTEA over a

decision to provide health insurance benefits to employes through self insurance pursuant to Sec. 120.13(2)(b), Stats.

7. That disputed proposals 10, 12, 15, 16, 18-21, 25-26 (in part), 34, 39 (in part), 40 (in part), 44 (in part), 46 (in part), 49 (in part), 50, 68 (in part), 75, 80, 93 (in part), 95, 100 (in part), 107, and 116 (in part), as set forth in Findings of Fact 3, 4 and 5 are primarily related to wages, hours and conditions of employment.

8. That disputed proposals 1-4, 6, 8, 9, 11, 14, 17, 22-24, 25-26 (in part), 27-32, 36, 38, 39 (in part), 40 (in part), 41-43, 44 (in part), 45, 46 (in part), 47, 48, 49 (in part), 51-57, 59-67, 68 (in part), 69-74, 76-79, 81-92, 93 (in part), 94, 96-99, 100 (in part), 101-106, 108-115 and 116 (in part), as set forth in Findings of Fact 3, 4 and 5 primarily relate to educational policy and/or school management and operation.

9. That disputed proposal 117, as set forth in Finding of Fact 5, expressly conflicts with a statutory right.

10. That a decision by the Board to provide health insurance benefits to employes through self-insurance under Sec. 120.13(2)(b), Stats., would be primarily related to wages if said decision produced a benefit change or produced the increased risk that incurred claims will not be paid in the event of Board insolvency.

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

CONCLUSIONS OF LAW

1. That the proposals referenced in Finding of Fact 7 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

2. That the proposals referenced in Finding of Fact 8 are permissive subjects of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

3. That the proposal referenced in Finding of Fact 9 is a prohibited subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

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

DECLARATORY RULING 1/

1. That the Board and the MTEA have a duty to bargain under Sec. 111.70(1)(d), Stats., about the disputed proposals referenced in Conclusion of Law 1.

2. That the Board and the MTEA have no duty to bargain under Sec. 111.70(1)(d), Stats., about the disputed proposals referenced in Conclusion of Law 2 and 3.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of February, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

I dissent as to proposal 11.

_____
Marshall L. Gratz, Commissioner

I separately concur as to proposal 11.

_____
Danae Davis Gordon, Commissioner

I separately concur as to proposal 11.

1/ (Footnote 1 on page 25.)

(Footnote 1 from page 24).

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MILWAUKEE PUBLIC SCHOOLS

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

Before entering into a specific consideration of each proposal, it is useful to set forth the general legal framework within which the issues herein must be resolved. Section 111.70(1)(d), Stats., defines collective bargaining as ". . . the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, ... the employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees . . . ." (emphasis added)

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily", "fundamentally", "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of the "establishment of educational policy" affecting the "wages, hours and conditions of employment." The Court found that bargaining is not required with regard to "educational policy and school management and operation" or the "'management and direction' of the school system." Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979). Of course, a finding that a proposal is mandatory and thus subject to collective bargaining and, if necessary, to interest arbitration does not compel either party to agree to include the proposal in a collective bargaining agreement and does not represent a Commission opinion regarding the merits of the proposal under the statutory interest arbitration criteria.

When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express statutory command, the Court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will be found to be a prohibited subject of bargaining. Board of Education v. WERB, 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977).

Through argument in support of many of its proposals herein, the MTEA seeks to have the Commission dramatically alter the landscape on which teacher unions and school districts have collectively bargained over the last decade. The MTEA asks that we overturn Oak Creek Franklin Jt. School District, Dec. No. 11827-D, E (WERC, 9/74) aff'd (CirCt Dane, 11/75) wherein it was concluded that the decision of how to allocate a teacher workday was, on balance, a basic educational policy decision which thus was a permissive subject of bargaining. The MTEA asks that we overturn Beloit, supra, wherein it was concluded inter alia that the decision of how many students to have in a class was, on balance, a basic educational policy decision which thus was a permissive subject of bargaining. It is clear, as the MTEA has argued and as Oak Creek and Beloit affirm, that decisions regarding allocation of the workday and class size have a substantial impact upon wages, hours and conditions of employment. Thus, the MTEA has a right to bargain over proposals which seek to compensate employes in differing manners depending upon the manner in which the workday is allocated or the number of students in a class. See Racine Unified School District, Dec. No. 20653-A (WERC, 1/84); aff'd Case No. 85-0158 (CtApp, 3/86, unpublished); School District of Janesville, Dec. No. 21466, (WERC, 3/84). However, we remain persuaded that the balance between educational policy considerations and employe wages, hours and conditions of employment was properly struck in Oak Creek and Beloit, and thus have herein rejected the MTEA's numerous invitations seeking a different result.

We would also note that in drafting our rationale herein, we concluded that there was little value in exhaustively analyzing well established law or repeating analysis for analytically similar proposals. We would further note that the summary recitation of the parties' positions on many proposals is many times not

reflective of the careful thought the parties have generally given to this rather massive piece of litigation. However, we concluded that the interests of prompt issuance predominated over exposition in all instances of the ample efforts of the parties to assist us in our deliberations.

DISCUSSION OF PROPOSALS

The Board asserts that the underlined portion of the following proposal is a permissive or prohibited subject of bargaining:

> Part II, Section F
>
> 2. FAIR SHARE.
> b. The MTEA further agrees to hold the Board harmless for any damages arising out of any legal action by any employe contesting the above set forth deduction from his/her salary. The Board and the MTEA agree to jointly defend against any such action.

The Board contends that under this joint defense clause, it will incur untold liability to individual and/or group complainants challenging the unlawful collection of fees under the fair share provision. The Board thus argues that the proposal forces it to act "in bed" with potentially unconstitutional and/or otherwise unlawful MTEA fair share collection procedures when the Board's interests are likely to conflict with those of the MTEA. The Board also asserts that the clause precludes it from exercising its right to defend itself against resultant liability or from taking proper steps to fulfill its obligation to ensure that fair share fees are lawfully collected.

The Board argues that it should be afforded the right to defend itself from liability given the Seventh Circuit's opinion in Chicago Teachers Union Local No. 1 v. Hudson, 743 F2d 1187 (7th Cir. 1984) which establishes an employer obligation to make sure that Hudson's requirements are met. The Board contends that this proposal requires it to forsake its Hudson obligation to assure that the constitutional guarantees associated with the proper operation of the applicable MTEA "fair share" procedure are met and that the constitutional and/or other rights of objecting "fair share" payors are protected. Thus, the Board asserts that the joint defense clause forces it to assume a role necessarily in conflict with the proper and required role of an employer under Hudson to the Board's potentially great detriment.

The Board asserts that the MTEA has misleadingly and erroneously characterized this clause as a limited obligation to defend the general fair share provisions contained in the collective bargaining agreement. The Board points to the specific language of the provision which specifies "any legal action by any employe contesting the above set forth deduction from his/her salary" as establishing the broad scope of the clause which clearly includes the Hudson procedures. The Board further contends that the MTEA's position that the "hold harmless" clause sufficiently protects the Board's interests should be disregarded. The Board asserts that the "hold harmless" clause does not protect it from independent responsibilities and liabilities under Hudson nor does it protect the Board from the possibility of an award of compensatory and/or punitive damages against it resulting from such litigation. The Board argues that any such award of damages would constitute a judgment against the Board for which the Board would be fully and independently liable and that the contractual "hold harmless" clause at most provides a means of indemnification which (depending upon the inclinations and/or financial resources of the MTEA) may or may not operate to relieve the Board from the financial effect of any such judgment.

The Board asserts that the MTEA's real objective is to impose joint and several liability upon the Board resulting from the MTEA's Hudson related offenses in order to spread the liability resulting therefrom into a second "deep pocket" perhaps thereby inducing nonmember "fair share" payors to target the Board rather than the MTEA for satisfaction of any resulting judgment. The Board asserts that it should certainly be entitled to protect itself from such an eventuality.

The MTEA contends that the proposal is a mandatory subject of bargaining. It asserts that where, as here, the parties have in good faith agreed upon a fair share provision, it is appropriate that the parties jointly defend the provisions of the contract to which they are both parties. The MTEA rejects the Board's assertions as to the scope of employer obligations under Hudson. The MTEA asserts that the employer's obligation is limited to a determination that procedures consistent with Hudson have been adopted by the union and that once this determination has been made, the employer is obligated to negotiate concerning a provision requiring it and the union to jointly defend against any action seeking to invalidate a fair share provision.

On balance, we are persuaded that this proposal is permissive because it interferes with the Board's right to defend itself in litigation arising out of the fair share clause as its best interests dictate. While we are sensitive to the MTEA argument that parties who enter into a contract should be able to bargain a clause which obligates them to defend that contract, we nonetheless conclude that a party ought not be compelled to take legal positions which may be inconsistent with its policy interests. Our conclusion is consistent with that recently reached in Racine Unified School District, Dec. No. 23391-A (WERC, 11/86) at 32 wherein we concluded that an indemnification proposal which restricted District legal options was mandatory because the District could take whatever position it wished if it did not want to avail itself of the benefit of indemnification.

Proposal 2 states:

> PART IV, Section B
>
> 1. HIGH SCHOOLS.
>
> a. Teachers, beyond those needed for study hall, supervision, attendance counseling, and hall supervision, shall be assigned to projects dealing with curriculum improvement within their area of teaching. Normally, one (1) teacher and such aides as are necessary may be assigned to hall supervision. Additional teachers may be assigned where essential due to the structure of the building and special problems. Volunteers shall first be assigned, and where there are insufficient volunteers, assignments shall be made with available teachers on a rotating basis by semesters.

The Board asserts that this proposal is permissive because it limits the Board's discretion to assign teachers' duties fairly within the scope of their responsibilities; seeks to equalize workloads among teachers; and interferes with educational policy decisions regarding allocation of teacher time and the number of classes assigned to teachers during a workday.

The MTEA contends that the provision is a mandatory subject of bargaining. It asserts the clause represents a compromise arrived at between the parties to resolve a workload equalization issue. The MTEA notes that if this provision was not present in the contract, there would be a need to negotiate additional compensation for those teachers whose work assignments required additional duties.

We conclude that the proposal is permissive because it interferes with educational policy determinations regarding curriculum and with allocation of the workday. However, as we held in Janesville, supra, at 75, and Whitnall School District, Dec. No. 20784-A (WERC, 5/84) at 11, the Board would be required to bargain over a proposal to protect unit members "from being singled out for arbitrary, illegal or other specified impermissible reasons with an unusually heavy portion of...duties relative to the duties mix assigned to the balance of the bargaining unit."

Proposal 3 states:

> PART IV, Section B
>
> 3. ADDITIONAL ASSIGNMENTS.
>
> a. Pupils admitted to secondary buildings before 7:45 a.m. shall be required to have a pass. Early admission will be allowed only through a limited number

of entrances to be determined by the physical structure of the building. On days of inclement weather, exceptions will be allowed to the above. If a school has unique needs requiring exceptions to the above, the time for entrance to areas in the building by students will be determined by the principal only after meaningful involvement of the faculty.

The Board asserts that this proposal is a permissive subject of bargaining because the relationship of the proposal to teacher safety is either nonexistent or extremely tangential and because the proposal directly relates to the District's control of its physical facilities and to the determination of educational policy matters related to school student management and control. The Board also notes that since the school day actually starts at 7:45 a.m., the proposal does not realistically respond to the safety concerns expressed.

The MTEA counters by contending that the proposal deals directly with teachers safety in that it regulates and identifies which students will be in the building prior to the time when classes begin. The MTEA asserts that it is during this period that a great risk exists for teachers if there are unregulated numbers of unsupervised students and others wandering through the building.

If redrafted to make clear that the proposal is operative only during the period prior to the time students normally enter the school to prepare for the actual commencement of the school day, e.g. after "first bell", we would find this proposal to be a mandatory subject of bargaining in that its relationship to teachers' safety overcomes its intrusion into matters relating to building control and student management. The MTEA has correctly noted that if persons wishing to be present in the building prior to the time of normal admittance are required to have received official permission for their presence, the likelihood of students or other unauthorized individuals being present in the building for purposes of or with an opportunity for confronting or harming a teacher is lessened. As we have indicated in prior decisions, a union can seek to protect its members in a preventative manner from exposure to situations which may threaten employe safety. See Milwaukee Board of School Directors, Dec. No. 20398-A (WERC, 12/83) at 20; Sheboygan County Handicapped Board, Dec. No. 16843 (WERC, 2/79).

Proposal 4 states:

PART IV, Section D

1. To the extent possible, exceptional education students who are scheduled to be reassigned from elementary schools to middle schools or from middle schools to high schools at the beginning of a school year shall be identified to the receiving school by March 15 of the school year preceding the change in school assignment.

The Board asserts that this proposal is permissive because it is primarily related to the educational policy determination of when and how exceptional education students are reassigned. The Board contends that the proposal relates not at all or at most only marginally to wages, hours and conditions of employment. The Board argues that compliance with a complex series of statutory requirements related to exceptional education students places a considerable administrative burden upon the Board and that compliance with the time frame specified in this proposal is unrealistic and arbitrary. The Board asserts that the relationship, if any, of this proposal to employe ability to prepare for incoming students is "patent nonsense." The Board further contends that the planning needs of special education teachers are hardly different from those of their "mainstream" compatriots.

The MTEA asserts that this provision directly relates to teacher conditions of employment in that it provides the teachers in question with sufficient time to prepare for their duties the following school year. The MTEA argues that the proposal does not in any way interfere with management prerogatives related to the assginment of students. The MTEA asserts that the presence of the state and federal regulations and statutes does not preclude collective bargaining over the matter at issue so long as the proposal does not violate applicable state and federal law.

In our opinion the language of the provision as written does not support the interpretation that MTEA urges it be given. On its face, the language requires the Board to take all possible steps to reach decisions on or before March 15 as to which of the special education students will be moving at the beginning of the following school year. The educational policy dimensions of decisions regarding when to make such decisions and whether to take steps to assure that a decision in that regard is made on or before March 15 outweigh the wage, hour and condition of employment dimensions of the decision. If, however, the provision were modified so as to leave those policy matters to the Board and merely to require the Board to provide its best estimate as of March 15 as to which such children it will be moving, then we would find the educational policy dimensions of the matter so modest as to be outweighed by the wage, hour and condition of employment considerations involved.

Proposal 5 states:

> 2. Exceptional education students shall be moved from elementary to middle schools or from middle schools to high schools previous to the end of the third grading period unless, through unusual circumstances, such a move could not be made or anticipated by that time and a later move would be deemed necessary and in the best interest of the student and/or class involved.

The MTEA concluded that this proposal was permissive and thus withdrew same during hearing.

Proposal 6 states:

> PART IV, Section B
>
> 8. ROTATION OF DUTIES. Study halls, hall duty, lunchroom duty and attendance service shall be assigned so that individual teachers do not have to perform these duties year after year without being relieved when specially requested.

The Board asserts that this proposal is permissive because it primarily relates to the assignment of duties fairly within the scope of a teacher's responsibilities and to the equalization of workloads among teachers, citing Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83); School District of Janesville, Dec. No. 21466 (WERC, 3/84); Milwaukee Sewerage Commission, Dec. No. 17302 (WERC, 9/79); Milwaukee Sewerage Commission, Dec. No. 17025 (WERC, 5/79); Oak Creek School District, Dec. No. 11827-D,E (WERC, 9/74); Whitnall School District, Dec. No. 20784-A (WERC, 5/84).

The MTEA contends that this provision is mandatory in that it is designed to prevent an individual member of the unit from being unduly burdened with the duties performed by all members of the bargaining unit. The MTEA asserts that a union should be able to negotiate provisions to ensure that some members of the bargaining unit are not required to perform more duties than other members of the unit who are being paid the same wages. The MTEA asserts that if it cannot bargain over such a proposal, its only option would be to demand higher wage rates for such employes.

We conclude that this proposal is permissive in that it intrudes into management's determination as to the manner in which duties fairly within the scope of a teacher's responsibilities shall be assigned. However, as we noted in our discussion of proposal 2, the MTEA can seek to bargain certain protection for employes.

Proposal 7 states:

> PART IV, Section D
>
> 7. When it becomes necessary to release the regular teacher or diagnostic teacher to meet with the multi-disciplinary team during the regular school day,

provision shall be made to relieve such teacher from classroom responsibilities in accordance with Part IV, Section B(5).

The Board asserts that this proposal is identical to a proposal found permissive by the Commission in Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83). The Board asserts that the MTEA's testimony in this matter confirms that the proposal primarily relates to educational policy choices and thus is permissive.

The MTEA contends that the proposal is a mandatory subject of bargaining in that the Board is free to cover the class in question with any person it chooses. The MTEA asserts that the contractual provision referred to in this proposal, Part IV, Section B (5), only requires the Board to pay teachers if they are assigned to perform the service in question.

Given the MTEA's contention in its brief that this proposal does not limit the Board in the choice of how to cover a teacher's class in the circumstances described, and as the Board indicated during hearing that it would withdraw its objection to this provision if the MTEA agreed that the Board had such sole discretion, we need not decide the status of this proposal.

Proposal 8 states:

PART IV, Section D

11. When special equipment is ordered for hearing impaired classes and the person making the order feels that substitution should not be made, he/she should state that fact on the requisition and inform the program administrator. The Purchasing Division shall consult the program administrator, who in turn shall notify the teacher ordering the equipment before any substitutions are made.

The Board contends that this provision primarily relates to the matter of the Board's internal purchasing/requisition procedures, a matter directly related to the fiscal and business management of the schools and only marginally related to working conditions affecting the bargaining unit. The Board asserts that similar proposals relating to supplies, equipment and facilities to be furnished to teachers have been held by the Commission to be permissive subjects of bargaining. Racine Unified School District, Dec. No. 20652-A, 20653-A (WERC, 1/84); Blackhawk VTAE District, Dec. No. 16640-A (WERC, 9/80). The Board therefore asserts that this provision is a permissive subject of bargaining.

The MTEA asserts that the foregoing proposal was negotiated by the parties to deal with a problem which arose when teachers of hearing impaired classes ordered special equipment and were provided with something different. In such cases the MTEA asserts the teacher was confronted with an obligation to utilize an entirely different method of instruction and instructional content because of the substitution of equipment. The MTEA argues that this in effect doubled the teacher's workload and put the teacher under undue stress. The MTEA asserts that this provision is designed to allow the teacher to know that the requested item is not going to be available and to permit him or her to prepare appropriate instructional material and methods for the class. The MTEA argues that this proposal does not in any way infringe upon management prerogatives or educational policy decisions of the Board.

We conclude that the intrusion of this proposal into the Board's internal purchasing procedures, and thus into the management of the District outweighs the relationship to teacher working conditions recited by the MTEA. Thus the proposal is permissive.

Proposal 9 states:

PART IV, Section E

Reading research teachers may be used as reading resource teachers, reading center teachers or both.

The Board contends that this proposal is permissive because it primarily relates to a limitation upon the authority of the Board to assign reading research teachers duties other than those listed for which they are nonetheless qualified. Thus, the Board asserts that this provision primarily concerns the assignment of duties fairly within the scope of teaching responsibilities and as such is permissive. Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83); Milwaukee Sewerage Commission, Dec. No. 17302 (WERC, 9/79); Milwaukee Sewerage Commission, Dec. No. 17025 (WERC, 5/79).

The Board asserts that the MTEA's unfounded concern that such teachers might be used in areas outside of their areas of certification is irrelevant to the question of whether the proposal is a mandatory subject of bargaining. The Board asserts that this clause operates to restrict the use of reading resource teachers within the area of their knowledge and expertise.

The MTEA contends that this provision is mandatory in that it does not allow reading resource teachers to be used in capacities for which they are not licensed by the Department of Public Instruction. Racine Unified School District, Dec. No. 20652-A, 20653-A (WERC, 1/84). The MTEA asserts by way of example, that the Board may desire to use such teachers as librarians, a position for which they are not licensed.

In Racine Unified School District, Dec. No. 20652-A (WERC, 1/84) at 17, we held that a proposal which sought to mandate employer compliance with existing statutory provisions and administrative rules relating to use of teachers within their area of certification was a mandatory subject of bargaining. We reasoned:

> In Blackhawk, supra, the court concluded that the bargaining table is a proper forum for employes to seek protection from discipline when exercising constitutional rights. The court thus found a proposal which sought to establish such protection to be a mandatory subject of bargaining because of its substantial impact upon employe conditions of employment (i.e. discipline). We have followed that holding when concluding that proposals requiring compliance with DPI class size regulations and with statutory procedures relating to compensation were mandatory subjects of bargaining. Milwaukee Board of School Directors, 20093-A (2/83) p. 64; Milwaukee Board of School Directors, 20979 (9/83) p. 10. In those instances, the impact upon employes' working conditions and wages, respectively, predominated over any policy choice implications because the law established the only policy choice available to an employer in those areas. Here, the proposal appears to seek compliance with pertinent statutory provisions and administrative rules which impact upon employe working condition concerns such as the job security implications of teaching a subject for which one is not "qualified". But for the presence of a legally mandated policy choice as to the assignments which may statutorily be given to a teacher, this working condition impact would clash with and fail to predominate over employer prerogatives to assign duties fairly within the scope of a teacher's responsibilities. No such clash and resultant balancing of impacts is present here because the legislature has spoken on the subject. Given the impact upon employe working conditions and the absence of any impact upon countervailing policy choices, we conclude that this proposal would be a mandatory subject of bargaining if it were worded either to mandate compliance with the statutory provisions and administrative rules or to make clear that it would be effective only so long as its requirements remained identical to those in the applicable statutes and administrative rules.

While the MTEA characterizes its proposal as an effort to secure Board compliance with statutory and administrative restrictions on use of reading resource teachers, we conclude that the proposal, as written, does not require compliance with sufficient specificity to be found mandatory. If redrafted pursuant to the above quoted underlined portion of our Racine decision, the proposal would be mandatory.

Proposal 10 states:

> PART IV, Section I
>
> 1. In the employment of teachers, full credit for outside experience, up to five (5) years, shall be granted. Outside experience credit will be given equal to one Division B service increment for each of the five (5) years of experience.

The Board takes the position that the proposal deals primarily with (and would cripple) its ability to recruit experienced teachers and thus primarily impacts upon hiring and other matters of educational policy reserved to the Board. The Board asserts that Commission decisions in Franklin School District, Dec. No. 21846 (WERC, 7/84) and Racine Unified School District, Dec. No. 20652-A, 20653-A (WERC, 1/84) as cited by the MTEA do not address the status of this proposal and are wholly irrelevant to the determination of this matter.

The MTEA contends that the proposal is a mandatory subject of bargaining relating directly to the wages an employe will be paid for services rendered once in the bargaining unit. The MTEA contends that this provision does not in any way relate to the qualifications an applicant for employment must have in order to be hired. The MTEA thus requests the Commission find the proposal to be mandatory. Racine Unified School District, supra; School District of Franklin, supra.

This proposal defines the limits of the Board's discretion when determining the compensation a newly hired teacher will receive. As such, it clearly relates to wages in a most elemental way. This wage relationship renders the proposal mandatory despite any negative impact which it may have on the Board's efforts to succcessfully recruit new teachers.

Proposal 11 states:

> PART IV, Section D
>
> 8. Teachers to whom students with exceptional education needs have been assigned shall be provided multi-disciplinary team reports and educational assessments that are meaningful to the teacher developing the classroom program for the child.

The Board contends that this provision primarily relates to supplies and facilities to be furnished to teachers - particularly in that it mandates that a standard of "meaningfulness" apply to multi-disciplinary team reports and educational assessments. As such, the Board argues that the proposal's primary impact is upon how the Board conducts its business in the area of student management and control, specifically as regards evaluation of exceptional education students. In addition, the Board asserts that the subject matter dealt with by this proposal may be a permissive and/or prohibited subject of bargaining because it may cause a breach of a student's right to confidentiality as the reports often contain sensitive personal data concerning the student unrelated to instructional needs. See Sec. 118.125, Stats. Lastly the Board asserts that the subject matter of this proposal is also governed (and pre-empted) by state statutory provisions, See Secs. 115.80, 115.81, 115.83 and 115.85, Stats.

The MTEA asserts that this provision is mandatory in that it directly relates to the problem exceptional education teachers face when assigned a new student. The MTEA asserts that such teachers are required by law to promptly develop a Wisconsin Instructional Plan for each new student. The MTEA argues that unless such teachers are provided the multi-disciplinary reports and educational assessments which have already been developed for such child, it is literally impossible for the teacher to perform the legally required duty of preparing the Instructional Plan. The MTEA asserts that this provision in no way restricts or infringes management prerogatives or the development of educational policy. Instead, the MTEA argues that the proposal makes it possible for the teacher to perform required duties. The MTEA further asserts that the proposal's use of the word "meaningful" does not require that the Board create any additional reports and simply requires that such information as does exist shall be made available to the teacher. As to the Board's objection regarding the potential confidentiality

of certain information, the MTEA asserts that it is hard to imagine any information from the M-team which would not be relevant and necessary to the receiving classroom teacher adequately meeting the special needs of the referred student. However, to the extent that certain student medical records and behavioral records may be confidential as to the receiving teacher based on state or federal law, the MTEA asserts that such materials would of course have to be deleted by the Board from any material furnished to the teacher and that such deletions as are required by law would not in any way violate the provisions of this proposal.

OPINION OF COMMISSIONER DAVIS GORDON REGARDING ISSUE 11

I find the proposal as written to be a permissive subject of bargaining because it interferes with the Board's duty to refrain from releasing to teachers confidential information concerning students. While I am aware of the MTEA's assurances that it does not seek to require the Board to release legally confidential information, the proposal does not contain such express exclusions.

If the proposal was rewritten to expressly exclude confidential information, I would find it mandatory for the reasons set forth in Chairman Torosian's dissent.

OPINION OF COMMISSIONER GRATZ REGARDING ISSUE 11

I find the proposal, as written, to be a permissive subject of bargaining for the following reason.

In my opinion, the extent to which portions of existing multidisciplinary team reports and educational assessments about students with exceptional education needs are provided to the students' teacher(s) is a matter primarily related to educational policy more so than to wages, hours and conditions of employment.

I recognize that the proposal, as written, limits the disclosure requirement to those reports and assessments "that are meaningful to the teacher developing the classroom program for the child." Moreover, I assume that the provision would be interpreted so as not to require unlawful disclosures, and I note that MTEA's position is to precisely that effect, here. I further recognize that, on the surface, there would seem to be no reason why the Board would keep lawfully disclosable information from a teacher to whom it would be meaningful in the important function of developing the classroom program for students with exceptional education needs.

However, even within that limited scope, I am persuaded that there are important educational policy judgments to be made about whether revelation or non-revelation is in the student's best interests. In at least some circumstances, lawful disclosure of some information that would be meaningful in the development of the classroom program for the child might adversely affect the manner in which the teacher relates to the student involved. Judgments about whether in particular circumstances the risk of adverse consequences from disclosure outweighs the obvious benefits of maximizing the teacher's understanding of the student seems to me clearly to be a matter of educational policy, and one which in my opinion outweighs the wage, hour and condition of employment considerations involved.

In my view, the Association could obviate that problem and render the proposal mandatory by adding a proviso at the end stating for example, "unless the Board concludes that such disclosure would not be in the best interests of the student." The MTEA could also, of course, mandatorily impact bargain for a provision requiring the Board to hold the teacher harmless from adverse job security or other consequences that result from the Board decisions to withhold report or assessment information that would have been both lawfully disclosable and meaningful to the teacher in developing the classroom program for the child.

OPINION OF CHAIRMAN TOROSIAN REGARDING ISSUE 11

I find this proposal to be a mandatory subject of bargaining because of its primary relationship to the provision of information needed by teachers to satisfactorily meet job responsibilities imposed on them by law and the Board.

I do not interpret "meaningful" to require creation of additional reports or assessments beyond those that are in existence, and it does not require the Board to make disclosures that would be unlawful. Additionally, I interpret the language to only require "meaningful" information relative to developing a program for students with exceptional educational needs and for no other purpose. Thus, sensitive information not related to the development of a plan need not be disclosed. While I recognize Commissioner Gratz's concerns about revelation of certain information, the fact that (1) the instant proposal concerns students with exceptional and specific educational needs and (2) both the law and the Board require teachers to develop a Wisconsin Instructional Plan, lead me to conclude that sharing information already gathered which may be so vital in developing a meaningful plan, more closely relates to wages, hours and conditions of employment than to educational policy. In addition, my colleagues and I find the Board's preemption argument unpersuasive and conclude that the conventional "harmonization" is possible herein.

Proposal 12 states:

> PART IV, Section N
>
> 2. New teachers shall be employed on probation for three (3) years pursuant to the terms of a one (1)-year individual contract. Said contract shall automatically be renewed unless terminated, in accordance with the provisions of this section. Upon attaining their fourth contract, teachers shall achieve tenure status. All nontenured teachers shall receive a written evaluation at least once per year during the first three (3) years of employment.
>
> 3. After permanent tenure status has been reached, evaluation shall be made as follows:
>
> a. annually for the first two (2) years under such status; and
>
> b. at three (3)-year intervals thereafter.

The Board asserts that the frequency of teacher evaluations, particularly under the rigid conditions set forth under this proposal which preclude more frequent evaluations of permanent-status teachers, is a permissive subject of bargaining because it would render the evaluation function ineffective in whole or in part. The Board argues that the proposal would render it unable to effectively manage its affairs and to utilize its supervisory resources. The Board contends that the Commission has specifically recognized that requirements or limitations upon the frequency and duration of formal evaluations may have this effect and as such may be permissive subjects of bargaining. School District of Janesville, Dec. No. 21466 (WERC, 3/84) at 51; Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).

The Board asserts that the MTEA's testimony confirms this provision is intended to preclude evaluations of teachers on a more or less frequent basis than that specified absent a mutually agreed upon "special evaluation" for a particular teacher pursuant to an existing section of the contract.

The MTEA contends that this proposal is a mandatory subject of bargaining. School District of Janesville, supra. The MTEA asserts that the contract provision does not limit in any way the number of observations an administrator can make in any given year. Indeed, the MTEA notes that the expired agreement at Part IV, Sec. N provides that "a sufficient number of classroom visitations, observations and of personal conferences" are to be the basis for evaluations. The MTEA also asserts that Part IV, Sec. N (5) also provides that "the evaluator(s) may file and the teacher may request a special evaluation at a time other than the specified times for evaluations." Thus the MTEA argues that it is simply incorrect for the Board to assert that this proposal precludes more frequent evaluations of teachers by administrators.

In Janesville, supra, at 47-51, we engaged in an extended review of the status of the law as to the duty to bargain over evaluation proposals. That discussion stated in part:

Discussion of Proposal 4

In Beloit, supra, the Commission was confronted with the following proposal:

Teacher Supervision and Evaluation

"The parties recognize the importance and value of a procedure for assisting and evaluating the progress and success of both newly employed and experienced personnel for the purpose of improving instruction. Therefore, to this end, the following procedure has been agreed to in an effort to accomplish the goals.

A. During the first three (3) weeks of school, the Superintendent shall orient all new teachers regarding evaluative procedures and instruments.

B. Evaluation shall only be conducted by a qualified building principal or Assistant Principal or other qualified administrator. Each observation shall be made in person for a minimum of thirty consecutive minutes. All monitoring or observation of the performance of a teacher shall be conducted openly and with the full knowledge of the teacher.

C. New teachers shall be observed for the purposes of evaluation at least three (3) times during the school year. These observations shall occur prior to February 15 of each year and be scheduled so that no more than one (1) observation is made in any thirty (30) day period. Experienced teachers shall be observed for the purposes of evaluation at least once every year.

D. 1. Each teacher shall receive a copy of the classroom observation report at least two (2) school days prior to a conference between teacher and evaluator. This conference shall occur within five (5) school days after the classroom observation. A copy signed by the teacher and principal shall be submitted to the superintendent within two (2) days after the conference. No teacher shall be required to sign a blank or incomplete evaluation form.

2. In the event that the teacher feels his evaluation was incomplete or unjust, he may put his objections in writing and have them attached to the evaluation report to be placed in his personnel file.

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

2. Beginning immediately with the conference after the classroom observation, specific approprite (sic) direction shall be offered to guide the individual toward the solution of his particular professional problem. Suggested actions shall include at least three of the following:

(a) Demonstration in an actual classroom situation

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

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

(d) Guidance for the teacher toward professional growth workshops.

(d) Observation, continued and sustained, by the evaluator to note the day-to-day lessons and their inter-relationships.

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

F. Any complaints regarding a teacher, which may have an effect on his evaluation or his continued employment, that are made to the administration by any parent, student or other person shall be in writing and shall be promptly called to the teacher's attention. Said teacher shall have the right to answer any complaints and his answer shall be reviewed by the administrator and attached to the filed complaint."

The Commission found portions of the proposal to be mandatory and portions of the proposal to be permissive. It reasoned:

Teacher Supervision and Evaluation:

Inasmuch as the evaluation of a teacher may affect the retention or non-retention of that teacher, or the level of compensation received by that teacher, certain aspects of the Association's proposal regarding teacher evaluation and discipline are mandatory subjects of bargaining. On the other hand, other aspects of said proposal are not so subject to mandatory bargaining.

We hold that he matters of orientation of new teachers as to evaluative procedures and instruments is a mandatory subject of bargaining because it directly relates to the teacher's ability to perform as required by the employer, in that it involves informing the teacher of how such performance is measured, and thus as the teacher's ability to maintain employment.

Likewise, the matter of length of observation period, openness of observation, number of evaluations, and frequency of observations are also mandatory subjects of bargaining. It would indeed be specious to determine, as we do subsequently herein, that the Associaiton's proposal of a "just cause" standard is a mandatory subject of bargaining, but not require bargaining over such techniques as comprise the procedural aspects of said standard.

Similarly, the matters of copies of observation reports and conference regarding same, and teachers' objections to evaluations reflect the aspect of "just cause" which requires that, where appropriate, a teacher be allowed a fair opportunity to learn of his or her jeopardy, and possibly to defend his or her position. Thus, these matters are also held to be subjects of mandatory bargaining, as are matters concerning complaints made by parents, students and others.

On the other hand, the proposals involving the selection and qualifications of evaluators, assistance to teachers having professional difficulties, and the techniques to be employed in dealing with teachers found to be suffering professional difficulties, reflect efforts to determine management techniques rather than "conditions of employment." As such, they are not subjects of mandatory bargaining.

Upon appeal, Reserve Circuit Judge Currie agreed with the Commission's conclusion that the following five matters were mandatory subjects of bargaining:

(1) Orientation of new teachers as to evaluative procedures and techniques,

(2) Length of observation period and openness of observation,

(3) Number and frequency of observations,

(4) Copies of observation reports and conferences regarding same, and teachers objections to evaluations, and

(5) Notification of complaints made by parents, students and others.

Judge Currie noted that "these matters go to the reasonable expectation of teachers to notice of what is expected of them to be able to attain some security, to have notice of the deficiencies which may threaten that security, and the right to input into the procedures such as the timing and observation which might impair that security. No inherently managerial prerogative such as the selection of evaluators is touched."

Upon further appeal, the Wisconsin Supreme Court also upheld the Commission's determination concluding:

"A series of proposals relating to teacher evaluation were submitted to the school board's by the teacher's association as appropriate subjects for required bargaining. As to two of them, (1) who was to evaluate teacher performance, and (2) assistance to teachers who evaluations were poor, the commission held that they did not primarily involve 'wages, hours and conditions of employment' as to others, involving procedures to be used in evaluation, the commission held that they did primarily relate to 'wages, hours and conditions of employment'. The circuit court affirmed these holdings. Obviously the area of teacher evaluation relates to 'management and direction' as well to 'wages, hours and conditions of employment.' However, as to the procedures followed, these matters go to the right of teachers to have notice and input into procedures that affect their job security. On the record that was before it, we uphold the conclusion that was reached by the commission to teacher evaluation procedures being mandatorily bargainable. 17/ (Footnote 16 omitted)

. . .

We concluded our decision in Janesville by commenting:

We are cognizant of the impact which the required length and number of evaluations may have upon District supervisory resources. On the other hand, as noted in Beloit, the length and frequency of formal observations by which employes will be evaluated are inherently and directly related to the employes' job security. Assuming without deciding that there could be proposed requirements of or limitations on the

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17/ Clark County School District v. Local Government Employe Management Relations Board, supra, 10/, using the 'significantly related' test stating: '. . . the evaluation of a teacher's performance is significantly related to a teacher's working conditions inasmuch as the evaluation affects transfer, retention, promotion and the compensation scale.'. . .

frequency and duration of formal evaluations and class visitations that would render the evaluation function ineffective or that would so undly (sic) burden supervisors with evaluation requirements as to render the District unable to effectively manage its affairs, we cannot so characterize the instant proposal.

Applying the foregoing precedent to the instant proposal, we find this proposal to be a mandatory subject of bargaining because of its primary relationship to job security. Furthermore, on this record, we do not find the proposed schedule of evaluations to be so infrequent as to render the function ineffective.

13. Part IV, Section J

1. INSERVICE.

a. The Board and the MTEA agree that annual inservice needs exist for the professional staff. As part of developing an annual inservice training program, teachers once every other year shall be surveyed as to suggestions for courses for inservice training. Where teachers are hired to teach the courses, they will be paid their individual hourly rate.

b. Where inservice is deemed to be necessary, teachers will be paid for inservice as follows: . . .

The Board withdrew its objection to this proposal during hearing.

Proposal 14 states:

Part IV, Section U

7. PHYSICAL CONDITIONS OF BUILDINGS. Where physical conditions in a building may not allow the continuation of classroom instruction and such is brought to the attention of the MTEA, a representative of the Division of School Services and MTEA shall confer in the building as to whether school should continue. If necessary, the City Health Department may be consulted.

Where physical conditions within a classroom are such, that they may preclude its continued use as a classroom for the particular type of instruction, representatives of the administration and the MTEA will confer within a reasonable period of time to determine if the room's usage should be continued.

The Board contends that this provision primarily relates to its right to control its facilities, supplies and equipment and as such is a permissive subject of bargaining. The Board argues that this provision deals with the closing of school facilities due to undesirable physical conditions and as such restricts and infringes upon the Board's sole discretion to make determinations as to whether or not to close facilities.

The MTEA asserts that the provision is mandatory in that it directly relates to the health and safety of bargaining unit members and has minimal impact upon management prerogatives inasmuch as the Board retains the final decision making authority as to whether a school is to be closed.

While the MTEA has persuasively argued that this proposal has some relationship to employe health and safety concerns, we conclude that on balance said relationship is insufficient to overcome the intrusion into educational policy determinations regarding continuation of classroom instruction. Thus, this proposal is permissive.

The underlined portions of the following proposals are the subject of this proceeding:

N. TEACHER AND SCHOOL SOCIAL WORKER EVALUATIONS

. . .

4. The evaluator(s), when making his/her report, shall select from among the evaluation cards, the card which most nearly characterizes the teacher for whom the evaluation is being made, and a complete written statement shall be submitted in support of his/her appraisal. This evaluation should be based upon and should include the following:

a. a sufficient number of classroom visitations, observations and personal conferences;

(15) b. an analysis of points of strength and weakness, with specific examples;

(16) c. definite suggestions for ways in which improvement may be made, if such be necessary; and

(17) d. a statement of what has been done by the teacher and the evaluator to strengthen classroom instruction.

. . .

6. In the event a teacher receives a satisfactory evaluation card with an attachment where the evaluator(s) recommends a transfer should be taken under advisement, the teacher shall specify in writing whether he/she concurs in the recommendation for transfer. Where the teacher does not concur and upon request of the evaluator(s) or teacher, the MTEA and the Division of School Services shall confer in the building with all parties to resolve the problem. If, as a result of the conference, the Division of School Services concurs in the recommendation of the evaluator(s) and before any action is taken in the matter, they shall:

a. Notify the teacher and the MTEA within ten (10) working days in advance that a conference has been scheduled with the Division of Human Resources involving the teacher, MTEA, the evaluator(s) and the Division of School Services. The notice will include a statement of
(18) the problem. The purpose of the conference shall be to explore possible areas of assistance necessary to overcome the difficulties which have been referred to in the evaluation report.

b. The decision of the Division of Human Resources shall be reduced to writing and, together with the reasons, furnished to the teacher and MTEA. If the MTEA and/or the teacher are not in agreement with the decision, the MTEA may proceed through the final step of the grievance procedure, starting at the third step.

. . .

12. Day-to-day assignment of teachers may only be used during that period necessary to find another appropriate, professional assignment, except as to teachers who have not been initially assigned to a particular building. When a period of time exists in which it is necessary to make day-to-day assignments of appointed teachers, the following procedures shall be implemented:

a. The substitute dispatch office shall make every effort to place appointed teachers in appropriate assignments of a longer duration, especially assignments which may develop as vacancies.

(19) b. The evaluator(s) at a school to which an appointed teacher is assigned shall be notified. The evaluator(s) shall evaluate the teacher on each assignment in accordance with the provisions of the contract.

(20) c. An evaluation in a long-term assignment, forty-five (45) days or longer, shall comply with the procedures established for regularly assigned teachers.

(21) d. A teacher in a short-term assignment may be evaluated after one (1) day of service but shall be evaluated after three (3) days of service. A yearly evaluation based upon a compilation of the individual short term evaluations shall be made by the Division of Human Resources. Any adverse short-term evaluations shall be made known to the teacher and the teacher shall have an opportunity to have a conference with the evaluator(s) to discuss the evaluation.

The Board asserts that proposals 15-17 are permissive in that they primarily relate to educational policy determinations dealing with the content of evaluations and not the procedures to be followed in rendering same. The Board argues that proposal 15's requirement that a teachers "strengths" be listed is permissive because it impairs the authority of the Board to monitor teacher performance. The Board further argues that the requirements of proposals 16 and 17 regarding assistance to teachers experiencing professional difficulties are permissive under Beloit, supra.

Turning to proposal 18 the Board asserts that the provision primarily relates to the content of evaluations and to the nature of assistance to be given to teachers experiencing professional difficulties and as such is a permissive subject of bargaining under Beloit. The Board also notes that the record demonstrates the MTEA's intent to grieve compliance with such a proposal if the conference in question does not produce the desired suggestions for assistance.

Lastly, as to proposals 19-21, the Board asserts that said proposals are permissive because: (a) they relate to the content of evaluations and not to the procedures to be followed in rendering evaluations; and (b) the proposal relates only to teachers on a temporary day-to-day assignment, a subject far removed from evaluations of teachers on regular assignment and thus one related to the direction of the work force and not to wages, hours and conditions of employment. The Board also argues that as the frequency of the mandated evaluations is administratively cumbersome and that because the short-term assignments may be of insufficient duration to produce a meaningful evaluation, the proposal fits within the Commission's assessment in Janesville, supra, that there may be some evaluation proposals which become permissive because they render the District unable to affectively manage its affairs.

The MTEA asserts that proposals 15-17 are mandatory subjects of bargaining under Beloit. The MTEA argues that in Beloit the Commissison held the teachers had a right to know the criteria by which they would be evaluated. In this way, the MTEA argues that a teacher would know how their performance was being measured and have the ability to improve their chances of maintaining employment. The proposals at issue herein, in the MTEA's view, provide the teacher with information concerning the strengths and weaknesses of their performance so that they can act accordingly and ensure their job security or at least have a well informed opportunity to do so. The MTEA argues that these contract provisions do not in any way intrude into the managerial decision as to who will be the evaluator of the teacher and simply seek to elicit a reasonable indication from the evaluator as to what the evaluator regards as necessary to constitute satisfactory job performance.

Turning to proposal 18 the MTEA argues that since a recommendation of involuntary transfer has an adverse impact on working conditions, the instant proposal, which mandates a conference to discuss this subject, is a mandatory subject of bargaining. The MTEA contends that the Board's reliance upon prior decisions regarding assistance to teachers experiencing professional difficulties is misplaced in that the teachers impacted by this proposal have not received unsatisfactory evaluations. Thus the MTEA argues that the proposal does not in any

way infringe upon managerial policy decisions or techniques for overcoming deficiencies.

As to proposals 19-21 the MTEA argues that they are mandatory evaluation proposals under Beloit. The MTEA argues that the proposal does not involve the content of an evaluation but instead the frequency thereof.

As to proposal 15, we conclude that the provision is a mandatory subject of bargaining because, as the MTEA argues, notice of an employe's relative strengths and weakness allows the employe to act in ways which may insure continued employment. As noted in Beloit, supra, and quoted in our earlier discussion of proposal 12, "it would indeed be specious" to conclude that a "just cause" standard is a mandatory subject of bargaining but not to require bargaining over a proposal which gives the employe notice of how the employer perceives the quality of the employe's job performance.

Proposal 16 requests that the Board advise teachers found to have weaknesses how improvement may be made. The Board asserts that such a proposal smacks of providing assistance to teachers with professional difficulties a subject area found permissive by the Commission in Beloit. In our judgement, the Board misreads the breadth of Beloit. At issue therein were proposals which generally mandated "definite positive assistance" by the employer and specifically set forth the means by which assistance would be provided. Such proposals were found permissive because they sought to determine "management techniques." Proposal 16 does not determine what "management techniques" will be used to correct weaknesses nor does it mandate that the Board provide any of assistance recommended. The Board retains total discretion to determine the "management techniques" and Board resources, if any, to be utilized. Because we conclude that this proposal relates to job security in the manner discussed earlier herein and in Beloit and because, unlike the Beloit proposal, no specific "techniques" are required nor is the Board required to use its resources to implement any "techniques", the proposal is on balance primarily related to employe conditions of employment.

Proposal 17, on the other hand, requires Board personnel (the evaluator) to take certain action to improve classroom instruction and thus mandates Board action to substantively provide assistance resources. Therefore, this proposal falls within the scope of the Beloit rationale discussed above and is found to be permissive.

Proposal 18 requires that management meet with the MTEA to discuss possible solutions to problems which have meant that a teacher who is performing satisfactorily is nonetheless under consideration for involuntary transfer. We conclude that the proposal has a substantial relationship to conditions of employment as its purpose is to avoid the involuntary transfer of employes. We further find no Beloit type infringement into the determination of "management techniques" present in this proposal. Contrary to the views of the Board herein, specification of the proposal's purpose (i.e. problem resolution) does not interfere with management determinations as to how a problem should be ultimately addressed. Thus we find this proposal to be mandatory.

Proposals 19-21 establish a procedure regarding the evaluation of regular contracted teachers who are used by the Board to fill various assignments of varying lengths throughout the school year instead of having an assignment at a single school. In situations involving assignments of shorter duration, proposal 21 requires an evaluation after 3 days of service, an opportunity for a conference to discuss "adverse" evaluations and compilation of a yearly evaluation based upon all such evaluations. Proposal 20 specifies that if an assignment is to be 45 days or longer, evaluation procedures for regularly assigned teachers apply. We conclude that these proposals are mandatory under the timing and frequency of evaluation rationale of Beloit. While potentially burdensome, there is no persuasive evidence in this record upon which we would conclude that the Board is not able effectively to manage its affairs if this proposal were to continue to be included in the agreement.

Proposal 22 states:

> PART IV, Section S
>
> 1. BUILDING REPRESENTATIVE AND SCHOOL REPRESENTATIVE COMMITTEE. The MTEA may, in each

school, have a building representative and a school representative committee. The principal shall recognize such committee and shall meet with such committee, together with such other persons as he/she deems proper to be at the meeting. Such meetings must be conducted once a month, where a meeting is requested by either the principal or the MTEA committee, for the purpose of discussing school matters. More frequent meetings will be held where the situation warrants. School social workers shall be represented by the MTEA building representative in the building to which they are assigned or by an MTEA staff member.

The Board contends that this provision primarily relates to, and interferes with, management's discretion as to the means by which it obtains input to be utilized in making decisions regarding "school matters" and thus is a permissive subject of bargaining. The Board further notes that because the MTEA has consistently asserted that the school representative committee does not have authority to bargain on behalf of the MTEA, any claim that the meetings mandated by this proposal involve bargaining over mandatory subjects of bargaining should be discounted.

The MTEA contends that this proposal does not obligate the school principal to discuss permissive subjects of bargaining and thus does no more than require the principal and the teachers to meet and discuss matters not covered by the collective bargaining agreement which relate to the hours and conditions of employment in a particular school. As such, the MTEA asserts that the proposal is a mandatory subject of bargaining.

Given the breadth of the phrase "school matters", it is apparent to us that the clause mandates discussion over permissive management and educational policy decisions and that the proposal also dictates the identity of the Board representative in such discussions. Thus, we find the proposal permissive.

Proposal 23 states:

PART IV, Section S

2. RECOMMENDATIONS OF BUILDING CHANGES. Representatives of the MTEA will meet with the proper department and division personnel of the administration office to make recommendations as to basic facilities in new buildings or major remodeling of buildings. Such recommendations may include specific requests for particular buildings relating to concerns of individual departments or programs.

The Board contends that this provision primarily relates to, and interferes with, management's discretion as to the means by which it obtains input to be utilized in making decisions as to new school buildings or the remodeling of existing facilities and as such is a permissive subject of bargaining.

The MTEA contends that the proposal is a mandatory subject of bargaining because it places no restriction upon the ultimate managerial policy making decisions and allows the individuals whose working conditions are affected by such decisions to have input into the decision making process.

Because this clause mandates MTEA involvement in significant managerial and educational policy decisions of the Board relative to school buildings and facilities, it is a permissive subject of bargaining. We note generally for the parties' guidance that our decisions in Blackhawk VTAE, Dec. No. 16640-A (WERC, 9.80) at 8, aff'd in relevant part, 109 Wis.2d 415 (CtApp, 1982) and Racine Unified School District, Dec. No. 20653-A, at 46-47, aff'd Case No. 85-0158 (CtApp, 3/86, unpublished) discuss the extent to which bargaining over facilities can be required.

Proposal 24 states:

PART IV, Section U

3. PREPARATION PERIODS DURING ASSEMBLY PROGRAMS. If the method of organizing auditorium seating for assembly programs is according to homerooms, the periods chosen for assembly programs will be rotated.

The Board contends that this provision primarily relates to the level of prepatory time and to equalization of workloads among members of the bargaining unit, subjects that the Commission has determined are permissive subjects of bargaining.

The MTEA contends that this proposal is a mandatory subject of bargaining in that it allows preparation time available to teachers without homeroom assignments during assembly programs to be available on an equitable basis.

This clause is a permissive subject of bargaining because it interferes with educational policy judgements regarding the scheduling of school activities as well as allocation of the teacher workday.

Proposals 25 and 26 state:

Part IV, Section U

(25) 8. PARENT OR LEGAL APPEALS UNDER CHAPTER 115. In parent appeals or legal actions arising in connection with Chapter 115, Wisconsin Statutes, which involve individuals in the MTEA bargaining unit, the following shall apply:

(26) a. The MTEA shall be furnished notice of such appeal once a hearing is scheduled. The teacher, if he or she wishes, may have representation.

b. In the event that legal action is brought against a teacher arising out of the performance of duties related to Chapter 115, Wisconsin Statutes, as amended, shall apply.

The Board asserts that subsection (a) of this proposal concerns the extent to which the MTEA may rightfully appear as a "party in interest" in conjunction with parental or legal appeals under Chapter 115 of the Wisconsin Statutes. The Board asserts that the specific statutory procedure in question is an appellate procedure to be followed by a parent who is dissatisfied with the Board's determination regarding a child's specific exceptional education needs. The Board asserts that the only parties in interest in this procedure are the parent and the school board and that the teachers involved or their collective bargaining representative have no independent interest or standing in conjunction with these proceedings. Thus the Board asserts that a teacher is not entitled to separate representation during the course of the appellate procedure.

The Board rejects the MTEA's contention that such procedures can yield evidence that might ultimately be used to discipline a teacher or which might become the basis for a civil action against the teacher brought by the parent. In any event, the Board argues that other portions of the collective bargaining agreement adequately protect teachers against such concerns. The Board further contends that because its interest and the teachers' are aligned in the appellate procedure, the proper representation of teachers in conjunction with Section 115.81 proceedings can be provided by the Board.

Looking to subsection (b), the Board asserts that the proposal is unintelligible. If the Commission were to consider the MTEA's contention that the proposal is intended to refer and apply to pertinent provisions of Chapter 895 of the statutes as well as other pertinent contractual provisions governing liability coverage for teachers, the Board asserts that a statement of the applicability of other contractual provisions or of statutory provisions in no way constitutes a mandatory subject of bargaining. Thus the Board asserts that this subparagraph should also be found to be permissive.

The MTEA asserts that the proposals are mandatory subjects of bargaining in that the Sec. 115.81 procedure involves an appraisal and evaluation of job performance of said unit members and thus directly affects the working conditions of bargaining unit members. The MTEA asserts that the proposal gives it the opportunity to represent bargaining unit members in Chapter 115 appeals which potentially can involve future civil liability for the teacher or which could adversly affect evaluations of performance for the teacher. The MTEA asserts that it is clear that where a teacher's recommendation concerning a child who may have an exceptional education need is disputed by a parent, the teacher's performance is brought into question and that proper representation is important to avoid the adverse consequences which could follow a teacher's testimony in the appellate process.

Chapter 115 of the Wisconsin Statutes inter alia provides an appeal procedure for parents who wish to seek review of a school district decision relating to special education for their child. 2/ Part of that review process includes a hearing before a hearing officer during which witnesses, including teachers, may testify and be cross examined by the hearing officer, the parent(s) or the district. See Sec. 115.81(4) stats., and PI 11.06(5), Wis. Adm. Code.

2/ 115.81 Parental appeals. (1) RIGHT TO APPEAL. (a) A child's parent may appeal to the school board a decision relating to special education for the child if:

1. The appeal is filed within 4 months after the school district clerk has mailed the notice of placement under sub.(2)(b).
2. The appeal is filed within 4 months after the school district clerk has mailed the notice of removal under sub.(2)(c).
3. The parent believes the local school board has placed the child in a special education program which does not satisfactorily serve the child's needs.
4. The child has not been placed in a special education program and the parent believes that such placement would benefit the child.

b. No more than one appeal under par. (a)4 may be initiated in any school year.

(2) NOTICES. (a) Upon receipt of a recommendation for special education from a multidisciplinary team under s. 115.80 (3)(d), the school district clerk of the district in which the child resides shall immediately mail to the child's parent a notice of the recommendation and a brief statement of the reasons for the recommendation.

(b) When a decision is made under s. 115.85 (2) to place a child in a special education program, the school district clerk of the district in which the child resides shall immediately mail to the child's parent a notice of the decision and a brief statement of the reasons therefor.

(c) Whenever a decision is made by a school board to remove a child with exceptional educational needs from an educational program in which such child is currently enrolled, the school district clerk of the district in which the child resides shall mail to the child's parent a notice of the decision and a brief statement of the reasons therefor.

(d) The notice of placement under par. (b) or program change under par. (c) shall state that a hearing before a hearing officer may be had if requested in accordance with procedures established by the department and set forth in the notice.

(3) CHANGE IN PROGRAM. A change in the program or status of a child with exceptional educational needs shall not be made within the period afforded the parent to request a hearing nor, if such hearing is requested, before the hearing officer issues a decision, unless a program change is made with the written consent of the parent. If the health or safety of the child or of other persons would be endangered by delaying the change in assignment, the change may be made earlier, upon order of the school board, but without prejudice to any rights that the child or parent may have. (Footnote 2/ continued on page 46)

The proposals in question seek to: (1) have the MTEA furnished with notice of the parent appeal and presumably the hearing date; (2) give any teacher in the MTEA bargaining unit who may be involved the option of MTEA representation at the hearing; and (3) contractually recognize the applicability of existing statutory provisions regarding teacher civil liability to lawsuits against the teacher arising out of a Chapter 115 proceeding. The MTEA correctly asserts that employes have an interest in protecting against the potential adverse consequences (discipline, poor evaluations, civil liability) which may flow from testimony given at such a hearing. Thus we are satisfied, as a general matter, that the right to notice of and representation at such hearing has a relationship to employe wages, hours and conditions of employment. Board arguments that the adverse consequences are speculative, that the Board itself can adequately protect the teachers' interest, or that other contractual provisions provide sufficient employe protection all go the the merits of the proposal and not to its mandatory or permissive status.

The Board also asserts that the teacher and the MTEA lack "party" status in a Chapter 115 appeal and thus that representation is somehow inappropriate. We disagree. The proposal at issue does not involve "party" status but

(Footnote 2/ continued)

(4) RIGHTS AT HEARING. A parent shall have access to any reports, records, clinical evaulations or other materials upon which a decision relating to the child's educational program was wholly or partially based or which could reasonably have a bearing on the correctness of the decision. At any hearing held under this section, the parent may determine whether the hearing shall be public or private, examine and cross-examine witnesses, introduce evidence, appear in person and be represented by an advocate. The school board shall keep a full record of the hearing, prepared by the hearing officer. A complete record of the proceedings shall be given to the parent, if requested. The hearing officer shall inform the parents of their right to a complete record of the proceedings.

(4m) HEARING OFFICERS. The department shall maintain a listing of qualified hearing officers who are not otherwise employed by or under contract to a school board to serve as hearing officers in hearings under this section.

(5) INDEPENDENT EXAMINATION . If a child's parent believes the diagnosis or evaluation of the child as shown in the records made available to him under sub.(4) is in error, he may obtain an independent examination and evaluation of the child and have the report thereof presented as evidence in the hearing. If the parent is financially unable to afford an independent examination or evaluation, the school district shall reimburse the parent for the reasonable expenses of the examination or evaluation.

(6) HEARING AND DECISION. The hearing officer shall conduct a hearing and shall issue a decision within 45 days of the receipt of the request for the hearing. The hearing officer may issue subpoenas, order an independent evaluation at public expense as provided under sub.(5) and grant specific extensions of time for cause, not to exceed 30 days, at the request of either party.

(7) APPEAL TO STATE SUPERINTENDENT. Within 30 days after the decision of the hearing officer under sub.(6), either party may appeal the decision to the state superintendent. An appeal under this subsection shall be initiated by filing a written request for review with the state superintendent. The request for review shall contain a brief statement of the grounds on which the review is requested and shall be served on all parties. The state superintendent shall review the record established at the hearing under sub.(6) and shall issue a written decision within 30 days of receipt of appeal.

(7m) For a child who resides, and is receiving special education, only in a state or county residential facility, the child's parent shall appeal to the governing body of the facility in accordance with subs.(1) to (6) so far as applicable. The parent may appeal the governing body's decision under sub.(6) to the state superintendent under sub.(7).

(8) APPEAL TO COURT. Within 30 days after the decision of the state superintendent under sub.(7), either party may appeal the decision to the circuit court for the county in which the child resides.

rather is limited to giving the teacher notice of the appeal and the abilityto have someone present during the hearing to advise them, if necessary, as to their rights.

We have also generally concluded in prior cases that a proposal which seeks to incorporate in the labor agreement existing statutory rights is a mandatory subject of bargaining so long as the statutory rights in question primarily relate to wages, hours and conditions of employment. 3/ The effort herein to reference existing statutory and contractual liability provisions in our view is also related to wages, hours and conditions of employment.

Applying the foregoing discussion to the specifics of the proposals at issue, we find the notice portion to be a mandatory subject of bargaining because of the primacy of the above-noted relationship to employe wages, hours and conditions of employment. As to the representation portion of the proposal, we conclude that said portion is not a bargainable matter despite the primary relationship to employe interests because it is Chapter 115 and the DPI examiner which control the right or lack thereof to representation. The Board thus has no ability to grant or deny the right the MTEA seeks to bargain herein.

As written, the supposed liability portion of proposal, subsection (b),makes no sense and thus we decline to rule on it in this proceeding. If it were amended to comport with the meaning the MTEA asserts the language has (e.g. by inserting references to Chapter 895 and to contractual provisions relating to liability insurance), we would find it mandatory. See also our discussion of a similar proposal in Racine Unified School District, Dec. No. 23381-A (WERC, 11/86) at 29.

Proposals 27-31 state:

(27) J. ASSIGNMENT TO A PARTICULAR SCHOOL

1. Teachers shall be assigned to a particular building where a vacancy exists, as long as the teachers are qualified within their teaching certificates issued by the Department of Public Instruction or their major or minor field of certification and specials skills and training needed. 1/ Where teachers have left an assignment, pursuant to a specific provision of this contract, they shall be reassigned in accordance with the following order of priorities.

1/ For example, a physical education teacher position in one particular school may require the services of a teacher with life guard training and water safety skills. Qualified applicants for this position must express interest in this vacancy by filing an application, have the basic Department of Public Instruction physical education certification for the secondary level, and must either have acquired life guard training and water safety skills or will have acquired the above skills before actually beginning said assignment.

3/ Racine Unified School District, Dec. Nos. 20652-A, 20653-A (WERC, 1/84), at 17; Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) at 64; Racine Unified School District, Dec. No. 23380-A, 23381-A (WERC, 11/84).

a. Teachers displaced from a particular building due to a reduction in enrollment in accordance with Part V, Section G(1), teachers requested reassignment in accordance with Part V, Section G(3), teachers requesting reassignment in accordance with Part V, Section G(2), teachers returning from a leave of absence, and teachers being reassigned in connection with the section on evaluation. Exceptions to this section may be made to provide meaningful assignments to those teachers being transferred as a result of evaluation.

b. Unassigned teachers as a result of premature curtailment of leave and unassigned teachers as a result of overhiring.

c. New teachers in the system who have not as yet taught in the Milwaukee Public Schools system.

2. Whenever there are two (2) or more qualified teachers to fill a vacancy in any one (1) of the above categories, preference shall be given to the teacher or teachers with the greatest system-wide seniority. The MTEA recognizes that there may be an occasion where departmental, extracurricular, kindergarten, primary, intermediate, upper grade level or counseling needs cannot be met in a specific instance through the provisions of this section. In such instance, the administration will give the teacher, upon request, reasons for the departure from these provisions. If the teacher requests, such reasons shall be reduced to writing.

(28) K. STAFFING OF SPECIALTY SCHOOLS

1.EXISTING TOTALLY SPECIALIZED BUILDINGS.
In any school which has a program in a special mode of instruction such as but not limited to open education, fundamental education, continuous progress multi-unit individually guided education, teacher pupil learning center, gifted and talented, and creative arts, vacant positions will be filled from a list of qualified applicants.

A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has the basic Department of Public Instruction certification required, and who meets at least one (1) of the following conditions:

a. Previous experience in the particular specialty.

b. Has taken or completes before the beginning of the next semester, college courses in the specialty, or vocational-technical courses where applicable or inservice training in the particular specialty. When the necessary college courses, vocational-technical courses or inservice training are not reasonably available to the teachers wishing to participate, the school administration will establish inservice programs that fulfill the training requirements.

For elementary specialties or modes of instruction, a qualified applicant is a teacher who has the applicable qualifications set forth above. For secondary specialties, the applicant must also have the applicable qualifications set forth in the paragraph above, but in

particular instances may also be required to have specific training or a specific skill. 2/

Teachers assigned to a specialty school during the 1976-77 school year are qualified for that specialty in terms of the above criteria. One (1) inservice program designed for that specialty and offered for the teachers in the specialty may be required. Said programs shall not exceed sixty (60) hours over the three (3) years of the contract, the dates of said programs to be negotiated with the MTEA.

In any school which has a Montessori program, vacant positions will be filled from a list of qualified applicants.

A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has both the basic Department of Public Instruction and American Montessori Society or American Montessori International certifications required and is willing to participate in inservice programs designed for teachers in the specialty, if such inservice is deemed to be necessary.

In any elementary school which is a second language proficiency school, vacant positions will be filled from a list of qualified applicants. A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has the basic Department of Public Instruction certification required for the grade level and subject, and can speak, read and write the school's second language.

For paragraph 1, assignments will be made in accordance with system-wide seniority to vacancies known by July 1, or by the date on which the general assignment of students to school occurs, whichever date comes later.

(29) 2. EXISTING SPECIALTY PROGRAMS WITHIN BUILDINGS. In any school which has specialized courses, programs or modes of instruction in addition to the regular program, vacancies shall be filled in the following order:

a. Qualified applicants currently at the school;

b. Other qualified applicants.

For elementary specialties or modes of instruction, a qualified applicant is a teacher who has the applicable qualifications set forth in paragraph 1. For secondary specialties, the applicant must also have the applicable qualifications set forth in paragraph 1, but in particular instances may also be required to have specific training or a specific skill. 3/

In any school which has a bilingual program, vacant positions requiring the second language will be filled from a list of qualified applicants. A qualified applicant is a teacher who has expressed an inteerst in the vacancy by filing an application, has the basic Department of Public Instruction certification required for the grade level and subject, and can speak, read and write the school's second language.

2/ See Footnote 1.

3/ See Footnote 1.

Assignment of qualified applicants to vacancies will be made first from applicants within the school in the order of system-wide seniority and secondly from other applicants on the basis of system-wide seniority to vacancies known by July 1, or by the date on which the general assignment of students to schools occurs, whichever date comes later.

(30) 3. NEW SPECIALTY SCHOOLS AND PROGRAMS. When a new specialty school or program is created, notice of the program and teacher qualification criteria will be publicized at the earliest possible opportunity. Teacher positions shall be filled in the following order:

a. From qualified applicants currently at the school in order of system-wide seniority;

b. From other qualified applicants in order of system-wide seniority.

For an elementary program or school, a qualified applicant is a teacher who has the applicable qualifications set forth above in paragraph 1. For secondary programs or schools, the applicant must also have the applicable qualifications set forth in paragraph 1, but in particular instances may also be required to have specific training or a specific skill. 4/ In any school which has a bilingual program, a qualified applicant for vacant positions requiring a second language will be the same as that set forth in paragraph 2. The cut-off date for the use of the seniority provision is the same as that described in paragraph 2.

In the special case of Rufus King College Preparatory School to be opened for the 1978-79 school year, teacher qualifications (as defined in (1) with the exception of inservice training) based upon curricular needs, will be used. In all other respects paragraph (3) applies.

(31) 6. QUALIFIED. Wherever the term qualified is used in Part XII, Sections D and F it shall have the same meaning as found in Part V, Sections J or K of the contract.

The Board brief summarizes its position as to these proposals thusly:

> In an instance such as this one, where Commission precedent is so clear and well-founded, the MTEA (as the party seeking to overturn that precedent) bears the burden of proof as to adducing substantial reasons why the Commission's precedent should now be reversed. The MTEA has demonstrably failed to sustain its burden of proof. Indeed, this case presents a fact situation that conclusively demonstrates the wisdom of the Commission's rulings denoting the establishment of "minimum qualifications" as a permissive subject of bargaining. This is not a subject area without applicable precedent. It involves two areas that have been denoted by the Commission as permissive subjects of bargaining: (1) determination of curricular content and procedure by which curriculum content and/or changes therein are to be determined. Milwaukee Board of School Directors (20093-A) 2/83; (2) the determination of "qualifications for teacher positions" distinct from and supplemental to "basic" DPI certification, a distinction that the Commission has expressly recognized. Janesville School District (21466) 3/84 (Proposal No. 5, Sec. 5, pp. 7, 66-67) wherein the Commission

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4/ See Footnote 1.

specifically stated that the district has the right to offer the curriculum and programs of its choice and to retain a teaching staff that is minimally qualified to teach grades and subject areas offered by the District."

First of all, there is no question but that Part V secs. J. and K. and Part XII Sec. G. of the Agreement deal primarily with the issue of "minimum qualifications." They do not deal, except in an incidental sense, with issues that the MTEA devoted much time and testimony to at the hearings held in this matter - issues such as staffing and restaffing procedures, "excessing," and teaching outside of areas of certification. (Those areas are dealt with in Part V, Secs. A. through G. of the Agreement, primarily Sec. G.). An examination of Secs. J. and K. and Part XII Sec. G., on the other hand, indicate that the definition of "qualified" teachers is the primary subject area addressed by those contractual provisions. This can be shown as follows:

(a) Part V Sec. J. - Paragraph 1 states that assignments to particular buildings shall depend upon whether "the teachers are qualified" within their teaching certificates issued by the Department of Public Instruction of their major or minor field of certification and special skills and training needed." The latter phrase also incorporates a footnote giving a specific example in the area of physical education. Those arbitration awards construing Sec. J. (and introduced as part of Exhibit 20 into this proceeding) are devoted entirely to the application of this provision. It is to be noted that this provision defines "qualification" largely in accordance with the MTEA's view (DPI "minimum" certification/licensure), and that the MTEA has consistently sought to construe the footnoted and referenced exception almost out of existence.

Similarly, paragraph J. 2 incorporates the concept of "qualifications" and states that selection from among qualified teachers shall be made in accordance with system-wide seniority. The MBSD would not have contested the mandatory bargainability of the "seniority" selection criterion once it is established that the teachers from among whom selection is to be made are "qualified" - in accordance with qualifications established by the MBSD alone. However, since paragraph J. 2 impinges upon the MBSD's right to establish those "qualifications" themselves, that paragraph is permissive.

(b) Part V Secs. K. 1 - 3. These sections are very much parallel to one another in substantive content. The only differences between them have to do with the particular types of programs to which they relate. An examination of all three of these subsections will reveal that the vast majority of the language thereof addresses the definition of the term "qualifications" and the standard by which those "qualifications" will be defined. This is precisely what constitutes a permissive subject of bargaining. To the extent (however marginal) that these sections address the issue of selection criteria among "qualified applicants," the MBSD does not contest their mandatory bargainability; however, this is not the case with respect to the vast majority of provisions contained in Part V Secs. K. 1 through 3.

(c) Part XII Sec. G. - This subsection only contains a cross reference to the term "qualified" (as used in Part V Secs. J. or K. (to the issue of layoff. As such, it contains nothing substantively different from the subject matter contained in those Sections - indeed, this section is devoted entirely to the definition of the term "qualifications" and as such is entirely permissive.

A municipal employer has the right to determine necessary minimum qualifications for any particular position within its work force. Brown County (Department of Social Services) (19042) 11/81; City of Waukesha (Fire Department) (17830) 5/80; Milwaukee Sewerage Commission (17302) 9/79; City of Madison (16590) 10/78. See also Glendale Professional Policemen's Association of City of Glendale, 83 Wis. 2d 90, 106-107, 264 N.W.2d 594 (1978). As stated in Milwaukee Sewerage Commission, supra, Memorandum Decision at p. 10: "The Commission finds merit to the Sewerage Commission's position that the establishment of job qualifications affecting unit members may relate to the formulation of management public policy. The reason for this is that the selection of employes may affect the services offered by the municipal employer." This case presents a perfect illustration of that principle - because of the very direct and pervasive effect that bargaining over "minimum qualifications" for teachers has upon the level and quality of the services offered by MPS' education program.

In considering this subject, the Commission must distinguish between "impact" items such as selection criteria from among bargaining unit members and such items as the procedures by which bargaining unit members may attain necessary qualifications and/or the employer's obligation to provide sufficient resources for bargaining members to obtain said qualifications. Thus, for example, the contractual sections involved herein are entirely separate and apart in concept and in terms of bargainability from that addressed by the Commission in Janesville School District (21466) 3/84, proposal 3, Sec. 2. c (Teacher Initiated Voluntary Transfers) at pp. 3, 41-42, which addressed selection criteria from among "qualified" bargaining and non-bargaining unit applicants, while leaving the determination of "qualified" to the District. The MBSD has never disputed that the "impact" concepts noted above constitute a mandatory subject of bargaining, and has so stated repeatedly in the record. However, Part V Secs. J. and K. and Part XII Sec. G. do not confine themselves to such matters, but are rather primarily concerned with the establishment of the substantive "minimum qualifications" themselves. It is for that reason that the MBSD contends that they constitute permissive subjects of bargaining.

In a recent declaratory ruling proceeding involving these very same parties, the Commission unmistakably affirmed the MBSD's right to impose (without bargaining) "minimum qualifications" primarily related to its "education mission." In discussing a proposal in Milwaukee Board of School Directors (20093-B) 8/83 at pp. 10-12, dealing with the qualifications for athletic coach positions, the Commission explicitly re-affirmed its long-standing precedent holding that employers need not bargain over the minimum qualifications for a job. Citing School District of Rhinelander (19671) 7/82, the Commission stated as follows:

> As footnote 8 in the Rhinelander decision indicates, the Commission has consistently held that an employer need not bargain the minimum qualifications for a job, but must bargain over the

> selection criteria to be applied when choosing among qualified applicants. The right to establish such qualifications, as recognized by the Court in Beloit (Beloit Education Assn. v. WERC, 73 Wis. 2d 43 (1976)) flows from the need to insure that qualified individuals be available to direct any activity which is sufficiently related to the educational mission. . . .

Milwaukee Board of School Directors (20093-B) 8/83 at p. 11.

There can be no doubt that the positions addressed by A27-A31 are primarily "related to the educational mission"- indeed, they lay at the heart of the MBSD's educational mission.

The distinction between the employer's right to unilaterally establish "substantive" minimum qualifications and the obligation to bargain over certain impacts of those decisions as affecting bargaining unit members were succintly put forth by the Commission in Brown County (Department of Social Services), supra Memorandum Decision, p. 6 as follows:

> Turning to question of qualifications, in City of Waukesha (Fire Department), the Commission held that while the municipal employer need not bargain over the minimum qualifications needed to hold a position or classification, the selection criterion to be applied when promoting qualified bargaining unit candidates affects promotional or transfer opportunities for unit employees, is primarily related to wages, hours and working conditions, and thus constitutes a mandatory subject of bargaining.

The MBSD urges that the Commission strictly apply that reasoning to this situation. Were Part V Secs. J. and K. and Part XII Sec. G. confined to selection criteria from among qualified members for teaching positions, (whether by system-wide seniority or by any other measure), the MBSD would have regarded those provisions as mandatory subjects of bargaining and, consequently, that issue would not have been presented in the context of the declaratory ruling proceeding. However, that is most emphatically not the case. Those provisions of the Agreement (and the numerous grievances and arbitration awards that have arisen thereunder) address the substantive minimum qualifications themselves, and the "reasonableness" or "unreasonableness" of managerial decisions establishing such qualifications. This is explicitly set forth by the Agreement's definition of the term "qualified" - the very subject that the Commission has determined to constitute a managerial prerogative and a permissive subject of bargaining. To the extent that the applicable portions of the Agreement infringe upon the MBSD's right to determine the definition of "qualified" in the context of particular teaching positions, well-established Commission precedent requires that such limitations be deemed permissive subjects of bargaining.

The MTEA has put forth no evidence whatsoever as to why the Commission's well-established and well-reasoned precedent should be overturned, or why the establishment of "minimum qualifications" should be regarded as anything other than a subject primarily related to the formulation and implementation of educational policy and the credibility of curricular content. Its testimony was designed to divert attention from that issue rather than to enlighten the Commission upon that issue. Furthermore, the MTEA's discussion of the various "exceptions" contained in the

contractual language at issue whereby the MBSD is given limited discretion to establish "minimum qualifications" above and beyond DPI "minimum" certification/licensure is wholly irrelevant to the determination of the issue. It begs the issue as to whether or not the MBSD need bargain for "exceptions" or whether or not any fetters ought to be placed on the MBSD's prerogative in this area at all. The same reasoning holds true for much of the remainder of the MTEA's argument, such as the extensive testimony and documentation regarding the factual background and circumstances of the various grievances, arbitration awards, and memoranda of understanding that have arisen under Part V Secs. J. and K. and Part XII Sec. 6. over the years.

That portion of the MTEA's testimonial and documentary evidence respecting the distinct topics of selection criteria and time lines for attaining qualifications is similarly irrelevant, given that the MBSD does not contest the fact that such items constitute mandatory subjects of bargaining. However, to the extent that such concepts are incorporated into Part V Secs. J. and K. and Part XII Sec. G. they constitute an inextricable mix with the permissive elements that predominate with those Sections; as a result, their presence does not affect the fact that Part V Secs. J. and K. and Part XII Sec. G. as a whole constitute permissive subjects of bargaining.

The MTEA's Amended Petition cited three entirely irrelevant cases in support of its position - and the irrelevance of those cases must certainly reflect adversely on the credibility of the MTEA's position. City of Oak Creek - Franklin School District No. 1 (11827-D, E) 11/74, aff'd Dane Co. Cir. Ct. (1975); and Milwaukee Board of School Directors (17504) 12/79 did not concern any issue even minutely related to the subject of "minimum qualifications" and the employer's right to establish them. City of Brookfield (19944) 11/82 dealt with a promotional procedure which was not only obviously distinct from any issue involved in this case, but also contrary to the MTEA's repeated stance that no "promotional" position exists within the teachers' bargaining unit. These cases are therefore deserving of no weight in conjunction with the Commission's determination of this matter.

The Commission should also give no weight whatsoever to the MTEA's argument that the MBSD would abuse its authority to set "minimum qualifications" by "tailoring" qualifications to fit particular individuals. The fact is that the power to set "minimum qualifications" is part and parcel of the MBSD's managerial authority and statutory responsibility, and it must have the right to exercise that power in the interests of assuring the quality and credibility of the educational program. The fact that authority might be abused if left in unscrupulous hands has never been and should never be an argument for construing an item to be a mandatory subject of bargaining in instances where it would otherwise be clearly permissive. Certainly the same could be said for any other management right. Furthermore, Part II. Sec. C. of the Agreement contains a proscription against "arbitrary or capricious" exercise of the MBSD's managerial authority. That provision stands as a more than adequate safeguard against any of the abuses theorized by the MTEA.

The MTEA has also contended that Part V Sec. J. and K. and Part XII Sec. G. affect staffing and lateral transfer opportunities within the bargaining unit. As noted earlier, they do not affect staffing procedure except in an incidental sense. They may affect the identity of individuals eligible for certain positions within the teaching staff, but

need not and will not affect the procedure by which vacant positions are filled. (To the extent that staffing procedures are impacted, they have not been presented as a contested issue in this proceeding.) Furthermore, given that the MTEA has consistently taken a strong stance against the notion that any "promotional" positions exist within its teachers' collective bargaining unit (Tr. pp. 337-338, 585), the impact of this matter on transfer opportunities (if any) exists only with respect to lateral transfer opportunities. While the establishment of "minimum qualifications" will undoubtedly impact upon transfer opportunities for teachers who do not possess those qualifications and who will not make the necessary effort to attain them within the prescribed time period, this effect is quite minimal in comparison with the very extensive (and sometimes very harmful) impact that the existing contractual language has had upon the ability of the MPS to control its curriculum, and therefore the content and quality of its educational program. The test is "primary relationship"; for a subject to be mandatory it must "primarily" relate to wages, hours and working conditions, and not merely marginally relate thereto. In this case, the predominant effect of the operation of Part V Secs. J. and K. and Part XII Sec. G. is upon the formulation and implementation of educational policy.

In conclusion, Part V Secs. J. and K. and Part XII Sec. G. relate to the heart of managerial control over the content and quality of the MPS educational program. For that reason, the Commission must uphold the MBSD's position and conclude that those sections of the Agreement, including Part XII Sec. G. which incorporates the concepts of Part V Secs. J. and K. into the layoff area, constitute permissive subjects of bargaining.

The MTEA asserts that the Commission has previously rejected the Board's contentions herein and found a virtually identical proposal to be mandatory. Milwaukee Board of School Directors, Dec. No. 20093-A, pp. 67-68 (WERC, 2/83). The MTEA contends that the Commission's decision, arbitration awards interpreting the same contractual language, and various memoranda of understanding demonstrate that the Board has the necessary flexibility to successfully staff its educational programs. The MTEA argues that the potential for some arbitration awards to prohibit the addition of certain qualifications in addition to a DPI certification does not form a basis for finding the proposals permissive. School District of Janesville, Dec. No. 21466 (WERC, 3/84). Nor, in the MTEA's view, does the Board have a unilateral right, under the guise of establishing minimum qualifications, to have the "best qualified" applicant fill a position. Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83). Because these provisions do not interfere with the Board's ability to establish minimum qualifications, and do establish procedures and criteria for promotion and transfer of employes within the unit, the MTEA asserts that the proposals are mandatory subjects of bargaining, City of Green Bay, Dec. No. 12402-B (8/75), aff'd by operation of law, Dec. No. 12402-C (WERC, 2/75); Oconto County, Dec. No. 12970 (WERC, 3/75). City of Brookfield, Dec. No. 19944 (WERC, 8/82); Oak Creek-Franklin School District No. 1, Dec. No. 11827-D (WERC, 11/74) aff'd CirCt Dane, 11/75. Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79), City of Madison, Dec. No. 16590 (WERC, 10/78); City of Beloit, Dec. No. 11631-C (WERC, 7/74), aff'd 73 Wis. 2d 43 (1976).

As footnote 8 in the Rhinelander decision indicates, the Commission has consistently held that an employer need not bargain over the minimum qualifications for a job but must bargain over the selection criteria to be applied when choosing among qualified applicants. The right to establish such qualifications, as recognized by the Court in Beloit, flows from the need to insure that qualified individuals be available to direct any activity which is sufficiently related to the educational mission. We find that the District retains the right to set unilaterally certain minimum qualifications vis-a-vis the coaching position in question, notwithstanding the existence of the WIAA. We note that the WIAA is a voluntary organization to which the District need not belong and that the WIAA does not purport to and does not in fact make educational policy judgments that foreclose the District from pursuing further educational objectives where extra-curricular athletics programming is concerned.

We find the proposal as written to be permissive because, as in Rhinelander, it may prevent the District from providing qualified direction of an extra-curricular activity (athletics) which activity bears a significant and sufficient relationship to fulfillment of the District's educational mission. (See our note 9 in Rhinelander, above). We so conclude because the language at issue here may require the District to hire a bargaining unit member who has no familiarity with the sport in question and who thus could lack minimum qualifications to perform the assignment.

It is our view however, that the District's right to set minimum qualifications is not without its limits. The educational policy dimensions predominate as regards such job performance related minimum qualifications as the professional certification, educational attainment, experience with and knowledge of a sport, knowledge of safety practices regarding the sport, and knowledge of first aid and/or sports injury training practices that will be required of applicants for each of its coaching work opportunities . However, minimum qualifications that do not primarily relate to educational policy or management of the district could not be imposed without fulfillment of the statutory bargaining requirements; examples might include a requirement that the applicants must be District residents, unmarried, etc.

It follows, therefore, that the Association is entitled to mandatorily bargain about provisions that would limit the minimum qualifications imposable by the District to job performance related qualifications primarily related to the formulation or management of education policy. Moreover, as among coaching applicants from within and outside the bargaining unit, the Association is entitled to mandatory bargaining about whether bargaining unit members meeting the minimum qualifications shall be given preference and how the District shall be required to select from among more than one bargaining unit member applying for the position (e.g., preference for opportunities in the employe's building, seniority, etc.). The District can of course attempt at the bargaining table to secure or maintain the right to fill all the positions with the most qualified applicant.

In School District of Janesville, supra, at 66-67, we commented as follows when ruling upon whether a layoff clause was permissive because it prevented the employer from establishing qualifications over and above DPI certification:

Several of the District's objections to the remainder of the layoff proposal focus upon the Association's use of "certification" as the definition of teachers who are "qualified" for teaching positions within the District. The

District has in essence asserted that it should be free to consider a wide variety of factors in addition to certification when determining whether a specific teacher is qualified to hold a specific position. Initially, it should be noted that the layoff proposal before the Commission in Beloit, supra, on its face, specified that layoffs would occur by seniority and did not contain any reference to certification or qualification. That absence prompted by the Circuit Court and the Supreme Court to comment that seniority based layoff and recall provisions are mandatory so long as they do not prevent the school district from insuring that the remaining teachers are "qualified" to teach the particular subjects in the school curriculum which the district wishes to maintain. Here, the Association proposes that this requirement, which was imposed by the courts, can be met through a statement which provides that the layoff clause not be interpreted "to preclude the Board from retaining, in the case of staff reduction, a staff of teachers who are qualified by virtue of their certification to teach the instructional areas or subjects in the District's curriculum."

The employe interests at stake are substantial. As in the subcontracting situation in Racine Schools 2/ the employe interests at stake here involve job retention/job security. In that way, the instant case is distinguished from those in which it has been held that employer interests predominate as regards the establishment of minimum qualifications for initial hire, promotion, transfer, assignment to available extra-curricular work opportunities, etc. 3/

Here, we consider the employes' job security interests sufficient to warrant the right of their representative to bargain collectively to protect them, so long as the representative's proposal in that regard does not require the District to violate licensure requirements and does not prevent the District from providing courses or services that in the District's judgment ought to be provided and to retain a professional staff that is at least minimally qualified to perform the remaining work. Thus, in Beloit, the language of the Supreme Court's decision appears to have established that to be mandatory, a teacher layoff proposal must "stop . . . short of invading the school board's right to determine the curriculum . . . and to retain, in case of layoff, teachers qualified to teach particular subjects in such curriculum." 73 Wis. 2d at 59-60.

We think the issue of whether certification equals qualification is a close question with good arguments in support of both parties' positions. In the final analysis, while we are persuaded that in most cases certification would assure the District of qualified teachers for the curriculum and programs of its choice. There may be situations where such a requirement would prevent the District from offering the curriculum and programs it desires or where certification alone does not permit the District to retain a minimally qualified teacher in all of the grades and subject areas desired.

2/ 81 Wis. 2d 89 (1977).

3/ E.g., City of Madison, 16590 (10/78); Milwaukee Sewerage Commission, 17302 (9/79); City of Waukesha, 17830 (5/80); Brown County, 19041 (11/81); Milwaukee Board of School Directors, 20093-B (8/83).

Thus we conclude that the Association's instant proposal is permissive, but we would find a proposal defining qualified as "by virtue of their certification" mandatory if a proviso were added assuring that strict compliance with certification in layoff and recall decisions is not intended where it would interfere with the District's rights to offer the curriculum and programs of its choice and to retain a teaching staff that is minimally qualified to teach grades and subject areas offered by the District.

In addition, we think it appropriate to comment on the District's contention that in Milwaukee Board of School Directors, 20093-A, (2/83) the Commission held that consideration of factors other than basic qualifications and seniority may be considered when filling vacancies or when making reassignments or transfers. A close examination of our decision in that matter demonstrates that the Commission was interpreting the specific contractual language as granting the employer the flexibility to consider other factors and was not holding that it was a permissive subject of bargaining which the employer therein could unilaterally impose upon the union. Thus, our conclusion in that case is not inconsistent with that reached herein.

As the quoted portion of our Janesville decision indicates, even in the context of a layoff proposal where the strength of employe wage, hour and condition of employment interests is at its peak because the employe's job security hangs in the balance, a school district has the right to unilaterally establish qualifications in excess of those required to meet the Wisconsin Department of Public Instruction's (DPI) licensure and certification requirements if such additional requirements are necessary to retain a teaching staff which is minimally qualified to teach the programs, courses and curriculum which the school district wants to provide. Thus, in Janesville the Commission found permissive the union layoff proposal which absolutely prohibited the district from establishing qualifications beyond DPI certification. However, the Commission therein held that it would be a mandatory subject of bargaining for the union to propose, in the context of a layoff/recall proposal, that the district was prohibited from establishing qualifications in excess of the legal minimums except where necessary to retain a staff which was minimally qualified to teach the district's programs, courses and curriculum.

Proposals 27-31 herein, as implemented by the parties and as interpreted in numerous arbitration proceedings between these parties, actually involve the MTEA in the determination of the substantive qualifications needed to provide at least minimally qualified staff to teach the Board's program, courses and curriculum. This involvement in the establishment of minimum qualifications is most explicit in proposals 28-30 wherein the qualifications needed to hold positions in the Board's specialty school are specifically set forth. Because, as noted earlier herein, we have concluded that a school district has, in at least some circumstances, the right to unilaterally determine those qualifications, we find proposals 27-31 to be permissive to the extent that they represent impermissible intrusions into Board's right to determine said qualifications. 4/

Our decision does not leave the MTEA without the ability to bargain certain protection. As indicated earlier herein, in the context of a layoff/recall

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4/ In Milwaukee Board of School Directors, Dec. No. 20093-A, the focus of the decision regarding much of the same language before us herein was limited to whether or not the provision was permissive because it did not allow the Board to establish qualifications based on employe race or gender. As the Commission found that the language did not preclude such Board action, the Board's position was rejected. Since that decision, as the quoted portions of Milwaukee and Janesville demonstrate, the law in this area has been more fully explored and refined in litigation by the parties herein and elsewhere around Wisconsin. The Board is now presenting a different theory relying both upon this more refined precedent as well as upon the very extensive record developed in this proceeding.

proposal the MTEA can seek to tightly limit the Board's right to establish qualifications in excess of certification/licensure requirements through a "Janesville proviso" proposal. Lesser protection can be bargained in the context of transfer provision because, as we indicated in the quoted portion of Janesville, the employe wage, hours and condition of employment relationship is less substantial. Therefore, as we indicated in the quoted portions of Milwaukee, in the context of transfer proposals the Board's right to set minimum qualifications based upon educational policy considerations related to the teaching of the Board's programs, courses and curriculum predominates over employe interests. However, as we also indicated in Milwaukee, minimum qualifications that do not relate to educational policy (i.e. residency, marital status, etc.) could not be unilaterally imposed. Thus, for instance, the MTEA has a right to mandatorily bargain for a transfer provision which would limit the minimum qualifications imposable by the Board to lawful job-performance-related qualifications primarily related to the formulation or management of public policy. The language of Section J.1 of proposal 27 would also appear to be a mandatorily bargainable approach available to the MTEA so long as the current practice of MTEA involvement is clearly renounced to make it clear that the Board alone makes the determination of the specific qualifications applicable to any given position subject to the MTEA's right to grieve whether the Board had exceeded the limits on its rights contained in the existing contractual language or in any additional protections which the MTEA can seek to bargain as noted above.

It of course remains the case that the MTEA has a right to bargain over criteria (unit status, seniority in a building or in the district, etc.) by which it will be determined which applicant possessing the minimum qualifications will fill a unit vacancy.

Proposal 32 states:

> PART V, Section M
>
> FILLING VACANCIES. Teacher vacancies occurring after November 15 and March 15 may be filled by long-term substitutes for the duration of the first and second semester, respectively. These substitutes are to be paid in accordance with the regular teacher salary schedule and are to receive full fringe benefits except for pension.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to educational policy decisions regarding assignment and deployment of teachers and is identical to a proposal previously found permissive by the Commission in Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 2/83) at 59.

The MTEA asserts that this clause is a mandatory subject of bargaining in that it relates to the circumstances in which the Board may fill a unit vacancy with a nonunit employe. The MTEA contends that an arbitration award, which was enforced by the Wisconsin Supreme Court in Milwaukee Board of School Directors v. Milwaukee Teachers Education Association, 93 Wis.2d 415 (1980) determined that under the existing MTEA teachers contract, any vacancy which the Baord decided to fill had to be filled with a teacher bargaining unit employe. The MTEA contends that this language was bargained in response to that award to give the Board greater flexibility. Thus, the MTEA contends that if the Commission finds this proposal to be permissive, the Board would be required to place bargaining unit employes in any such vacancy which it determines to fill.

The Board correctly points out that we found this provision non-mandatory in Milwaukee Board of School Directors, Dec. No. 20093-A, at 59. In that decision, we held:

> The Commission, in City of Sheboygan, supra, and Wisconsin Rapids School District (17877) 6/80, concluded and hereby reaffirms, that a bargaining representative cannot bargain over the terms and conditions of employment of non-bargaining unit employes. MTEA is incorrect in citing the City of Madison, supra, as being supportive of a contrary holding. The temporary employes

discussed in that decision were bargaining unit employes, and thus it was entirely proper for the union representing those employes to bargain over their wage rates and benefits. Here, from the record, it is clear the parties agree that the work involved is within the jurisdiction of the substitute teachers. Having so agreed, MTEA, as the bargaining representative of the teachers, has no right to bargain over the terms and conditions of employment of the substitute teachers since they are in a separate bargaining unit. We agree with MTEA it has a right to protect unit work and it can accomplish same by bargaining a provision that provides that long-term vacancies, if filled, will be filled by bargaining unit employes and not by long-term substitutes.

We see no basis for altering our judgement that the MTEA cannot bargain wage rates for non-bargaining unit employes. We thus find this proposal to be permissive.

Proposal 33 states:

> Application
> SCHEDULE E - APPENDIX "C" FOR JULY 1, 1982 through June 30, 1985.
>
> 11. ****Vocational counselors coordinating the work experience program will be allowed ten (10) days above the school year at their daily rate of pay.

The Board withdrew its objection to this proposal during the hearing.

Proposals 34, 39, 40, 44, 46 and 49 state:

> (34) Application
> SCHEDULE E - APPENDIX "C" for July 1, 1982 through June 30, 1985.
>
> 15. Learning coordinators may, on a voluntary basis, work one (1) day beyond the end of the school year and two (2) days prior to the beginning of the school year compensated at their individual daily rate.
>
> (39) Appendix "F", Vocational Counselors
>
> 1. The vocational counselor coordinating the work experience program will be allowed an additional seven (7) days prior to the commencement of the school year to conduct job development activities, interview potential candidates for the program, interview parents of potential candidates, and place selected enrollees in specific employment positions and three (3) days following the close of the school year for placement of graduating seniors and follow-up activities.
>
> (40) Appendix "F", Coordinating Teachers of Cooperative Programs
>
> 3. As in the past, coordinating teachers of cooperative programs shall receive an additional twenty (20) days prior to the beginning of the school year to plan and conduct the necessary preschool program.
>
> (44) Appendix "F", Band Directors
>
> 2. Band directors shall be allowed to report to their respective schools one (1) day early to perform duties necessary for preparation. They shall receive their daily rate of pay.

(46) Appendix "F", Industrial Education Teachers

2. Where a new teacher is assigned to a shop or where a present teacher is assigned to a new shop in a different school or where a new teacher is hired and assigned to a shop during the school year, the teacher shall be allowed to start five (5) days prior to the beginning of school in order to acquaint himself/herself with the shop and prepare such equipment as needs preparation. Such teacher shall be paid 1/191 of his/her salary for each additional day. In addition, where a present teacher feels that the shop to which he/she is assigned requires additional work prior to commencement of school, he/she may apply through the principal to the central office for authority to start either prior to the beginning of the school year or continue on after the end of the school year.

(49) Appendix "F", Traveling Music Teachers

4. Traveling music teachers who work twenty-five (25) class periods per week or more shall receive five (5) hours preparation time at the end of each semester.

The Board contends that these proposals primarily relate to service level determinations and fiscal priorities which are properly within the sole province of the Board and its administrative personnel. The Board asserts that these proposals do not relate to the calendar and work schedule of MTEA bargaining unit employes. Looking specifically at proposal 34, the Board points out that the Commission has previously found an analogous proposal to be permissive. Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) at 62. As to proposal 46, the Board further notes that the second sentence thereof is permissive because it prescribes a method of application to the Board for the benefit in question. Lastly, as to proposal 49, the Board contends that this provision is subject to two different interpretations either of which are permissive. The Board contends that the most reasonable interpretation would render this clause permissive in the same manner as proposals 34, 39, 40, 44 and 46. In the alternative, the Board asserts the proposal could be read as a straight preparation time proposal which would be permissive due to its interference with the allocation of the teacher workday.

The MTEA asserts that these proposals are mandatory subjects of bargaining primarily relating to the work schedule and wage rates to be received by bargaining unit employes.

These proposals seek to give employes the right to work and be compensated for the specified number of hours or days outside the context of the school year. The MTEA correctly asserts that these are, at least in part, "work schedule" proposals and cites the school calendar portion of the Wisconsin Supreme Court's decision in Beloit and our reaffirmation thereof in Janesville for the proposition that said proposals are mandatory subjects of bargaining. The Board counters by essentially arguing that the proposals invade management's right to determine whether there is work which it wants employes to perform during the times specified.

As has been noted repeatedly by the Commission and the courts, many if not all proposals relate to some extent to both wages, hours and conditions of employment and to management prerogative. These proposals are no exception. However, our task is to determine on balance which relationship predominates and as to the portions of these proposals which establish a work schedule and wage rate, we are persuaded that the "hours" and "wages" relationship is predominant. We do so because a work schedule and wage rate are at the very core of employe interests and because "hours" proposals of necessity intrude into managerial decisions as to the manner in which employes will be utilized. We also note that the educational policy implications of these proposals are much smaller than those present in Beloit wherein the subject of school calendar was nonetheless found to be a mandatory subject of bargaining.

Our holding renders proposal 34 mandatory in its entirety. However, as to proposals 39, 40, 44, 46 and 49, we find them mandatory to the extent they establish a work schedule and wage but permissive to the extent that the proposals specify the duties to be performed. The allocation of duties during work time remains a permissive subject/employer prerogative.

We acknowledge that our holding herein differs from an earlier decision in Milwaukee Board of School Directors, Dec. No. 20093-A, at 62. However, as we decide the status of proposals based upon the argument presented by the parties to the dispute, upon the record presented, and upon intervening case law developments differing results do occur when differing argument is present. (See proposals 27-31, footnote 4 and proposal 36 herein for other such instances). We further note that our earlier decision was affected, at least in part, by the failure of the MTEA to make any argument in support of many of its proposals.

Proposal 35 states:

> Application, Appendix "C"
>
> 10. ***Limited to:
> 40 hours per school of 1,200 enrollment or less;
> 64 hours per senior high school of 1,201-1,500 enrollment;
> 80 hours per senior high school of 1,501 enrollment and above.

The Board withdrew its objection to this MTEA proposal at the hearing.

Proposal 36 states:

> Appendix "F", Driver Education Instructors
>
> 8. Where all four (4) phases of driver education are conducted at a school, the chairperson shall be released from homeroom to permit time to set up all necessary equipment and prepare automobiles.

The Board contends that this provision is a permissive subject of bargaining because it primarily relates to management's right to assign duties to teachers fairly within the scope of their responsibilities and to allocate the teacher workday as it sees fit.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it eliminates the stress on instructors created by the need to set up equipment during a regular instructional period and also eliminates the requirement that some members of the bargaining unit perform more duties than others for the same wage rate. The MTEA also contends that the Commission in Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 2/79) found a similar release time proposal to be a mandatory subject of bargaining.

We find this proposal to be a permissive subject of bargaining because on balance it primarily relates to managerial and educational policy determinations as to how to allocate a teacher workday. The Board correctly notes that this conclusion is consistent with portions of our decision in Milwaukee Board of School Directors, Dec. No. 20093-A, at 63. While the MTEA is correct that we found a "department chairperson release time" proposal to be mandatory in Milwaukee Board of School Directors, Dec. No. 17504, at 20, we expressly noted that our determination was limited to the arguments and objections raised by the Board therein. The workday allocation argument was not presented by the Board in that case.

Proposal 37 states:

> Appendix "F", Driver Education Instructors
>
> 10. Driver education shall be given departmental status in the same manner as other Board departments with appropriate release time for department chairpersons.

The MTEA concluded that this proposal was permissive withdrew same during the hearing.

Proposal 38 states:

> Appendix "F", Guidance Counselors
>
> 3. To be eligible for selection as a guidance director, a guidance counselor shall be subject to the following requirements:
> a. an "A" or professional license;
> b. a minimum of two (2) years experience in guidance in which at least half of the time was spent in guidance;
> c. a minimum of two (2) years in teaching in the Milwaukee system; and
> d. seniority in the system and in the building should be considered.

The Board asserts that the proposal primarily relates to the minimum qualifications and initial selection criteria for unit positions and thus constitutes a permissive subject of bargaining.

The MTEA contends that this proposal is a mandatory subject of bargaining in that it establishes criteria for selection from bargaining unit employes for unit positions.

This proposal, as written, is permissive because it interferes with the Board's managerial and educational policy determinations regarding establishment of minimum job related qualifications for a position. However, as our discussion of proposals 27-31 indicates the MTEA can bargain over the aplication of criteria such as seniority to the decision of which qualified applicant will receive a unit position.

Proposal 41 states:

> Appendix "F", Audiovisual Building Directors In Middle and High Schools
>
> 2. Audiovisual building directors shall receive a minimum of two (2) released periods for audiovisual work in the high school. Middle school audiovisual release time is set forth in Board policy.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the level of preparation time available to unit employes and thus to the allocation of a teacher's work time during the workday.

The MTEA asserts that this proposal is a mandatory subject of bargaining because it directly relates to the conditions of employment of the employes in question.

This proposal is permissive because it interferes with managerial and educational policy determinations regarding allocation of the workday.

Proposals 42-43 state:

> Appendix "F", Audiovisual Building Directors In Middle and High Schools
>
> (42) 4. The Board shall require all high school audiovisual building directors who have been appointed in the same manner as department chairpersons to have the following requirements:
> a. Each audiovisual building director shall have a four (4) year degree or be eligible to hold a regular Wisconsin teaching license under 118.19(7) of the 1971 Wisconsin Statutes.

b. Each audiovisual building director shall have a minimum of four (4) semester hours in audiovisual instruction, one (1) of which shall be a basic audiovisual methods course. All present audiovisual directors who do not have the required hours shall earn the hours within the length of the contract.

(43) 5. The Board shall require all middle school audiovisual building directors to have the following requirements:

a. Each audiovisual building director shall have a four (4) year degree or be eligible to hold a regular Wisconsin teaching license under 118.19(7) of the 1971 Wisconsin Statutes.

b. Each audiovisual building director shall have a minimum of four (4) semester hours in audiovisual instruction, one (1) of which shall be a basic audiovisual methods course.

All present audiovisual directors who do not have the required hours shall earn the hours within the length of the contract.

The Board asserts that these proposals are permissive subjects of bargaining because they primarily relate to the minimum qualifications and initial selection criteria for unit positions.

The MTEA contends that these proposals are mandatory subjects of bargaining because they primarily relate to criteria for promotion or lateral transfer to positions within the bargaining unit.

These proposals are permissive for the reasons set forth in our discussion of proposals 36 and 27-31.

Proposal 45 states:

Appendix "F", Industrial Education Teachers

1. When a shop teacher, working under an eight (8)-period day cannot be released from a homeroom assignment, his/her equivalent period shall be assigned to him/her for shop maintenance.

The Board asserts that this proposal is a permissive subject of bargaining primarily relating to the amount of preparation time available to employes and thus to the allocation of a teacher's workday.

The MTEA contends that this proposal is a mandatory subject of bargaining in that it allows the teachers in question to perform duties required to prepare the shop for class.

This proposal is permissive because it primarily relates to managerial and educational policy determinations regarding allocation of the workday.

Proposal 47 states:

Appendix "F", Interscholastic Academics
Chess, Math, Debate, and Forensics

2. TRANSPORTATION - A sum of five thousand eight hundred dollars ($5,800) will be allocated for transportation for debate, forensics, chess, and mathematics competition. The sum will be administered by the Director of Transportation. Coaches of the events may request, as an option to the charged to this amount, carchecks for students engaging in activities. Any request for transportation service for carchecks must reach the Director of Transportation one (1) week before the scheduled event.

3. AFFILIATIONS - One (1) check for schools interested in association in the Wisconsin High School Forensics Association and the Debate Judges Association would be issued. Schools which were active and members of these associations last year would have the dues paid upon notification of interest. Schools which were not members last year would have to present a program for activity outside of the individual school; and to qualify for affiliation in the Wisconsin High School Forensics Association, would have to demonstrate an interest in participating in the district tournaments sponsored by the Wisconsin High School Forensics Association. It was agreed that a lack of interest in such participation in district contests would preclude a school from being included in this sum.

A central check for ten dollars ($10) per interested middle and high school will be issued to schools interested in becoming associated with the Milwaukee High School Chess League. Middle and high schools which have demonstrated an interest in debate will be allowed membership in the Wisconsin Debate Coaches Association and the Wisconsin Forensics Coaches Association. Schools which have not participated in the past will have to demonstrate a program of planned participation in order to qualify for this sum.

4. HANDBOOKS, LITERATURE, AWARDS, REGISTRATION FEES, AND NECESSARY LUNCHES -
These amounts would be grouped together and transferred into the activity account at each high school. The amount of one hundred sixty dollars ($160) would be transferred into the activity account of debate and one hundred ninety dollars ($190) to be the activity account of forensics for schools which have not participated outside the school level must present a plan for participation in the coming year. The maximum amount to be allocated to any middle school will be one hundred dollars ($100) upon certification of a program of activity outside of the individual school. For schools with an active chess program, fifty dollars ($50) will be transferred to the school activity account of each high school. Middle schools will not be included at this time. The administration will explore supplying of chess sets to schools with an active chess team. The chess coach shall bear the responsibility of accounting for the materials.

5. MATH COMPETITION - A sum of one thousand five hundered dollars ($1,500) will be administered by the curriculum specialist in charge of mathematics, which would cover awards, registration, and necessary lunches for mathematics competiton. Students participating in competitions within the City of Milwaukee would not have their lunches paid.

The Board contends that this proposal is permissive because it primarily relates to the educational program, fiscal affairs and budgetary priorities of the District. The Board asserts that this provision in essence mandates continuation both of the programs mentioned therein and of the particular form of expenditures attached thereto.

The MTEA asserts that the proposal is a mandatory subject of bargaining primarily related to the impact on bargaining unit members of the educational policy decisions to have the programs mentioned in the proposal.

This proposal is permissive because it primarily relates to educational policy determinations regarding program offerings and fiscal appropriations in support thereof.

Proposal 48 states:

Appendix "F", Kindergarten Teachers

Kindergarten classes shall be organized by the principal with kindergarten teacher(s) involvement.

The Board asserts that this provision is a permissive subject of bargaining primarily relating to the formulation and management of an educational program. The Board notes that this provision interferes with the principal's discretion when organizing classes and asserts that the selection of the means by which one obtains input to be used in making permissive decisions is part and parcel of the power to make the decisions themselves.

The MTEA contends that this is a mandatory proposal because it does not infringe upon management's ultimate decision making power and does relate to the teacher working conditions.

This proposal is permissive becaused it primarily relates to educational policy determinations.

Proposals 50-52, and 75 state:

(50) A/31

f. Students who pose a threat to teachers by possession, threat or use of a dangerous weapon on school property shall be considered by the school board for expulsion.

(51) A/32

g. Students who are suspended for serious breach of discipline, such as a threat of assault or assault on a teacher shall not be reinstated until a parent conference is held at the school.

(52) A/33

h. In those schools where the physical safety of teachers has been threatened by outsiders, security aides shall be hired to protect teachers from this danger.

(75) A/87

Add the following underlined language to paragraph 6 below:

G. Discipline

1. When student conduct presents a threat to the physical safety of teachers, administrators shall take appropriate steps including the immediate removal of the students from the classroom to protect the physical safety of the teacher in accordance with the Board's legal obligation and responsibility.

2. When a teacher who has been physically assaulted recommends the suspension of the student assailant, the student will normally be suspended. If the principal elects not to suspend the student, the teacher who was assaulted may appeal the principal's decision to the Division of School Services.

When the teacher recommends a particular disciplinary action for a student who poses a

physical threat to the teacher's safety and the administrator processing the referral does not concur, the administrator shall communicate with the teacher in writing why he/she did not follow the recommendation.

3. Students who are or have been suspended from school for posing a threat to the physical safety of a teacher(s) shall be excluded from the building and prohibited from attending all classes and all other activities held at school. The student(s) shall remain under immediate administrative supervision until the parent is contacted and the student can be sent home or until the end of the school day (whichever comes first). In all suspension cases, the suspended student(s) shall be escorted out of the building. If the student(s) refuses to leave the school and/or grounds, and administrative means exclusive of the use of teacher(s), or aide(s) proves inadequate to remove the student(s), other appropriate assistance shall be utilized. Prior to the reinstatement of the student(s), the teacher and the administrators handling the matter shall confer with regard thereto.

4. Where necessary, appropriate personnel shall be available to escort students referred for disciplinary action to the office when the student's conduct poses a threat to the teacher's physical safety.

5. The administrator shall exclude from a particular class, any pupil whose threatening conduct has proven to be a constant discipline problem and has not been corrected through previous referrals until a conference can be conducted with the pupil, teacher, principal, and/or other administrator under his direction and any other specialist dealing with the problem student.

6. If the problem is not resolved by the previous steps, the matter shall be referred to the Division of School Services for appropriate disposition. . . <u>after a conference with the MTEA and the involved teacher(s), if so requested</u>. (Emphasis Added)

7. Any reasonable and appropriate means including the use of physical force may be used by school personnel to prevent a threatened breach of discipline or to stop a continuing breach of discipline. It is expected that physical force will be used only when other means for preventing a breach of discipline or stopping its continuance have been ineffective. Any reasonable and appropriate means, but not including the use of physical force (corporal punishment) may be used in relation to any breach of discipline which has been completed. Corporal punishment may not be used; however, reasonable force may be used in self-defense. Self-defense is permissible where a teacher finds it necessary to defend himself/herself of a third person, where the teacher reasonably believes that such action is necessary for the safety of himself/herself or a third person. Self-defense means the use of such force as is necessary to protect oneself. It does not mean that any additional force may be used or that force may be used after the individual is no longer in danger.

The Board asserts that proposal 50 is a permissive subject of bargaining primarily relating to student management and control, matters within the sole province of management also bearing on educational policy decisions. In particular, the Board asserts that the proposal mandates that the Board "consider" certain students for expulsion when sound educational policy and the best interests and/or legal rights of the student involved may indicate or require a different disposition. The Board further asserts that the proposal is not limited to situations involving actual physical assault upon teachers and thus, as written, is permissive for this additional reason. Racine Unified School District, Dec. No. 20652-A, 20653-A (WERC, 1/84); Blackhawk VTAE District, Dec. No. 16640-A, (WERC, 9/80); Milwaukee Teachers' Education Association, Dec. No. 17504-17508 (WERC, 12/79).

More specifically, the Board asserts that the MTEA has no right to interfere with the entire subject of determinations as to student expulsions which are governed by Board policy consistent with statutory and constitutional requirements. See Sec. 120.13(1) Stats.; Goss v. Lopez, 419 US 565 (1975). The Board asserts that it must not be constricted in the choice of alternatives that it may wish to employ in addressing the problem of how to handle students who carry weapons in schools. The Board asserts that this is particularly so because the student not the teacher is the real "party in interest" in this context and furtherance of the welfare of the student and the future of his/her education is the Board's primary, legal and moral responsibility. The Board notes that the MTEA's concerns over teachers' safety are more than sufficiently addressed by Board policy and by portions of the collective bargaining agreement already in existence. The Board asserts that the Commission's decision in Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) appropriately indicates that the Board need not bargain over appropriate remedial procedures for problem students. The Board concludes by asserting that its discretion as to expulsions of students - an extremely drastic step having constitutional and other legal overtones - should not be constricted by the collective bargaining process, and thus must be deemed to be permissive.

As to proposal 51, the Board reiterates the arguments made with respect to proposal 50 asserting that the determination of student suspensions and reinstatements are properly within the sole province of the Board as they involve student management and control, techniques of student discipline and the legal rights of students to an education. In addition, the Board asserts that this proposal, as worded, is permissive because it addresses all student suspensions following any "serious breach of discipline" and is thus not necessarily limited to those cases involving teachers' safety. The Board contends that similar contractual provisions mandating particular procedures to be followed in student disciplinary cases have previously been ruled to be permissive by the Commission. Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) pp. 15-16, 51-52. The Board asserts that the MTEA is attempting to dictate the terms of a student disciplinary procedure that is within the sole province of the Board and applicable state law (particularly Sec. 120.13 Stats.) in a way that will in all likelihood lead to irreconcilable conflict with that law, particularly, although not exclusively, with time lines applicable to student suspensions. Therefore the Board asserts that this proposal must be deemed permissive.

As to proposal 52 the Board contends that this is a permissive subject of bargaining because it requires the hiring of nonbargaining unit personnel and also constitutes a form of "minimum manning". Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83); City of Fond du Lac, Dec. No. 22373 (WERC, 2/85).

As to proposal 75, the Board contends that this proposal is permissive because it primarily relates to student management and control, a matter properly within the sole province of the Board and one in which the MTEA has no necessary standing or legitimate involvement. The Board contends that upon careful examination of the contract language in question, it becomes apparent that Section G is not limited to "teachers' safety" situations. The Board asserts that the MTEA's proposed modification applies to situations involving "any pupil whose threatening conduct has proven to be a constant discipline problem and has not been corrected to through previous referrals."

As to proposal 50, the MTEA asserts that it is a mandatory subject of bargaining in that it directly relates to the physical safety of members of the

bargaining unit during their work day. Citing Beloit, supra, and Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83). For the same reasons the MTEA asserts that proposals 51, 52 and 76 are mandatory subjects of bargaining. Contrary to the District's arguments, the MTEA asserts that proposal 51 would not require that a suspension be in excess of the three day limit imposed by Sec. 120.13, Stats. The MTEA asserts that the proposal provides that a student could be reinstated as soon as a parent conference was held at the school and that, if no conference is held, the provision would result in the student being continued in suspension up to three days, the statutory limit, but no longer. Turning to proposal 52, the MTEA asserts that, contrary to the District's arguments, this provision does not require that any specific employes be hired or assigned by the Board. The MTEA contends that the proposal only requires that some person be made available to protect teachers where their physical safety has been threatened by outsiders.

As to proposal 75, the MTEA asserts that it is a mandatory subject of bargaining as a procedural proposal dealing directly with the physical safety of members of the bargaining unit. Beloit, supra. It argues that paragraph 6 of the disciplinary clause found at Part IV Section G of the expired agreement only deals with matters involving threats to the physical safety of teachers. The MTEA therefore contends that the amendment to paragraph 6 is clearly a mandatory subject of bargaining given the apparent relationship to the physical safety of members of the bargaining unit.

Before entering into a specific discussion of these proposals, it is useful to review prior decisions dealing with the subject of teacher safety.

In Beloit, supra, the Commission was confronted with the following proposal:

> Problem Students
>
> "A. The Board recognizes its responsibility to give all reasonable support and assistance to teachers with respect to the maintenance of control and discipline in the classroom. Whenever it appears that a particular pupil requires the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, such students shall be referred to that particular person.
>
> B. Whenever it appears that the presence of a particular student in the class will impede the education of the balance or the class because of disruptions caused by said student, the board will relieve the teacher or responsibilities with respect to said student. Any transfers of students for disciplinary reasons shall be with the consent of the teacher to whom the student is transferred.
>
> C. A teacher may exclude a pupil from one class when the grossness of the offense, the persistance (sic) of the misbehavior, or the disruptive effect of the violation makes the continued presence of the student in the classroom intolerable. In such cases, the teacher will furnish the principal, as promptly as his teaching duties allow, full particulars of the incident or incidents in writing. The pupil shall not be returned to the class until after consultation by the principal with the teacher and said student.
>
> D. A teacher may, at all times, use such force as is necessary to protect himself, a fellow teacher or administrator, or a student, from attack, physical abuse, or injury. All teachers shall report in writing to the school principal all cases of assault or assault and battery in which they are involved during the course of their employment. Said report shall be filed no later than 24 hours after the close of the day in which said event took place.
>
> E. The written reports above referred to shall be delivered to the Superintendent of Schools and said Superintendent or

his authorized representative shall cooperate with the teacher submitting the report or with the Association in supplying whatever information is available to him.

F. The Board of Education shall maintain and keep in full force and effect the liability policies now existing and shall furnish to the Association a copy of said policy at the request of the Association. The Board shall compensate teachers who are absent from duty due to injury(s) resulting from performance of duties at a rate equal to their regular sick leave compensation. Such compensation or days so missed shall not be deducted from their accumulated sick leave."

The Commission found the proposal to be a mandatory subject of bargaining to the extent that it related to student misbehavior involving physical threats to teacher safety. The Commission commented:

Problem Students:

The behavior of students in a classroom, particularly to the extent that it presents a physical threat to the teacher's safety, is a condition of employment. Thus, proposals that go to such matters are mandatory subjects of bargaining. The instant proposal, unfortunately, is ambiguous as to whether it covers only such misbehavior; and the record herein does not clarify such ambiguity. Misbehavior of students that does not involve threats to physical safety is not a condition of employment and therefore, is a permissive subject of bargaining. Thus, for example, determining the appropriate response to students who are disruptive but not physically threatening, because they suffer a physical handicap, is a basic educational policy.

Upon review in Dane County Circuit Court, Judge Currie affirmed the Commission's ruling except as Section A of the proposal which was found to be permissive. The Court held:

As so limited, the Court is in agreement with WERC that subject matters (2), (3), (4), (5) and (6) listed under "Problem Students" in Finding of Fact No. 8 are mandatory subjects of collective bargaining because they relate to conditions of employment and not basic education policy. However, neither WERC's Memorandum nor the briefs submitted by the Attorney General and the Association present any justification for including subject matter (1), referral of problem students to specialized personnel and others, in this category.

The Association's proposal with respect to subject matter (1) reads:

". . . Whenever it appears that a particular pupil requires the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, such students shall be referred to that particular person."

The Court is of the opinion that this proposal involves a matter that falls primarily in the field of basic educational policy and therefore is not a subject of mandatory collective bargaining.

The Wisconsin Supreme Court affirmed the Circuit Court commenting:

(E) PROBLEM STUDENTS. The teachers' association submitted as proper subjects for mandated bargaining a number

of proposals involving "problem students." 27/ The commission found the proposals to be "ambiguous" and divided them into two categories of student misbehavior: (1) Misbehavior that does not involve threats to physical safety (of the teachers); and (2) misbehavior of students that presents a physical threat to the teacher's safety. It then held that the first category was not mandatorily bargainable, and that the second was. The reviewing court continued this sharp distinction, upholding the commission ruling that held the portions of the association's proposals that were required bargaining subjects to be confined "strictly to student misbehavior involving physical threats to the teacher's safety." The trial court also noted a particular association proposal dealing with referral of problem students for needed counseling. 28/ The trial court held that this proposal did not primarily relate to "wages, hours and conditions of employment," and held it not be mandatorily bargainable. With the limitations set by the commission and the modification made by the reviewing court, we affirm the holding that the proposals as to problem students who present a physical threat to teacher safety are primarily related to "wages, hours and conditions of employment," and are required by the statute to be bargained.

In Milwaukee Board of School Directors, Dec. No. 17504, the Commission applied Beloit and ruled upon two proposals related to the dispute before us herein. One of the proposals specified:

> "e. In schools where the physical safety of employes in the bargaining unit may be in jeopardy, the Board shall provide appropriate central office support personnel to help in building control." (Emphasis added)

The Commission ruled:

> We agree with the Board's contention that the mere fact that a proposal in bargaining deals with the physical safety of employes does not necessarily make the proposal a mandatory subject of bargaining. It is true, as suggested by our decision in the Beloit case, that some proposals which might otherwise be found to be permissive subjects of bargaining are mandatory subjects of bargaining to the extent that they deal with threats to the physical safety of teachers. However, it is also true that some proposals, even where so limited, still

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27/ The proposals as to problem students can be summarized as follows: "Problem Students (1) Referral of problem students to specialized personnel and others, (2) Relief of teacher responsibility with respect to problem students, (3) Consent of teacher to whom problem student is assigned, (4) Exclusion of problem student from classroom, report thereof, and consultation prior to return to classroom, (5) Teacher self-protection and report of action taken, and (6) Liability insurance coverage and compensation resulting in absence from duty from injuries in performance of teaching and related duties, with no deduction from accumulated sick leave."

28/ The particular proposal was as follows: ". . . Whenever it appears that a particular pupil requires the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, such students shall be referred to that particular person."

do not relate primarily to wages, hours and working conditions. For example, one of the proposals in the Beloit case, found by the Commission to be a mandatory subject, would have required that disruptive students who posed a physical threat to teachers' safety and required the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, be referred to that particular person. The Dane County Circuit Court modified the Commission's ruling to hold that such a proposal was not a mandatory subject of bargaining. Contrary to MTEA's contention, this entire proposal, not just the portion dealing with counselors, was also found to be a permissive subject of bargaining by the Wisconsin Supreme Court.

We are satisifed that this proposal is, in general, a mandatory subject of bargaining. It relates directly to the handling of physical threats to teachers in a way that omits the public policy implications which were present in the proposal found by the courts to be permissive subject in the Beloit case. On the other hand, we are troubled by the reference to the use of appropriate "central office support personnel". While we understand that this aspect of the proposal reflects current practice, the inclusion of that portion of the proposal in the agreement would restrict the Board in making determinations as to who in its organizational structure would provide such assistance or whether it should utilize employes in supplying such assistance. Such matters relate primarily to the Board's management functions as noted in our Oak Creek-Franklin decision as well as the Milwaukee Sewerage Commission case relied upon by the Board. It also interferes with the Board's choice as to assignment of particular personnel. 8/ Therefore, we conclude that this proposal, as worded, is a permissive subject of bargaining. If it were modified to exclude the words "appropriate" and the words "central office support personnel" so as to require the District to provide help when bargaining unit personnel are in jeopardy we would find it to be a mandatory subject as written. Worded in this manner, the Board would not be restricted to utilizing any particular personnel or employes of the District nor would it necessarily be required to hire additional personnel as argued in its brief.

The other proposal specified:

"J. INTERIM CLASSES AND/OR PROGRAMS

Special classes and/or programs shall be expanded as the need arises to deal with socially maladjusted pupils who present a physical danger to teachers and students. (Emphasis added)

During the period of this contract interim classes and/or programs shall be implemented. Those classes started should be maintained in elementary and secondary schools for the purpose of meeting the needs of students demonstrating a lack of reasonable self control and whose behavior is seriously interferring with their own education, as well as the other children in the regular school program and whose behavior is a danger to the physical safety of the teachers and students. (Emphasis added)

These interim classes and/or programs shall be budgeted at an annualized (calendar year) level of seven hundred sixty five thousand ($765,000). Specific aspects of the program will reflect local school needs. The principal and staff in each building may plan for and propose the establishment of such classes and/or programs and transmit such proposals to the Division of Curriculum and Instruction, where such proposals shall be reviewed and approved by the Superintendent within

the budgeted amounts. These programs shall be reviewed and acted upon with (sic) one month after presentation. The principal and staff, when planning for classes and/or programs, shall take into consideration the facilities necessary to implement such classes and/or programs.

Where teachers are needed for interim classes and/or programs, the Division of Personnel shall recruit either new teachers or experienced teachers from within the system to staff such classes and/or programs. The MTEA will also help to acquaint teachers with such classes and/or programs.

1. The administration will provide the MTEA and each school library with an updated listing of all existing interim classses and/or programs, as well as a brief description of each program.

2. A listing of other programs designed to meet the 'special needs of pupils' will be added to the above list (i.e., work-study programs, returnees, emotionally disturbed, DVR, Job Corps, community agencies, S.A.P.)."

The Commission ruled that the proposal was permissive under Beloit commenting:

> The principal thrust 27/ of MTEA's proposal is to require the establishment of and maintenance of special classes and programs at a minimum level of cost of $765,000 per year to deal with socially maladjusted pupils who present physical danger to teachers. MTEA places its principal reliance on the Beloit case where several proposals dealing with the handling of problem students were found to be mandatory subjects to the extent that they were limited to the behavior of students in a classroom which presented a physical threat to the teacher's safety. In that case we stated in relevant part:
>
> "Problem Students:
>
> The behavior of students in a classroom, particularly to the extent it presents a physical threat to the teacher's safety, is a condition of employment. Thus, proposals that go to such matters are mandatory subjects of bargaining. The instant proposal, unfortunately is ambiguous as to whether it covers only such misbehavior; and the record herein does not clarify such ambiguity. Misbehavior of students that does not involve threats to physical safety is not a condition of employment and therefore, is a permissive subject of bargaining. Thus, for example, determining the appropriate response to students who are disruptive but not physically threatening, because they suffer a physical handicap, is a basic educational policy."

27/ There are other aspects of this proposal, such as the reference to phsycial safety of students and the reference to the interference with the education of students and prescribing the procedure for the implementation of the programs which would also appear to be permissive subjects of bargaining but could be eliminated from this proposal without changing this purpose or "thrust." Further, the provision that teachers be considered for these positions and the proposal that information be provided to teachers concerning this program, possibly relate to working conditions but would not appear to be the focus of the Board's objection or MTEA's concern in making this proposal.

There were six proposals in all. They provided for:

"(1) Referral of problem students to specialized personnel and others,

(2) Relief of teacher responsibility with respect to problem students,

(3) Consent of teacher to whom problem student is assigned,

(4) Exclusion of problem student from classroom, report thereof, and consultation prior to return to classroom,

(5) Teacher self-protection and report of action taken, and

(6) Liability insurance coverage and compensation resulting in absence from duty from injuries in performance of teaching and related duties, with no deduction from accumulated sick leave."

Only the first of these proposals is relevant to the discussion here. That proposal read in its entirety:

> "'A. The Board recognizes its responsibility to give all reasonable support and assistance to teachers with respect to the maintenace of control and discipline in the classroom. Whenever it appears that a particular pupil requires the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, such students shall be referred to that particular person.'"

The Dane County Circuit Court affirmed the Commission's decision in all respects except for its finding that this proposal, even to the extent that it was "strictly limited" to situations where the problem student posed a physical threat to the teacher, was a mandatory subject of bargaining. The court concluded that this proposal "involves a matter that falls primarily in the field of educational policy and, therefore, was not a subject of mandatory collective bargaining." 28/ The Wisconsin Supreme Court affirmed the decision of the circuit court in this regard.

Given this conclusion that a proposal that would require the referral of problem students who posed a physical threat to the safety of teachers in the classroom to the enumerated specialized personnel, the conclusion is inescapable that the proposal here which requires the establishment and maintenance of a major educational program for the same purpose primarily relates to educational policy rather than wages, hours and working conditions.

The Commission next delved into teacher safety proposals in Blackhawk, supra. The proposal at issue stated:

Section O - Discipline Policy

1. It shall be the duty and responsibility of each teacher to maintain proper class discipline. Every teacher

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28/ Cf. Madison Metropolitan School District (16598) 10/78; p.6.

shall have the right to dismiss from class any student causing serious disruption to classroom proceedings.

2. Any teacher dismissing a student from class for disciplinary purposes, shall immediately submit a written report of the incident and causes requiring such dismissal to his or her immediate supervisor. Before any student, dismissed from class by a teacher for disciplinary reasons, shall be permitted to return to such class, that studentshall be counseled and effective administrative action shall be taken to prevent further classroom activities by said student before such student is permitted to return to the classroom.

The Commission ruled:

The District argues that the provision does not concern matters of teacher safety, but rather how disruptive students are to be disciplined, counseled and administratively dealt with. It contends that such matters are directly related to educational policy decisions, which are permissive subjects of bargaining, as determined by the Commission in Beloit Schools. 9/ The Federation would agree that paragraph 2 of the provision is permissive under that rationale in said case, except for that portion which requires "effective administrative action" to prevent further disruption. It argues that paragraph 1 relates to a mandatory subject of bargaining for the reason that it only states that the teacher has the right--correlative to his or her duty and responsibility to maintain proper class discipline--"to dismiss from class any student causing serious disruption to classroom proceedings."

In Beloit Schools the Commission engaged in the following analysis, which was upheld by our Supreme Court:

"The behavior of students in a classroom, particularly to the extent that it presents a physical threat to the teacher's safety, is a condition of employment. Thus, proposals that go to such matters are mandatory subjects of bargaining. The instant proposal, unfortunately, is ambiguous as to whether it covers only such misbehavior; and the record herein does not clarify such ambiguity. Misbehavior of students that does not involve threats to physical safety is not a condition of employment and therefore, is a permissive subject of bargaining."

Since the application of the disputed provisions is not limited to situations involving physical threats to teacher safety, it must be concluded that they are non-mandatory subjects of bargaining, for that reason alone, and therefore we see no reason to discuss any other aspects of the provisions involved. (Footnote omitted)

Upon review in Rock County Circuit Court, Judge Jaeckle affirmed the Commission thusly:

STUDENT DISCIPLINE POLICY

The Commission ruled that the following provisions of the contract were permissive subjects of bargaining:

1. It shall be the duty and responsibility of each teacher to maintain proper class discipline. Every teacher shall have the right to dismiss from class any student causing serious disruption to classroom proceedings.

2. Any teacher dismissing a student from class for disciplinary purposes, shall immediately submit a written report of the incident and causes requiring such dismissal to his or her immediate supervisor. Before any student,

dismissed from class by a teacher for disciplinary reasons, shall be permitted to return to such class, that student shall be counseled and effective administrative action shall be taken to prevent further classroom activities by said student before such student is permitted to return to the classroom.

Petitioner asserts that the record does not show whether the School Board requires teachers to maintain their classrooms without serious disruption, and, therefore, from the record it cannot be determined whether the contractual provisions relating to student discipline policy are mandatory or permissive. Petitioner argues that the finding of the respondent that these provisions are permissive should be set aside; however, this Court should not determine that the provisions are mandatory.

In Beloit, the respondent ruled that msibehavior of students that presents a physical threat to teachers' safety was mandatorily bargainable; whereas, misbehavior not involving threats to physical safety of teachers was a permissive subject of bargaining. The respondent's ruling was affirmed by the Supreme Court on appeal.

In the judgment of the Court, these provisions of the agreement relating to student discipline policy are policy matters and only remotely related to conditions of employment. As a result, they are not mandatorily bargainable.

Giving the respondent's ruling relating to student discipline policy due weight and as a result of the Beloit precedent, the ruling of the Commission is affirmed.

The Court of Appeals, District IV also affirmed the Commission ruling and stated:

The WERC concluded that because the disputed provision is not limited to situations involving physical threats to teacher safety, it is not mandatorily bargainable under the rationale affirmed by the court in Beloit.

The Federation urges that the WERC's holding be set aside; however, the Federation contends that the record is insufficient to warrant an opposite holding that the provision is mandatorily bargainable. The Federation specifically argues that if teachers may be disciplined for failing to maintain classroom discipline, the provision is mandatory. The specific language, however, contains no reference to disciplinary action for a teacher's failure to control classroom disruptions. The provision additionally does not refer to disruption involving threats to a teacher's physical safety, and is not limited to situations involving such threats. See id. at 60-61, 242 N.W.2d at 239. We therefore affirm the WERC's holding that under the decision in Beloit, this provision is a permissive subject of bargaining.

In Milwaukee Board of School Directors, Dec. No. 20093-A, the following language was at issue:

(41) H. DISCIPLINE

1. When a pupil is referred to the administrator by a teacher for disciplinary purposes, he/she shall not be returned to the area under that teacher's jurisdiction in which the infraction occurred until he/she has been seen by an administrator and that administratror has communicated the disposition of the case to the teacher on the form 72. To the

extent possible teachers should supply necessary background information to assist the administrator in making the decision concerning the referral.

2. When the teacher recommends a particular disciplinary action and the administrator processing the referral does not concur, the administrator shall communicate with the teacher in writing on the 72 card why he/she did not follow the recommendation. It is understood that a conference elaborating on the remarks on the 72 card may often be helpful and appropriate.

4. Students who are or have been suspended from school shall be excluded from the building and prohibited from attending all classes and all other activities held at school. The student shall remain under immediate administrative supervision until the parent is contacted and the student can be sent home or until the end of the school day (whichever comes first). In all suspension cases, the suspended student shall be escorted out of the building. If the student refuses to leave the school and/or grounds, and administrative means, exclusive of the use of teacher(s), or aide(s) proves inadequate to remove the student, other appropriate assistance shall be utilized. Prior to the reinstatement of the student, the teacher and the administrator handling the matter shall confer with regard thereto.

5. Where necessary, appropriate personnel shall be available to escort students referred for disciplinary action to the office.

6. The administrator shall exclude from a particular class any pupil who has proved to be a constant disciplinary problem and whose conduct has not been corrected through previous referrals, until a conference can be conducted with the pupil, teacher, the principal or other administrator under his/her direction and any other specialists dealing with problem pupils. He/She shall be retained by the office or removed from the building.

7. If the problem is not resolved by the previous steps, the matter shall be referred to the Superintendent's Office for appropriate disposition.

. . .

9. When a school has continuous discipline problems, every effort will be made to provide released or compensated time for teachers. The principal and the teachers shall use such time to develop appropriate programs to reduce the causes of the problems.

10. Form #72 cards shall be printed in triplicate with the code of student offenses and teacher recommendations printed on the back of the hard copy.

(42) 3. Physical assaults by students on teachers shall call for the student's suspension from a school until a parent conference is conducted within three (3) days of the suspension unless, because of the nature of the assault, the teacher and the school administrator agree not to suspend. A parent conference in this paragraph shall be defined to mean a conference at school as opposed to reinstate following a parent telephone conversation to arrange for a conference unless the principal and teacher agree that a parent conference at school is not necessary. If it is not possible for a parent to appear at school, the student will not be reinstated until after three (3) days. If ther assault has

resulted in bodily injury, a field counselor shall be present at the reinstatement conference or at a subsequent conference within five (5) days of the reinstatement conference. Pupils guilty of assault on teachers shall be considered for alternate placement if appropriate and/or disciplinary reassignment. Consideration should be given to the pupil's ability to continue in a school atmosphere.

The Commission ruled:

The Commission is satisfied that as to Sections H. 1., 2., 4., 5., 6., 7., 9. and 10., the language therein is not limited to a disciplinary procedure which is relevant to threats to the physical safety of teachers and thus, under Beloit, supra, the objected to language must be found to be permissive. However as to Section H. 3., we conclude that as the impact of the clause is applicable to instances in which there has been a physical assault on a teacher, that portion of the clause which mandates suspension, would be found to be a mandatory subject of bargaining. This conclusion assumes that the procedures regarding student suspension incorporated in the provision are not in conflict with the statutory requirements involving student suspension and/or expulsion under Sec. 120.13(1), Stats. We do not find that distinction set forth by the Board is a meaningful one for the purposes of determining whether the clause is a mandatory subject of bargaining. Rather, it is clear that where physical safety is threatened or has already been compromised the union has the right to bargain with respect to action to be taken by the agents of the Board to remove the condition or person responsible for the threat to the physical safety of or the actual injury to or assault of the employe or employes. However, to the extent said provision goes beyond dealing with the physical safety of the teacher by dictating the appropriate remedial procedure for the student and naming of particular school personnel to be present at certain conferences, we find it permissive. In Beloit, supra, the Dane County Circuit Court reversed the Commission's finding that a proposal which provided for referral of problem students who threatened teacher safety to specialized personnel was mandatory. The Court found said proposal to constitute a matter of basic educational policy and therefore a permissive subject of bargaining. The identification of a "field counselor" similarly interferes with the District's right to determine which personnel should be responsible for these matters. Such matters relate primarily to the District's management function as noted in Milwaukee Board of School Directors, supra.

Commissioner Torosian - Dissent

I disagree with the majority's conclusion in the last paragraph above. In the instant case, as opposed to the referral of problem students to specialized personnel addressed in the Beloit case, the language does not refer students to specialized personnel, but provides that in situations where ". . . the assault has resulted in bodily injury, a field counselor shall be present at the reinstatement conference. . . ". Assuming that it is the filed counselor's job responsibility to deal with problem students who assault teachers, I find that the field counselor's attendance at the re-instatement conference after an assault and injury to a teacher primarily relates to the teacher's working conditions and not primarily to educational policy. The language places no commitments on field counselors except for his/her attendance at the re-instatement conference.

Lastly in Milwaukee Board of School Directors, Dec. No. 20398, (WERC, 12/83), we found the following proposal to be permissive:

> e. In schools where there is a record of danger to the accountants or students, the Board shall provide appropriate additional personnel to help in building control.

We reasoned:

> Initially the Commission wishes to note that it sees no meaningful distinction between a record of danger requirement and a "danger requirement" as contained in the Milwaukee Board I proposal, cited by both parties. Clearly a union can seek to bargain protection of its employes in situations where safety has in the past been threatened and need not wait until an actual threat is presented to a teacher. Obviously, a proposal requiring an actual threat would have little or no meaningful impact upon the safety threat as the need for protection would have passed before protection would be provided. However, as we found in Milwaukee Board III, our rationale in Milwaukee Board I, especially that which goes to the use of the word "appropriate" requires that this proposal be found to be permissive.

Applying the foregoing to the proposals at hand, we note Beloit found to be mandatory subjects of bargaining proposals which mandated exclusion of a student from class and required the consent of the teacher before a disruptive student could be transferred so long as such proposals were limited to student behavior which involved physical threats to a teacher's safety. In Milwaukee Board of School Directors, Dec. No. 20093-A, pp. 51-52, the Commission applied Beloit and concluded that a proposal mandating suspension, if desired by the teacher, of a student who physically assaulted a teacher was a mandatory subject of bargaining. In those instances, even the direct intrusion into educational policy represented by those proposals was insufficient to outweigh the extraordinarily strong condition of employment interest represented by physical safety of employes.

Here, in proposal 50, the MTEA only seeks to have expulsion considered by the Board in circumstances which involve physical threats to teacher safety. Because no specific disciplinary action by the Board is mandated by this proposal, the intrusion into educational prerogatives is limited, especially when compared to the intrusions noted above. While we are cognizant that the educational consequences of an expulsion are substantial, we find this limited intrusion into an educational policy judgment to be insufficient to outweigh the employe interest in removal of a threat to safety from the employe workplace for a substantial period of time.

Turning to proposal 51, the Board correctly notes that, as drafted, the proposal is permissive under Beloit because it extends beyond disciplinary situations involving teacher safety. However, if redrafted to be limited to safety situations and to make clear the MTEA's expressed intent that in no event shall the suspension exceed the maximum length established by Sec. 120.13, Stats., the proposal would be mandatory.

As to proposal 52, our above-noted rulings in Milwaukee Board of School Directors, Dec. No. 17504 and Dec. No. 20398-A, are dispositive. The MTEA's protestations not withstanding, the proposal as drafted mandates use of specific Board personnel and thus impermissibly interferes with the employer determination of whether to utilize its employes to provide assistance, and, if so, who in the organizational structure should provide such assistance. If redrafted to obviate these problems the proposal would on balance primarily relate to conditions of employment.

Lastly, looking at proposal 75, we are persuaded after a review of the parties' positions that the language of subsection G-6 can reasonably be interpreted as being limited to situations involving threats to teachers' physical safety. Thus, in our view, the proposed addition is mandatory under Beloit, supra.

Proposal 53 states:

A/58

*Add: or "subject area resource rooms," to existing contract at Part IV, Section B (See proposal 2 herein).

This proposal would seek to add the phrase "or subject area resource rooms" to the language previously found permissive and set forth herein as proposal 2. We find this proposed addition to said language also to be permissive for the reasons set forth in our earlier discussion of issue 2.

Proposal 54 states:

A/59

As the impact for the increase in the length of the elementary pupil day, provide elementary teachers, including preschool, kindergarten and exceptional education teachers, with daily, duty-free preparation time by hiring art, music, physical education teachers and librarians to provide all instruction in these areas.

The Board contends this proposal is permissive because it primarily relates to the allocation of a teacher's time during the workday.

The MTEA asserts that the proposal is mandatory because it deals with the impact of the Board's decision to lengthen the elementary pupil day.

This proposal is a permissive subject of bargaining because it primarily relates to management and educational policy decisions regarding allocation of the teacher workday. The MTEA can, of course, seek to bargain over the impact of workday allocations which do not provide teachers with the desired amount of preparation time. See, Janesville, at 86-88.

Proposal 55 states:

A/65

e. Teachers will not be asked to cover the class of absent teachers unless substitutes have been called and none are available.

The Board contends that this proposal is permissive because it primarily relates to management's right to assign duties to teachers which are fairly within the scope of their responsibilities as well as to the allocation of the teacher workday. In addition, the Board argues that this proposal is permissive because it regulates and infringes upon the relationship between the Board and substitute teachers who are members of a different bargaining unit. Lastly the Board argues that the Commission has previously found virtually identical proposals to be permissive in Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).

The MTEA contends that the proposal is a mandatory subject of bargaining which seeks to address the problem created when teachers in the bargaining unit were required to perform additional duties because a teacher was absent but where substitutes had not even been contacted to determine their availability. The MTEA contends that for classroom teachers given these assignments, there is a resultant increase in workload because they are compelled to perform their preparation duties outside the scope of the teacher day.

In Milwaukee Board of School Directors, supra, at 42, we concluded that a proposal which precluded the Board from making an educational policy decision as to whether or not to utilize a substitute teacher was a permissive subject of bargaining. This proposal has as its premise that the Board should use substitute teachers for the absences in question except where no substitutes are available. We therefore conclude that this proposal is a permissive subject of bargaining because it interferes with the educational policy judgement noted above.

Proposal 56 states:

> A/66
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> a. Teachers shall be entitled to a duty-free lunch period equal in length to a normal class period in high school, no less than fifty (50) minutes in the middle school, and no less than one (1) hour in the elementary school. When an elementary teacher moves from one school to another, he/she shall receive travel time in addition to the lunch period. Where travel time is restricted between an a.m. and p.m. assignment, teachers shall be released fifteen (15) minutes prior to dismissal time. Kindergarten teachers in lieu of being released fifteen (15) minutes prior to dismissal time shall be paid one-fourth (.25) of the part-time certificated hourly rate for each day traveled. When hazardous conditions exist, kindergarten teachers who must travel to reach their afternoon school shall be released up to fifteen (15) minutes. One (1) teacher per lunchroom, supported by lunchroom aides within the limitations of the allocation, shall be used to supervise elementary school lunchrooms. However, if the principal, after consultation with the teaching staff, determines that the safety of the children requires additional supervision, he/she may assign an additional teacher per lunchroom for supervision. In the elementary school, where voluntary noon paid supervision is not in effect, noon supervision shall be by non-bargaining unit employes.

This proposal seeks to require the Board to provide lunchroom supervision by the use of nonbargaining unit employes.

The Board contends that this proposal is a permissive subject of bargaining because it prohibits the assignment of teachers to lunchroom supervision, a duty fairly within the scope of their responsibilities. The Board further asserts that this proposal is permissive because it would require the hiring and deployment of nonbargaining unit personnel.

The MTEA argues that the proposal is a mandatory subject of bargaining in that it would prevent the Board from making assignments during the teachers' negotiated duty free lunch period.

In Whitnall School District, Dec. No. 20784-A (WERC, 5/84) we addressed the issue of bargaining regarding teacher assignments to lunchroom supervision in the following manner:

> The status of the instant proposal, therefore, turns on whether the lunchroom and playground supervision duties at issue are fairly within the scope of a professional educator's job. We are persuaded that they are. The District's arguments emphasizing the potential importance to students' social skills development that the teacher's performance of lunchroom and playground supervision can have may be educationally sound and hence worthy of weight in determining whether the duties involved are fairly within the scope of the bargaining unit positions involved here. Even more persuasive, however, are the common sense notions that students are more likely to respect the authority of teachers and conform to teachers' directions and control in playground and lunchroom settings than they would respond to nonfaculty personnel. For, students know that teachers administer students' grades, impose disciplinary measures and grant or withhold student privileges. Moreover, teachers are responsible for controlling students' behavior in classes, study halls and hallway passing periods. Finally, given the historical inclusion of the instant language in the parties' agreement, it would appear that some measure of lunchroom and playground supervision duties have historically been performed by bargaining unit personnel.

For those reasons, we are satisfied that the allocation of playground and lunchroom supervision duties during the teacher work day is generally not a subject for mandatory bargaining. Rather, it is a matter primarily related to the formulation of educational policy.

As noted, the District would be required to mandatorily bargain about a proposal to protect bargaining unit members from being singled out for arbitrary, illegal or other specified impermissible reasons with an unusually heavy portion of lunchroom and playground supervision duties relative to the duties mixes assigned to the balance of the bargaining unit. Janesville, supra, at p.75. However, the instant proposal imposes a greater limitation than such an anti-discrimination proposal would on the District's educational policymaking in the area of allocation of the teacher work day. As written, therefore, we conclude that the instant proposal is a permissive subject of bargaining.

Of course, the Federation can propose and mandatorily bargain over the impact of District decisions to assign teachers certain amounts of playground and lunchroom supervision duties and could thereby mandatorily bargain for additional compensation for teachers who receive in excess of a stated amount of such work assignments.

Under the foregoing analysis, we are satisfied that the instant proposal is a permissive subject of bargaining.

Proposal 57 states:

A/68

substitute: One (1) release period shall be provided if a department has twenty-six (26) to fifty (50) sections, two (2) release periods if the department has fifty-one (51) to seventy-five (75) sections and three (3) release periods if the department has seventy-six (76) or more sections.

The Board contends that this proposal is a permissive subject of bargaining which primarily relates to its right to assign duties to teachers fairly within the scope of their responsibilities and to allocate a teacher's workday.

The MTEA contends that the proposal is a mandatory subject of bargaining identical to one previously ruled upon by the Commission in Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 2/79).

We conclude that this proposal is permissive in that it primarily relates to the allocation of the teacher workday. As we have noted earlier herein during our discussion of proposal 36, in the prior decision cited by the MTEA we were not confronted with the argument or record presented herein.

Proposal 58 states:

A/70

Exceptional education and reading shall be recognized as departments. Department chairpersons shall be selected by a vote of department members.

The MTEA concluded that this proposal was a permissive subject of bargaining and withdrew same during the hearing.

Proposal 59 states:

A/71

10. No senior high school teacher shall be required to

teach more than three (3) different subjects/grade level preparations.

The Board contends that this proposal primarily relates to management's right to assign duties to teachers that are fairly within the scope of their responsibilities and to the allocation of the teacher workday.

The MTEA contends that the proposal is a mandatory subject of bargaining because it attempts to limit the number of subjects or grade levels which a teacher can be required to teach and thus seeks to respond to the impact upon workload which class assignments present.

We conclude that this proposal is a permissive subject of bargaining primarily relating to the management and educational policy choices as to how to assign teaching responsibilities to bargaining unit employes.

Proposal 60 states:

A/72

11. The present time allocation at the middle school level for student exploratory shall include academic enrichment and remedial skill strengthening classes. Students shall receive a letter grade for work done in these classes. A budget shall be provided at the school level to provide for curriculum materials in these classes.

The Board contends this proposal primarily relates to the number and levels of nonduty free preparation time, to management's right to assign duties to teachers fairly within the scope of their responsibilities and to management's right to allocate time during a teacher workday. The Board further argues that this proposal primarily relates to the range and level of services to be offered by the Board together with the procedures by which funding for such services will be provided.

The MTEA contends that the proposal is a mandatory subject of bargaining primarily related to providing sufficient resources to teachers involved in the student exploratory program.

We find that this proposal is a permissive subject of bargaining primarily related to educational policy determinations as to how educational services shall be provided and funded as well as how the teacher workday should be allocated.

Proposal 61 states:

A/73

13. Establish the Designated Vocational Instructor position as a full time release position to carry out the assigned duties.

The Board contends that this proposal primarily relates to the managerial right to establish or not to establish positions as well as to determination of the manner in which duty shall be assigned to unit members fairly within the scope of their responsibilities.

The MTEA contends that this proposal is a mandatory subject of bargaining because by requiring the establishment of an additional position, existing workload burdens would be spread more equitably. The MTEA asserts that in cooperative vocational educational programs, the coordinating instructor teaches his or her students in the morning and coordinates their placement in the afternoon. The MTEA contends that designated vocational instructors carry out a full class load with very similar duties to the coordinating instructor position but in addition is required to coordinate the placement of all exceptional education students in the high school not just the students from that specific teacher's classes. The MTEA asserts that this proposal would prevent the one unit individual who coordinates all exceptional education students from being unduly burdened with duties greater than other unit personnel performing similar functions.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy choices as to how services shall be provided as well as to staffing levels.

Proposal 62 states:

> A/74
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> 14. Provide early childhood MR classes, generic pre-school classes and secondary exceptional education classes with child care attendant services where such services are necessary.

The Board contends that this proposal is permissive because it primarily relates to the range and level of services to be provided in conjunction with the educational program. The Board further argues that the proposal is permissive because it mandates that the Board hire and assigns specific nonbargaining unit personnel.

The MTEA contends that this is a mandatory subject of bargaining because unless child care attendant services are provided for early childhood MR classes, generic pre-school classes and secondary exceptional education classes, the classroom teacher would be required to perform duties not customarily performed by professional educators such as toileting and changing diapers. The MTEA argues that it is a mandatory subject of bargaining to negotiate concerning the imposition of duties which are not fairly within the scope of the employe's responsibilities. The MTEA rejects the Board's contention that the proposal requires that the specified classes be held or that the Baord assign any particular employes to perform the services in question. The MTEA asserts that under this proposal both decisions are left solely within the discretion of the Board.

The Commission has previously concluded that the issue of whether an employer can require employes to perform duties which are supplemental to and supportive of the employe's primary responsibilities and duties is a mandatory subject of bargaining. Oak Creek - Franklin Jt. City School District No. 1, Dec. No. 11827-D (WERC, 9/74), teachers performing clerical functions; City of Wauwatosa, Dec. No. 13109-A (WERC, 6/75) firefighters performing switchboard duties; Milwaukee Board of School Directors, Dec. No. 20398-A (WERC, 2/83), accountants performing clerical functions. However, an employer cannot be required to bargain over the identity of the individuals the employer may choose to have perform such supplemental duties if the union successfully bargains a clause which does not require unit employes to perform the work. Oak Creek, supra. Blackhawk VTAE, Dec. No. 16640-A (WERC, 9/80); aff'd (CtApp IV) 109 Wis.2d 415 (1982). Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).

We find this proposal to present a close question. However, we are satisfied from the record that the child care services in question (diapering children, etc.) are supplemental responsiblities for the teacher and thus, it would be a mandatory subject of bargaining for the MTEA to propose that teachers in the specified classes not be required to perform such services. However, it is clear from the record that the MTEA proposal at issue herein seeks not only to remove the services responsibility from teachers but also to dictate how the service will be performed (i.e. use of existing Board employed child care attendants). Thus, the proposal, as written, is permissive.

Proposal 63 states:

> A/75
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> 15. The age in wide range classes shall not exceed four (4) years.

The Board contends that this proposal is a permissive subject of bargaining solely related to student management and control and the determination of educational policy.

The MTEA contends that the proposal is a mandatory subject of bargaining which does not unduly restrict management but makes an effort to keep the job duties for classroom teachers within reasonable bounds.

We find this proposal to be a permissive subject of bargaining primarily relating to educational policy determinations.

Proposal 64 states:

> A/76
>
> 16. Establish a full time exceptional education coordinator at each high school to facilitate the exceptional education program.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the exercise of managerial prerogatives and educational policy determinations regarding the exceptional education program; the right of the Board to determine its fiscal and budgetary affairs and the range and level of services to be offered to the public; the decision to hire or not to hire personnel to perform duties; and the right of the Board to assign teachers to duties fairly within the scope of their responsibilities.

The MTEA asserts that if the Board does not establish the position requested in the proposal, it will be necessary for the classroom teachers involved with the exceptional education program to take on the coordination responsibilities. As such responsibilities are beyond those normally expected of classroom teachers, the MTEA asserts that the proposal is a mandatory subject of bargaining.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations.

Proposal 65 states:

> A/77
>
> 17. Provide LD resource teachers with classrooms.

The Board contends that this proposal is permissive because it primarily relates to the supplies and facilities to be furnished to teachers.

The MTEA contends that the proposal is a mandatory subject of bargaining because if learning disability resource teachers are to perform their duties, they must be provided with a room within which to do so.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations as to the facilities within which education of the learning disability students in question will take place. We refer the parties to our discussion of proposal 23 herein for guidance as to the scope of the parties' obligation to bargain over facilities.

Proposal 66 states:

> A/78
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> 18. Reduce the age span in MR, LD and ED classes.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to student management and control and educational policy determinations regarding the assignment of students.

The MTEA asserts that the age span in the classes referenced in the proposal relates to teacher workload and as such the proposal is a mandatory subject of bargaining.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations.

Proposal 67 states:

A/79

19. Increase the number of diagnostic program support personnel.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the exercise of the Board's managerial prerogatives to determine educational policy in the context of the diagnostic program; the Board's right to determine its fiscal and budgetary affairs; the equalization of workload of teachers; and the right of the Board to assign teachers to duties fairly within the scope of their responsibilities.

The MTEA asserts that because the Board does not currently provide sufficient diagnostic program support services to assist classroom teachers, classroom teachers are required to perform additional duties in implementing such programs. The MTEA contends that the proposal is a mandatory subject of bargaining because it would eliminate the need for classroom teachers to perform such duties.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations.

Proposal 68 states:

A/80

20. The Board shall take the following steps to safeguard teachers against communicable diseases such as cytomegalovirus, AIDS and herpes:

a. The medical records of students should be available to teachers to determine if there are any health risks for which employes need to take precautions to safeguard the health of their students and themselves.

b. Employes should be notified if any child in the building is known to be a carrier of a communicable disease which poses a health threat.

c. Each classroom used by students with such a communicable disease should be equipped with soap, a sink and toilet to facilitate proper hygiene.

d. Arrangements should be made to insure that the classrooms (including contents, such as toys, tables, mats, etc.) used by students with such a communicable disease are thoroughly cleaned before each school day.

e. Inservice training in hygiene techniques, including hand washing, should be provided to employes who have contact with a student who has such a communicable disease.

f. Employes who request to be tested to determine the presence of herpes group antibodies in the blood should receive such testing at board expense.

g. Employes who are at risk should be afforded the opportunity, on a voluntary basis, to be reassigned from contact with students known to have a communicable disease which poses a health threat.

The Board asserts that this proposal is a permissive and prohibited subject of bargaining. The Board contends that this proposal infringes upon its exclusive right of student management and control and upon its right to manage its physical plant and facilities. In addition, the Board asserts that this proposal is akin to one which requires that certain steps be taken to deal with "problem students" and as such primarily relates to educational policy decisions. Furthermore the Board argues that this proposal infringes upon the constitutional and statutory right of students to receive a public education and thus is a prohibited subject of bargaining. Looking specifically at the proposal itself, the Board asserts that Subsection A infringes upon the confidentiality of pupil medical records guaranteed under Sec. 118.125 stats., and Sec. 146.81-146.83 stats., and thus constitutes a prohibited subject of bargaining upon this additional basis. The Board further argues that the general subject area of this proposal (safeguarding

of the school system's personnel from communicable diseases) is primarily within the jurisdiction and responsibility of the City of Milwaukee Health Department. Thus the Board asserts that its current responsibility where a teacher alleges exposure to a student with a communicable disease is to report the problem to the City Health Department and to assist that department in the investigation and remediation of the problem. The Board asserts that this proposal, if adopted, also requires an unqualified grievance arbitrator to make medical decisions on a number of purely medical questions such as: (1) the definition of a "communicable disease"; (2) the degree to which a disease constitutes a "health threat"; (3) whether particular remedial measures called for by the proposal have been sufficiently performed and/or adequately addressed the particular "health threat." The Board contends that experts in the field of medicine and public health not grievance arbitrators are the proper individuals to make such determinations.

The Board argues that the MTEA's amendment of the proposal to add the phrase "such as c.m.v., AIDS and herpes" is not a bona fide limitation upon the scope of the proposal. The Board further argues that there is no evidence of any crisis within the school system in this area and asserts that the record demonstrates that the Board has been responsive to MTEA requests that teachers be accommodated to protect them from health risks. Thus the Board requests that the Commission find this proposal to be a permissive and prohibited subject of bargaining.

The MTEA contends that this proposal is a mandatory subject of bargaining primarily related to the protection of the physical health of members of the bargaining unit. The MTEA asserts that the proposal is directed at the following matters: (1) providing notice to a teacher that a child in the class has a specified communicable disease; (2) that facilities be available which would decrease the likelihood of transmittal of the disease from the child to the teacher; (3) provide teachers with knowledge as to how to avoid spread of the disease; (4) provide teachers with the opportunity to receive tests for certain diseases; and (5) provide teachers the opportunity to be removed from contact with the student posing the health threat.

In attempting to resolve the various issues presented in relation to proposal 68, we have encountered significant difficulties. On the one hand, the problems addressed are of growing import in the workplace and have not been directly addressed in any depth in prior Commission decisions. We therefore feel that it is important for the Commission to provide as much general guidance in this area as possible. On the other hand, while we are responsible for ruing on the particular proposal language before use, the record herein does not provide us with a fully satisfactory factual basis for evaluating certain of the specifics of this proposal. In addition, it appears that there may be no presently available scientific answers to uncertainties about the extent to which certain diseases, e.g. AIDS, present a threat of contagion in the typical school setting.

Accordingly, we will offer what general guidance we can in this area in addition to responding as specifically as the record permits to the particular proposals before us. It should be emphasized that there are no doubt other proposals or approaches to these serious issues which may produce a different duty to bargain analysis.

In general, it is clear to us that a proposal which seeks to protect employes from the threats to their health and safety related to exposure to disease has a substantial relationship to conditions of employment. Where proposals seek to protect employes from possible contagion by requiring the Board to provide equipment, facilities or lawfully disclosable information that bear a reasonable relationship to preventing contagion, we would be more inclined to deem the proposal mandatory than we would where the employe concern relates, for example, to workload. To be somewhat more specific, to the extent that the instant proposals seek to protect employes by giving them knowledge and facilities which would reduce the threat of contagion from students whom existing health laws allow to remain in the classroom, we are inclined to view the employe health considerations as predominant over the educational policy or management prerogative considerations involved.

We turn now to the specific provisions of proposal 68.

As to sections (a) and (b) which seek to provide the teacher with notice and knowledge of health threats, we would find them mandatory if they contained a

proviso such as "to the extent allowable by law" so as to assure that statutory rights such as the confidentiality of medical records remain protected. As to sections (c) and (d) we would find them mandatory if the record established a clear nexus between the preventative action and facilities in question and the diseases which are the focus of the proposal. Such proposals would also be mandatory if they simply generically required that preventative action and facilities be provided. However, as written and under the existing record, they lack sufficient connection to the MTEA's professed intent to be found mandatory. Turning to section (e), we find this portion of the proposal to be mandatory. While the subjects to be addressed during inservice are not bargainable in the context of educational policy judgments vis-a-vis the services and curriculum to be provided to students, the nexus herein to employe safety and the absence of significant educational policy ramifications produce a different result. Section (f) is akin to a fringe benefit proposal and thus we find it mandatory due to a primary relationship to wages. Lastly, as to section (g), this proposal raises significant educational policy concerns because of the potential for educational disruption of a teacher exercised the right to be reassigned. However, on balance, if the proposal were redrafted to make it clear that it applied only to teachers who are at a "heightened risk" vis-a-vis the general adult population, we would find that the safety concerns predominate and that the proposal is thus mandatory.

Proposal 69 states:

> A/81
>
> 21. ED classes should not be placed in buildings without assistant principals.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to student management and control and the composition and location of classes all matters impacting upon educational policy choices.

The MTEA asserts that in most Milwaukee schools one of the functions of the assisting principal is to handle behavioral problems which arise in emotionally disturbed classes. Thus, if such classes are held in buildings without assistant principals, the teachers' working conditions are directly impacted in that the difficulty of their duties increases. Therefore, the MTEA asserts that this proposal is a mandatory subject of bargaining in that it attempts to see that classroom teachers are not unduly burdened with additional duties resulting from behavioral problems.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy decisions as well as staffing levels which the District finds appropriate.

Proposal 70 states:

> A/82
>
> 22. Provide one day per month for primary exceptional educational education classroom teachers to make home visits, where the teacher feels the home visits are necessary.

The Board asserts that this proposal is permissive because it primarily relates to management's right to assign duties to teachers that are fairly within the scope of their responsibilities and to the allocation of the teacher workday.

The MTEA contends that this proposal is a mandatory subject of bargaining in that it attempts to equalize the job duties and responsibilities of employes performing similar functions in the bargaining unit.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations regarding allocation of the teacher workday.

Proposal 71 states:

A/83

E. CLASS SIZE GENERAL PROVISIONS. Effective September, 1985 and for the remainder of the term of this contract the following formulas shall be used.

1. Class size at all levels will be established at the following maximums:

a. Senior high clases shall be limited to a maximum of twenty-five (25) students, unless otherwise specified.

b. Middle school classes shall be limited to a maximum of twenty-five (25) students, unless otherwise specified.

c. Elementary classes (1-3) shall be limited to a maximum of fifteen (15) students, unless otherwise specified.

d. Elementary intermediate classes (4-6) and (7-8) classes in K-8 schools shall be limited to a maximum of twenty (20) students, unless otherwise specified.

e. Five (5)-year old kindergarten classes shall be limited to a maximum of fifteen (15) pupils for each half day session or full day class.

f. Four (4)-year old kindergarten classes shall be limited to a maximum of fifteen (15) pupils each half day session. To the extent possible, classes shall be established in the afternoon on a daily basis, and be taught by the teacher who teaches the five (5)-year old kindergarten classes in the morning.

g. Pre-school classes shall be limited to a maximum of ten (10) in three (3) year old classes and fifteen (15) in four (4)-year old classes. Multi-age classes will have an average of the class sizes of each age class.

h. There will be no split grade classes.

i. Study halls shall be limited to a maximum of thirty (30) students per teacher.

j. Physical education classes in secondary schools shall not exceed twenty-five (25) students in any single class.

k. English teachers assigned classes in remedial English, composition, creative writing, fundamentals of English and journalism shall have a maximum of one hundred (100) students and two (2) preparation periods daily.

l. Science teachers utilizing laboratory methods and materials on a regular basis shall not have more than four (4) classes and shall have two (2) preparation periods daily. Classes shall not exceed one hundred (100) students per day and the number of lab stations per class.

m. Home Economics classes and Industrial Education classes shall not be organized to exceed facilities equipment and the regular class size of twenty-five (25). Each class will not have more than one course or level per class period.

n. Computer concepts mathematics classes and mathematics resource rooms shall be limtied to twenty (20) students per class.

o. Class sizes for general music or music appreciation shall not exceed the rgular class size.

p. Reading classes at the secondary level shall have a limit of fifteen (15) students per class period.

q. Chapter I Reading teachers shall have a maximum of thirty-six (36) students per day.

r. Class sizes for art, music physical education shall not exceed the maximum of regular classroom.

s. Unit leaders should not be counted in the class size formula.

t. Adaptive physical education classes shall be established for students that cannot handle large class settings and/or activities and for exceptional education students that have such needs. Classes shall not exceed a maximum of fifteen (15) students.

u. Where extenuating circumstances prevail, the staffing formulas noted above may need to be revised downward to protect the interest of the individual pupil and the total student program.

The Board asserts that this proposal is a permissive subject of bargaining primarily relating to determination of class size.

The MTEA asserts that this is a mandatory subject of bargaining because nothing more directly affects the working conditions of teachers than class size. The MTEA urges the Commission to reconsider exisiting precedent in this area.

As we commented earlier in this decision, we remain persuaded that the matter of the determination of class size remains primarily related to educational policy despite the substantial implications for teacher workload.

Proposal 72 states:

A/81

F. MAINSTREAMING.

1. In order to reduce class size for non-exceptional education teachers receiving mainstreamed exceptional education students, the following provisions shall be implemented:

a. At the end of each school year, each school will determine the mainstreaming anticipated for the next school year based on Multidisciplinary Team (M-Team) recommendations and Individualized Education Programs (IEP's).

b. Each exceptional education student to be mainstreamed will be assigned a weighted value in accordance with the individual student's needs based on the chart below:

EXCEPTIONAL EDUCATION NEED	EQUIVALENCY
Early Childhood	
Self-contained modified	4
Self-contained integrated	3
Mild/Borderline Mentally Retarded	
Self-contained modified	4
Self-contained integrated	3
Moderate/Severe Mentally Retarded	
Self-contained modified	4
Self-contained integrated	3
Physical Handicapped	
Self-contained modified	4
Self-contained integrated	3
Vision	
Self-contained modified	4
Self-contained integrated	3

Hearing	
Self-contained modified	4
Self-contained integrated	3
Emotionally Disturbed	
Self-contained modified	5
Self-contained integrated	4
Learning Disabilities	
Self-contained modified	5
Self-contained integrated	4

2. Exeptional education students shall be part of the original list and class load of teachers.

3. Appropriate adjustments to the allocations provided to each school shall be made based on the Teacher Needs Reports in September to reflect actual student enrollment and mainstreaming.

4. The total number of student equivalents based on the weighted values of each mainstreamed student shall be computed for each school and reported as part of the Teacher Needs Report. Based on the class size maximums, an additional teacher position shall be allocated to the school for each teacher position, or major fraction thereof, needed to maintain the class size maximums. In secondary schools, the allocation would be proportional to the level of mainstreaming in each subject area.

The Board contends that this proposal is a permissive subject of bargaining related to educational policy determinations as to class size as well as the placement of exceptional education students.

The MTEA asserts that this proposal is a mandatory subject of bargaining which attempts to preclude the addition of far more difficult duties upon unit members beyond those normally required of classroom teachers.

We again conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations.

Proposal 73 states:

A/85

G. RELEASE TIME FOR IEP's. Preparation of Individual Education Programs (IEP's) for all exceptionalities shall be handled as follows:

1. Each exceptional education teacher shall be allowed up to four (4) days annually for which a substitute teacher will be provided. These days shall be taken in one (1) day minimums as they are needed for preparation, writing and attending conferences related to IEP development.

2. Regular education teachers who are significantly modifying their curriculum for exceptional education students will be provided release time of up to one-half (1/2) hour per child for IEP writing and up to one-half (1/2) hour per child for parent conferences.

3. The Board shall offer exceptional education teachers inservice training annually for IEP's.

The Board contends this proposal is a permissive subject of bargaining primarily relating to: (1) preparation time allocation during the teacher workday; (2) equalization of workloads among members of the bargaining unit; (3) staffing levels; and (4) the nature and content of inservice programs.

The MTEA contends that exceptional education teachers are not currently given time during the school day within which to prepare individual education programs (i.e.p's.). The MTEA asserts that this proposal is a mandatory subject of bargaining in that it attempts to require the Board to make time available to teachers to perform these duties.

The Commission concludes that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations as to the manner in which a teacher workday should be allocated.

Proposal 74 states:

> A/86
>
> Twice (2) per year reading resource teachers shall meet to exchange ideas, puruse new curriculum goals and to discuss problems or subjects identified by the reading teachers.

The Board asserts that this proposal is a permissive subject of bargaining primarily relating to the manner in which the Board obtains input into educational policy decisions and the allocation of the teacher workday.

The MTEA asserts that this proposal is a mandatory subject of bargaining because the matters discussed at the meetings in question impact on teacher conditions of employment and do not significantly invade management prerogatives.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations.

Proposal 76 states:

> A/89
>
> 10. The Board of Review shall meet monthly to review employe credit appeals, unless no appeals are pending.

The Board contends that this proposal is a permissive subject of bargaining primarily related to internal management structure and decision making. The Board argues that the Board of Review referenced in this proposal is an administrative subcommittee entirely eternal to the Board's administrative structure and thus that this proposal is akin to one which would require periodic meetings of the Board's employe relation staff to determine management's position on pending grievances - and unwarranted interference in management's own decisional process. The Board asserts that it can unilaterally abolish the Board of Review if it wishes and issue its internal decisions on credit disputes through some other mechanism. Lastly, the Board points out that a teacher wishing to grieve denial of a credit application can do so directly through the grievance arbitration procedure.

The MTEA asserts that this proposal is a mandatory subject of bargaining primarily relating to a grievance procedure as to questions impacting on the wages of unit members. The MTEA asserts that the need for this proposal has been generated because the Board of Review has refused to meet in a timely manner to make credit determinations.

This proposal intrudes into the Board's internal decision making process by mandating the existence of the Board of Review and thus is found to be a permissive subject of bargaining. However, a proposal which simply generically required that the Board grant or deny the credit requests in question within a specified time frame would be a mandatory subject of bargaining because of the direct relationship of such a proposal to wages.

Proposal 77 states:

> A/101
>
> 4. A committee shall be established to determine the feasibility of computerizing the elementary report card.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the managerial function of designing and implementing elementary report cards. The Board asserts that it has no significant relationship to wages, hours or conditions of employment.

The MTEA asserts that the proposal is a mandatory subject of bargaining because it directly relates to the time required to perform the work in question and does not intrude into the educational policy decision of whether to have elementary school report cards.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy decisions and management prerogatives.

Proposal 78 states:

> A/102
>
> Provide a more basic Scott Forseman Program for the students who are marginal achievers and are moved to the next reading level without the ability to handle it.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to educational policy choices regarding curriculum as well as supplies and facilities available to students.

The MTEA contends that this proposal is a mandatory subject of bargaining in that students who procede to a higher reading level without the ability to handle the material at that level create difficult working conditions for unit employes. Thus the MTEA argues that this proposal directly relates to employe working conditions and employe interest in having appropriate material available to perform required duties.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy.

Proposal 79 states:

> A/103
>
> 6. Provide computer curriculum guides with simple step by step instructions on use and presentation to students, plus in-building inservice to help put the computers to meaningful use.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to educational policy and the development of curriculum as well as the manner in which services will be provided to students.

The MTEA contends that this proposal is a mandatory subject of bargaiing in that it improves teacher working conditions and provides them with the resources needed to perform the work in question.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy.

Proposal 80 states:

> A/157
>
> 15. Learning coordinators may, on a voluntary basis, work two (2) days beyond the end of the school year and five (5) days prior to the beginning of the school year compensated at their individual daily rate.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to management decisions as to whether work is available and whether or not the services of the learning coordinators are needed during the time periods specified.

The MTEA asserts that this proposal is a mandatory subject of bargaining because it deals with the work schedule of bargaining unit employes.

As our earlier discussion of proposals 34 et al indicates, we conclude that this proposal is a mandatory subject of bargaining primarily relating to employe hours and wages.

Proposal 81 states:

A/161

4. The Board shall establish a job description for guidance counselors which shall be negotiated with the MTEA.

The Board contends that this proposal is primarily related to managerial discretion to establish and maintain position descriptions where the duties set forth therein are fairly within the scope of teaching responsibilities as well as to the establishment of minimum qualifications for positions. As such, the Board asserts that the proposal is a permissive subject of bargaining.

The MTEA argues that this proposal is a mandatory subject of bargaining because very few things relate more directly to working conditions and performance expectations than job descriptions.

This proposal is a permissive subject of bargaining because it obligates the Board to bargain with the MTEA over duties and responsibilities fairly within the scope of a guidance counselor's function, matters as to which the Board need not bargain. Milwaukee Sewerage Commission, Dec. No. 17025 (WERC, 5/79); Milwaukee Sewerage Commission, Dec. No. 17302 (WERC, 9/79); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83). We note, however, that the MTEA is entitled to receive from the District the currently existent duties and responsibilities of each unit position, including that of guidance counselor, so that the MTEA can collectively bargain as to wages, hours and conditions of employment, and that the MTEA has a right to bargain over imposition of duties by the employer which are not fairly within the scope of the guidance counselor's responsibilities Milwaukee Sewerage Commission, Dec. No. 17025, supra.

Proposal 82 states:

A/162

5. Full time secretarial help shall be provided in secondary schools.

The Board asserts that this proposal is a permissive subject of bargaining because it primarily relates to management determinations regarding the hiring of nonunit personnel as well as control of supplies and facilities.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it attempts to improve the working conditions of secondary school teachers who are currently unduly distracted by secretarial and clerical duties.

As we indicated earlier herein when discussing proposal 62, the MTEA can mandatorily propose that teachers not perform duties that are supplemental to and supportive of their primary responsibilities. However as the discussion of proposal 62 also indicates, the MTEA cannot mandatorily bargain about the manner in which such duties will be performed or the level at which such services will be provided. As this proposal seeks to dictate those matters, it is a permissive subject of bargaining.

Proposal 83 states:

A/163

6. Guidance counselors shall be full time in guidance.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to allocation of the guidance counselor's time during the workday.

The MTEA contends that the proposal is a mandatory subject of bargaining because where there is a lack of continuity in the services of the guidance counselor, it makes their working conditions more difficult. Thus, the MTEA asserts that it is essential that guidance counselors be full-time in guidance so that they will have the desirable continuity.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy decisions regarding allocation of the guidance counselor's workday.

Proposal 84 states:

A/164

7. Guidance counselors shall not have a homeroom.

The Board contends that this proposal is a permissive subject of bargaining in that it primarily relates to the allocation of the guidance counselor's workday.

The MTEA asserts that when students have a need to see a guidance counselor, the least disruptive time for the student is during the student's homeroom period. The MTEA argues that if the guidance counselor is not available because he or she is conducting a homeroom class, the meeting will have to take place at another time during the day. If the student is not available at another time, the MTEA asserts that the guidance counselor may find it necessary to meet with the student after school in order to carry out the guidance counselor's duties. Thus, the MTEA argues that this proposal is a mandatory subject of bargaining primarily related to the guidance counselor's hours and working conditions.

We conclude that this proposal is a permissive subject of bargaining because the interference with the educational policy determinations as to how to allocate a guidance counselor's day predominates over the impact on hours and conditions of employment.

Proposal 85 states:

A/166

9. Do not include the guidance director in the staffing ratio.

The Board asserts that this proposal is a permissive subject of bargaining relating entirely to class size and pupil teacher ratios.

The MTEA asserts that this proposal is a mandatory subject of bargaining because nothing impacts upon teacher workload than more class size.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy. However, if this proposal was made in the context of a "class size impact" proposal geared to "staffing ratios," it would be mandatory.

Proposal 86 states:

A/167

10. Middle school guidance directors should have a released period.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the number and level of nonduty free preparation time available during the teacher workday as well as to management's rights to assign duties to teachers fairly within the scope of their responsibilities.

The MTEA argues that middle school guidance counselors have many of the same coordinating functions to perform that the department chairmen have in other schools. The MTEA asserts that to perform guidance director duties it is necessary to have a released period and thus argues that this proposal is a mandatory subject of bargaining.

As we concluded as to proposal 57, this proposal is a permissive subject of bargaining primarily related to eduational policy determinations regarding allocation of the guidance director's workday.

Proposal 87 states:

A/169

12. Provide guidance services for secondary summer schools.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the range and level of educational programs and services to be provided during summer school.

The MTEA asserts that the loss of continuity of guidance program during summer impacts upon the guidance counselor's working conditions during the school year and thus argues that this proposal is a mandatory subject of bargaining.

We conclude that this proposal primarily relates to an educational policy and management determination as to services to be provided.

Proposal 88 states:

A/171

5. Librarians shall be staffed on the basis of one per each four hundred (400) students at elementary, middle and high school level.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to staffing formulas and student-librarian ratios.

The MTEA contends that this is a mandatory subject of bargaining because nothing impacts upon employe workload more than the number of students an employe is required to serve.

The Commission concludes that this proposal is a permissive subject of bargaining primarily relating to management decisions regarding staffing levels to be maintained and service levels to be provided.

Proposal 89 states:

A/172

6. Provide a minimum of six (6) hours of clerk-typist time for each library.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to management's right to control its supplies and facilities as well as the determination as to whether and how to provide the services in question.

The MTEA contends that the proposal is a mandatory subject of bargaining in that it seeks to improve librarian working conditions by providing clerk-typists time to perform clerical duties otherwise inflicted upon the unit employe in question.

As we discussed earlier herein in our analysis of proposal 82, the MTEA can mandatorily propose that teachers not perform clerical responsibilities supportive of or supplemental to their primary responsibilities. However, this proposal seeks to mandate that a certain level of service be provided and as such must be found to be a permissive subject of bargaining.

Proposal 90 states:

A/173

7. Librarians will receive a floating preparation period that will be utilized on a different period each day.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the number of preparation periods and allocation of the librarian's workday.

The MTEA contends that this proposal is unlike those discussed earlier herein with respect to guidance directors and center chairpersons. The MTEA asserts that the purpose of this proposal is to provide librarians with a duty free break period during the workday. The MTEA argues that the Commission has previously concluded that duty free break time is a mandatory subject of bargaining. Brown County, Dec. No. 20623 (WERC, 5/83); Madison Metropolitan School District, Dec. No. 16598 (WERC, 10 /78).

As written, we conclude that this proposal is not a break period provision but instead a preparation time proposal which is a permissive subject of bargaining because it allocates the librarian's workday among duties fairly within the scope of his or her responsibilities.

Proposal 91 states:

> A/174
>
> 8. Librarians in the middle schools shall not be responsible for text books.

The Board contends that this proposal primarily relates to management's right to direct the work force and assign duties to librarians fairly within the scope of their responsibilities.

The MTEA argues that text book selection is an entirely unrelated process from the normal duties of the librarian and therefore asserts that this proposal is a mandatory subject of bargaining.

From the evidence in the record, it appears that the proposal in question is so broad as to intrude into responsibilities as to text books that have traditionally been performed by at least some librarians in the middle schools and which are fairly within the scope of the responsibilities of a librarian. Therefore we conclude that this proposal is, as written, a permissive subject of bargaining.

Proposal 92 states:

> A/176
>
> Audiovisual building directors in middle schools shall receive a minimum of two (2) released periods for audiovisual work.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to allocation of the teacher workday.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it provides the employes in question with time to perform their duties and thus improves their working conditions.

We conclude that this proposal is a permissive subject of bargaining primarily relating to the educational policy determinations regarding allocation of the teacher workday.

Proposal 93 states:

> A/177
>
> 8. Industrial education teachers shall be allowed to report one (1) day prior to organization day and remain one (1) day after the record day for the purpose of opening and closing the shop and performing shop maintenances.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to management determinations as to whether work is available and whether or not the services of the industrial education teachers are needed during the particular periods specified in the proposal.

The MTEA asserts that this proposal is a mandatory subject of bargaining primarily relating to employe work schedules.

As we concluded in our discussion of proposals 34 et al, this proposal would be a mandatory subject of bargaining primarily related to hours and wages if it did not specify the purpose for which the work time was to be used. However, as drafted, it is permissive.

Proposal 94 states:

> A/178
>
> 1. JUDGES' EXPENSES - A central fund shall be set aside for judges' expenses in debate forensics sufficient to fund the activities.

The Board argues that this proposal is a permissive subject of bargaining primarily relating to the educational program, fiscal affairs and budgetary priorities of the Milwaukee Public Schools.

The MTEA asserts that the proposal is a mandatory subject of bargaining in that it attempts to assure that necessary resources will be available for debate and forensic programs.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy judgements regarding activities which should be available as well as the funding of same within the school system.

Proposal 95 states:

> A/178
>
> Judges will be paid the certified part-time rate, with a maximum payment of four (4) hours for any one (1) day of judging.

The Board contends that this proposal is a permissive and perhaps prohibited subject of bargaining in that it purports by its own terms to set a pay rate for an activity largely performed by nonbargaining unit members acting as independent contractors. The Board argues that the proposal therefore regulates many individuals who are not represented by the MTEA. The Board asserts, contrary to the MTEA, that judging is not bargaining unit work and therefore the MTEA has no right to attempt to regulate the terms and conditions under which judges are hired. The Board asserts that it is irrelevent that the parties have historically bargained the rate paid to judges in that the subject has always been a permissive subject of bargaining.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it establishes the rate of pay for bargaining unit work.

We conclude that this proposal is a mandatory subject of bargaining primarily relating to the wages paid to bargaining unit members when they perform the specified work.

Proposal 96 states:

> A/178
>
> 2. TRANSPORTATION - A central fund will be allocated for transportation for debate, forensics, chess, and mathematics competition sufficient to fund the activities. The sum will be administered by the director of transportation. Coaches of the events may request, as an option to be charged this amount,

carchecks for students engaging in activities. Any request for transportation service or for carchecks must reach the director of transportation one (1) week before the scheduled event.

The Board asserts that this proposal is a permissive subject of bargaining primarily relating to the educational program, fiscal affairs and budgetary priorities of the Milwaukee Public Schools.

The MTEA contends that this proposal is a mandatory subject of bargaining primarily relating to the impact of the decision of the Board to have the specified programs on the working conditions of bargaining unit members.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy choices and management prerogatives related to the programs specified in the proposal.

Proposal 97 states:

A/178

4. HANDBOOKS, LITERATURE, AWARDS, REGISTRATION FEES, AND NECESSARY LUNCHES -
These amounts would be grouped together and transferred into the activity account at each high school and middle school. The amount of five hundred dollars ($500) would be transferred into the activity account of debate and six hundred dollars ($600) to the activity account of forensics for schools which have participated in a program of outside competition last year. Schools which have not participated outside of the school level must present a plan for participation in the coming year. For schools with an active chess program, one hundred dollars ($100) will be transferred to the school activity account of each high school and middle school. The administration will explore supplying of chess sets to schools with an active chess team. The chess coach shall bear the responsibility of accounting for the materials.

The Board alleges that this proposal is a permissive subject of bargaining primarily relating to the educational program, fiscal affairs and budgetary priorities of the Milwaukee Public Schools.

The MTEA contends that this proposal is a mandatory subject of bargaining primarily relating to the impact of the programs specified on the members of the bargaining unit.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations and management prerogatives related to the activities in question.

Proposal 98 states:

A/178

5. MATH AND ENGLISH COMPETITION - A central fund will be administered by the curriculum specialist in charge of mathematics and English which would cover awards, registration, and necessary lunches for competition sufficient to fund such activities. Students participating in competitions within the city of Milwaukee would not have their lunches paid.

The Board asserts that this proposal is a permissive subject of bargaining primarily relating to the educational program, fiscal affairs and budgetary priorities of the Milwaukee Public Schools.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it primarily relates to the impact on working conditions of Board decisions to have the programs specified.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations and management prerogatives as to the implementation of same.

Proposal 99 states:

> A/180
>
> 1. The Board shall take steps to provide more equipment for computer science instruction since the number of students per piece of equipment far exceeds the number than can be effectively instructed.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the fiscal and budgetary priorities of the Board as well as educational policy determinations regarding the level of supplies and services available to students.

The MTEA contends that this proposal is a mandatory subject of bargaining primarily relating to the impact upon working conditions of the Board's decision to have a computer science instruction program.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy and service level determinations.

Proposal 100 states:

> A/181
>
> 1. Senior high school science teachers shall be allowed to report one (1) day prior to organization day and remain one (1) day after the record day for the purpose of packing and unpacking equipment and supplies, taking inventory and performing other necessary duties to prepare the science laboratories.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to management determinations as to whether work is available and whether or not the services of senior high school science teachers are needed during the periods specified.

The MTEA asserts that this is a mandatory calendar proposal primarily relating to employe work schedules.

As we discussed earlier herein with respect to proposal 34 et al, this proposal would be a mandatory subject of bargaining primarily related to employe hours and wages if it did not specify the purpose for which the work time was to be used. However, as drafted, it is permissive.

Proposal 101 states:

> A/108
>
> 11. Teachers assigned to more than one school will be assigned duties consistent with the amount of duties that the teacher would receive if they were assigned to one school.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to educational policy and managerial determinations as to assignment of duties to teachers fairly within the scope of their responsibility.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it seeks to keep one teacher from being unduly burdened with more duties than

are required of other members of the bargaining unit.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations regarding allocation of a teacher's workday. However, as we noted in our discussion of proposal 2 herein, the MTEA can seek to bargain certain protections against arbitrary workload allocations.

Proposal 102 states:

> A/109
>
> 12. Outdoor recess will not be held when the wind chill factor is 0 degrees Fahrenheit or below.

The Board contends that this proposal is primarily related to student management and control and to the range and level of services to be offered to students and thus is a permissive subject of bargaining. The Board asserts that the MTEA's justification for this proposal appears to be either an attempt to mandate outdoor recess when the wind-chill is above the zero degree fahrenheit range (clearly a permissive educational policy decision) or to protect teacher health and safety (a premise which is factually unsupported by the record). The Board further argues that the standard established in the proposal is arbitrary in that the wind-chill varies widely within the City of Milwaukee. Lastly, the Board asserts that because students are more sensitive to weather than adult teachers, retention of the existing discretion by individual school principals as to whether recess should be conducted outside based upon the students' health and safety will more than adequately protect teachers.

The MTEA contends that when it becomes unbearably cold, the working conditions of members of the bargaining unit who perform outdoor recess supervision are adversly affected. The MTEA therefore argues that this proposal is mandatory in that attempts to ensure that members of the bargaining unit will not have unbearable working conditions. The MTEA further argues that this proposal also insures that principals will not cancel recess breaks when the weather is moderate. As such, the MTEA argues that the proposal insures that teachers will be able to have their coffee break on such days. The MTEA argues that the proposal thus also qualifies as a break time proposal which is a mandatory subject of bargaining.

We conclude that this proposal is a permissive subject of bargaining because the educational policy relationship predominates over impact upon employe working conditions.

Proposal 103 states:

> A/110
>
> 13. A system-wide task force shall be established covering all grade levels to determine which paper work can be combined, reduced or eliminated.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to educational policy decisions relating to paper work.

The MTEA asserts that where unnecessary paper work is required of teachers, their working conditions are adversly affected. Therefore, the MTEA asserts that this proposal is a mandatory subject of bargaining in that it seeks to find a means to eliminate unnecessary paper work and thus impacts directly on employe working conditions.

We conclude that this proposal is a permissive subject of bargaining primarily relating to management determinations regarding the amount of paper work needed to properly implement the Board's educational policy directives and programs.

Proposal 104 states:

A/111

14. Allow each school a sum of money sufficient to contract with a private plowing service so that school parking lots and/or portions of playgrounds are plowed before teachers arrive.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to management of fiscal affairs and determinations as to whether or not to make budgetary appropriations allowing contracts with third parties to be entered into for the specified purposes. The Board further asserts that this proposal may in practical operation affect work available to nonunit employes and thus is also a permissive subject of bargaining from that stand point as well.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it seeks to improve working conditions of teachers so that when they arrive to work in their cars, they are not stuck in snow banks or required to walk blocks to the school from the location in which they must park an unattended car because of unplowed snow.

We conclude that the MTEA could propose as a mandatory subject of bargaining that existing school parking lots and playgrounds utilized for parking be plowed before teachers arrive at work. Such a proposal would in essence be a fringe benefit proposal primarily related to wages which would not interfere with educational policy nor would it interfere with any management determination as to how to provide the snow plowing service. However, this proposal, as drafted, dictates an appropriation process as well as specifies that the work in question be performed by private contractors. We conclude that these intrusions into management prerogatives predominate over the wage impact of this proposal and thus find the instant proposal to be a permissive subject of bargaining on that basis.

Proposal 105 states:

A/112

15. All teachers assigned to elementary schools shall share equally in duty assignments. This provision does not include members of M-Teams.

The Board asserts that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations as to utilization of teachers to perform duties fairly within the scope of their responsibilities.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it attempts to keep one teacher from being unduly burdened with more duties than are required of other bargaining unit members.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations regarding allocation of the teacher workday. However, as we noted in our discussion of proposal 2 herein, the MTEA can seek to bargain certain protections against arbitrary workload allocations.

Proposal 106 states:

A/113

16. Increase the amount budgeted for supplies, prepared materials, equipment, computer programs and field trip funds on a system-wide basis.

The Board asserts that this proposal is a permissive subject of bargaining primarily relating to the Board's right to manage its fiscal affairs and to determine whether or not to make budgetary appropriations and enter into service contracts with third parties for specified purposes.

The MTEA argues that the proposal is a mandatory subject of bargaining which seeks to improve working conditions of bargaining unit members and to ensure that there is an adequate amount budgeted for the purposes specified in the proposal.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations as to the services to be provided and the level at which such services shall be funded.

Proposal 107 states:

> A/114
>
> 17. If students are released from school to celebrate an event like winning the state basketball championship the teachers shall also be released.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the Board's discretion to make determinations as to whether or not to close school facilities. The Board contends that this is not a "holiday" proposal as contended by the MTEA because the proposal has nothing to do with the contracted for school calendar or work schedule of bargaining unit members. The Board argues that release of students has nothing whatsoever to do with the release of teachers from their contracted for duties. Indeed the Board argues that a review of any school calendar will demonstrate the teachers will normally be required to report to work on "record days", parent conference days and other times when students are not in the classroom.

The MTEA asserts that this proposal is a mandatory subject of bargaining as a calendar proposal providing for an additional paid holiday under the conditions specified.

We conclude that this work schedule or holiday proposal is a mandatory subject of bargaining primarily relating to employe hours and wages.

Proposal 108 states:

> A/116
>
> 19. Teachers should have access to photo copy machines in each school.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the supplies, equipment and facilities to be furnished to teachers. The Board argues that the MTEA's clarification of this proposal during hearing to indicate that it only applies to schools presently having access to a photo copy machine does nothing to eliminate the permissive nature of this proposal. The Board argues that such schools will be required under this proposal to maintain existing equipment and purchase additional equipment as a replacement thereto. The Board asserts that it has a managerial right to determine the uses to which it supplies and facilities may be put. Thus, the Board argues that if it wishes to preclude teacher access to photo copy machines, it has the managerial right to do so. The Board argues that the MTEA adduced no testimony to support its view that the proposal has any significant impact on wages, hours and conditions of employment of bargaining unit members. The Board asserts that at most the record indicates that this is simply a matter of convenience for teachers.

The MTEA argues that perhaps one of the most onerous duties in the teaching profession is the performance of clerical work involving messy ditto masters. The MTEA argues that this duty is no longer necessary even for clerical employes because of the advent relatively inexpensive photo copying machines. The MTEA asserts that this proposal does not require the purchase of any equipment by the Board but only grants teachers access to existing machines that are available in schools. Thus the MTEA asserts that the proposal is a mandatory subject of bargaining in that it seeks to improve the working conditions of bargaining unit members.

We conclude that this proposal is a permissive subject of bargaining primarily relating to managerial and budgetary determinations regarding the type of equipment to be available for teachers' use in the schools.

Proposal 109 states:

A/117

20. Reduce report cards to four (4) per year and two (2) report cards per year for MR students.

The Board contends that this proposal primarily relates to management's right to assign duties to teachers fairly within the scope of their responsibilities and more fundamentally to educational policy determinations. The Board notes that the Commission in Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83) ruled that the number of report cards was a permissive subject of bargaining.

The MTEA asserts that the proposal is a mandatory subject of bargaining in that it primarily relates to the volume of work employes will have to perform.

As pointed out by the Board, we have previously ruled that the number of report cards to be received by students each year is a permissive subject of bargaining and we reaffirm that ruling herein.

Proposal 110 states:

A/118

21. Elementary teachers shall not be required to supervise playgrounds before or after the student day and at recess.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the allocation of the teacher workday among duties fairly within the scope of a teacher's responsibilities. The Board asserts the Commission concluded in Whitnall School District, Dec. No. 20784-A (WERC, 5/84) that playground supervision is within the scope of a teacher's responsibilities.

The MTEA argues that this proposal is a mandatory subject of bargaining because playground supervision is only supportive of and supplemental to the primary responsibilities of teachers and thus not fairly within the responsibilities which can be unilaterally imposed upon a teacher. The MTEA further argues that playground supervision is a nonprofessional duty and that the Board should be obligated to bargain over whether or not professional licensed educators will perform such supervision. The MTEA equates this proposal to one which would prohibit assignment of clerical responsibilities to teachers.

As we noted in Whitnall, playground supervision is fairly within the scope of a professional educator's job. We further note that such duties have historically been performed by teachers in the Milwaukee Public Schools. Thus, on balance, we are satisfied that the instant proposal is a permissive subject of bargaining in that it seeks to allocate the teacher workday in a specific matter among duties fairly within the scope of a teacher's responsibilities.

Proposal 111 states:

A/119

Teaching sex education should be done by teachers who volunteer to do so.

The Board contends that this proposal primarily relates to management's right to assign duties to teachers fairly within the scope of their responsibilities and to determine whether and how sex education classes will be taught in the Milwaukee Public Schools.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it seeks to protect and improve the working conditions of members of the bargaining unit by insuring the teachers who are not qualified, or who are uncomfortable discussing sex, will not be required to do so as part of their job related duties.

We conclude that this proposal is a permissive subject of bargaining primarily relating to allocation of duties fairly within the scope of a teacher's

responsibilities as well as curriculum judgements regarding the teaching of sex education.

Proposal 112 states:

> A/120
>
> 23. Art teachers shall be provided release time to deliver exhibits and put away stock.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to allocation of the teacher workday among duties fairly within the scope of a teacher's responsibilies.

The MTEA asserts that the proposal is a mandatory subject of bargaining in that it takes time for art teachers to perform necessary duties and delivering exhibits and putting away stock.

This proposal is a permissive subject of bargaining primarily relating to educational policy judgements regarding allocation of the teacher workday.

Proposal 113 states:

> A/121
>
> 24. Release one man and woman in the physical education department from homeroom to set up equipment in secondary schools.

The Board contends that this proposal primarily relates to the allocation of the teacher workday among duties fairly within the scope of a teacher's responsibilities and as such is a permissive subject of bargaining.

The MTEA asserts that this proposal is a mandatory subject of bargaining in that it seeks to provide time to perform necessary duties when setting up equipment and thus relates to hours and working conditions.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations as to allocation of the teacher workday.

Proposal 114 states:

> A/122
>
> V. SCHOOL AIDES AND PARAPROFESSIONALS
> 1. School Aides and Paraprofessionals. Each elementary school shall continue to receive a base allocation of one hundred twenty (120) hours per week. During the term of this contract the Board shall increase school and program aide hour allocations to the level authorized for the 1980-81 school year. It is recognized and agreed that school aides are employed to supplement and assist teachers in the performance of their professional duties. It is further recognized that a school aide shall not be used to replace or supplant the teacher as the instructional leader.
> 2. Temporary Substitute Aides. The Board shall provide temporary substitute aides when the regularly assigned aide is absent from Head-Start, kindergarten, pre-school and exceptional education classes.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to the range and level of services to be provided in conjunction with the educational program. In addition, the Board argues that this proposal is permissive because it mandates the hiring of specified nonbargaining unit personnel, a unilateral management prerogative as to which the Board need not bargain.

The MTEA contends that this proposal is a mandatory subject of bargaining in that it seeks to maintain and improve the working conditions of the bargaining unit by ensuring adequate school aide and paraprofessional staff levels.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy determinations and management prerogatives as to the range and level of services to be provided.

Proposal 115 states:

> A/190
>
> The Board shall establish a "Homework Hotline" from 3:00 p.m. Monday through Thursday for students to call and receive help with their homework from teachers. Teachers will be hired, on a voluntary basis, to man the phone for homework help. Teachers will be selected by seniority if more than enough volunteer. Teachers shall be paid at their individual hourly rate.

The Board contends that this proposal is a permissive subject of bargaining primarily relating to student management and control and the range and level of services to be offered to students.

The MTEA contends that this proposal is a mandatory subject of bargaining in that it seeks to improve the working conditions of teachers by improving the preparation of students.

We conclude that this proposal is a permissive subject of bargaining primarily relating to educational policy judgements as to the services to be offered to students.

Proposal 116 states:

> 1. Bargaining unit employes who temporarily assume on a voluntary basis, the duties of acting principal, assistant principal, assistant in administration or other supervisory positions, shall have a qualified replacement assigned to relieve them of their bargaining unit duties after the first day of assignment. Such temporary administrative assignment may be made by reason of any administrative vacancy or a temporary absence and will be exempt from the application of Part V, Section M. Upon conclusion of the temporary administrative assignment, the bargaining unit employe shall return to his/her regular bargaining unit assignment. No temporary administrative assignment shall continue beyond the end of the school year in which the assignment was accepted.
> 2. Bargaining unit employes who temporarily assume the duties of acting principal, assistant principal, assistant in administration or other supervisory positions shall be paid, in addition to their regular salary, at the rates set forth in Appendix "A" application.

The MTEA asserts that this proposal is a permissive subject of bargaining primarily related to the performance of nonbargaining unit duties by bargaining unit members.

The Board asserts that this proposal is a mandatory subject of bargaining primarily relating to issues generated by work "out of classification" by members of the MTEA teacher unit. The Board notes that temporary assignment to administrative positions is a desirable option for many teachers and that there is no shortage of volunteers for such assignments. The Board further asserts that a teacher temporarily assigned to administrative duty does not relinquish his or her status within the MTEA bargaining unit. More specifically, the Board argues that the first paragraph of its proposal relates to impact items resulting from the temporary administrative assignment and can properly be considered only as either mandatory or "permissive-employer discretion" subjects of bargaining. The Board

asserts that the second paragraph of its proposal is clearly mandatory as it deals solely with the issue of additional compensation for employes receiving the temporary assignment.

Alternatively, the Board argues that its proposal can be viewed as one primarily relating to the assignment of duties and responsibilities not fairly within the scope of a teacher's normal responsibilities and thus is a mandatory subject of bargaining for that reason as well.

To the extent that the proposal before us establishes the wages and certain other conditions of employment applicable to bargaining unit employes who, while retaining their unit status, voluntarily and temporarily assume supervisory positions, we find it to be mandatory. In those contexts, Section 2 is essentially a pay for work "out of classification" proposal which is a mandatory subject of bargaining. Similarly, the sentence of the proposal commencing with the words "Upon conclusion . . ." is mandatory given its relationship with the right of a unit employe to return to his or her former position. The second and fourth sentences of the proposal essentially serve to define what a "temporary administrative assignment" is and thus are mandatory as essential interpretative components related to an otherwise largely mandatory proposal. See, School District No. 5, Franklin, Dec. No. 21846 (WERC, 7/84) at 19. Thus, in our view, only the first sentence of this proposal is permissive because as we discussed in the context of proposal 55, it interferes with the educational policy judgment of whether and how to replace an absent teacher.

Proposal 117 states:

> As a condition of eligibility to receive health insurance benefits, each participant (including the subscriber on his/her own behalf and on behalf of his/her dependents under the age of 18 and subscriber's dependents over 18) agrees to execute a waiver of confidentiality to the employer which authorizes the employer to examine for auditing purposes only, all individual claims documentation, excluding treatment records and operative reports prepared by the provider. Auditing procedures will be conducted in a manner which maintains the confidentiality of parties' medical record(s) and condition(s).

The MTEA asserts that this proposal is a prohibited subject of bargaining because the MTEA cannot waive employes' statutory rights concerning the confidentiality of medical records. The MTEA contends that the records to which the Board wants access are clearly confidential under Sec. 146.81, Stats., and that the Board is not one of the statutorily identified entities permitted access to confidential records without informed consent. The MTEA further argues that the blanket waiver proposed by the Board does not meet the requirements of informed consent established by Sec. 146.81(2), Stats. The MTEA argues it is "ridiculous and preposterous" for the Board to assert that employes are not required to waive because employes need only waive if they want health insurance benefits. The MTEA alleges that such an analysis is akin to having employes waive their constitutional right to free speech if they want to enjoy a contractual benefit.

The Board counters by asserting that the proposal is either mandatory because of a primary relationship to insurance benefits (as an eligibility requirement) or permissive because of a primary relationship to the Board's fiscal and managerial prerogatives (as a needed component of a valid audit of the "cost plus" health insurance plan). The Board denies that the proposal is prohibited asserting that applicable statutory provisions do not preclude the possibility that "informed consent" be sought through collective bargaining. In this regard the Board notes that "harmonization" of statutory provisions is to occur wherever possible to avoid the finding that a proposal is a prohibited subject of bargaining.

The Board further argues that the very philosophy of the statutes (Secs. 146.81-146.83, Stats.), cited by the MTEA establishes the legality of the audit clause proposal. The Board asserts that these statutory provisions explicitly recognize the legality and practical necessity of the auditing process. Thus the Board avers that its proposal's purpose falls directly within

the scope of one of the circumstances for which informed consent is not even required. Indeed, the Board notes that Sec. 120.13(2)(f), Stats., explicitly requires an annual audit for districts who self insure. The Board further argues that it is by no means clear the "individual claims documentation" referenced in the Board proposal qualify as "patient health care records." The Board also notes that employes can choose not to give their "informed consent" and thereby either elect to waive health insurance benefits or to receive same through existant HMO's.

The Board asserts that the foregoing analysis demonstrates the proposal does not violate any express statutory command or public policy and thus is not a prohibited subject of bargaining. The Board requests that the Commission find the proposal either mandatory or one which can be unilaterally implemented by the Board.

We are satisfied from our review of the record and of Sec. 146.81(4), Stats., that the records to which the Board seeks access through this proposal for auditing purposes are "patient health care records" under Sec. 146.81(4), Stats. 5/ Pursuant to Sec. 146.82, Stats., access to such records can be achieved only with "informed consent of the patient or of a person authorized by the patient" or if certain statutorily enumerated exceptions exist. 6/ While the Board is correct that one such exception applies to the performance of audits in certain circumstances, it is clear that the Board is not one of the auditing entities referenced in Sec. 146.82(a)(1), Stats. Thus the Board needs "informed consent" 7/ to gain access to the records it seeks for its audit.

5/ Sec. 146.81(4), Stats., provides:

> (4) "Patient health care records" means all records related to the health of a patient prepared by or under the supervision of a health care provider, but not those records subject to s. 51.30, reports collected under s. 69.186 or records of tests administered under s. 343.305.

6/ Sec. 146.82, Stats., provides in part:

> 146.82 Confidentiality of patient health care records. (1) CONFIDENTIALITY. All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient.
>
> (2) ACCESS WITHOUT INFORMED CONSENT. (a) Notwithstanding sub.(1), patient health care records shall be released upon request without informed consent in the following circumstances:
> 1. To health care facility staff committees, or accrediation or health care services review organizations for the purposes of conducting management audits, financial audits, program monitoring and evaluation, health care services reviews or accrediation.
>
> . . .

7/ Sec. 146.81(2), Stats., provides:

> (2) "Informed consent" means written consent to the disclosure of information from patient health care records to an individual, agency or organization containing the name of the patient whose record is being disclosed, the purpose of the disclosure, the type of information to be disclosed, the individual, agency or organization to which disclosure may be made, the types of health care providers making the disclosure, the signature of the patient or the person authorized by the patient, the date on which the consent is signed and the time period during which the consent is effective.

The proposal before us seeks to have the MTEA agree that employes wishing to receive health insurance benefits from a source other than the contractually available HMO's will give the Board "informed consent" to allow access by Board auditors to confidential patient health care records. Because we conclude that the MTEA's status as the collective bargaining representative of employes does not empower it to obligate employes to give the Board "informed consent" as a condition of benefit eligibility, we agree with the MTEA's contention that this proposal is a prohibited subject of bargaining. Under our reading of the applicable statutes, the right of confidentiality is clearly an individual patient right which can be waived only by the patient (i.e. employe) or a "person authorized by the patient." 8/ As it is clear that there has been no authorization from the employe to allow the MTEA (assuming that the MTEA is a "person" under Sec. 146.81(5), Stats.), to provide "informed consent", the proposal seeks authorization the MTEA is in no position to legally provide. As the proposal would thus be void as a matter of law, we conclude that it is a prohibited subject of bargaining. WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977), Racine Unified School District, Dec. No. 20652-A (WERC, 1/84), at 20-21.

Self Insurance

The Board initially contends that the Commission lacks or should not exercise jurisdiction under Sec. 111.70(4)(b), Stats., over the MTEA's self insurance issue because there presently is no "dispute" or justiciable controversy between the parties. The Board asserts that neither party has a proposal on the issue and there is no evidence that the Board is contemplating a change in existing funding mechanisms, Commission precedent in West Bend Jt. School District No. 1, Dec. No. 22694 (WERC, 5/85) and Wheatland Center School District, Dec. No. 21972 (WERC, 9/84) mandates dismissal of the petition as to this issue.

Alternatively, the Board contends that the decision to self-insure under Sec. 120.13(2)(b), Stats., is a permissive subject of bargaining because such a decision affects neither benefit levels nor the administration of same but instead simply alters the mechanism by which payment for claims is funded, a matter primarily related to the Board's internal fiscal and budgetary policies.

The Board asserts that under the current "cost-plus" funding mechanism, Blue Cross/Blue Shield is paid a fee for administering the benefit plan and for accepting the obligation to pay incurred claims in the event the Board, the funding source for claims payment, becomes insolvent. If the Board remained the claim funding source but decided to "self-insure" under Sec. 120.13(2) Stats., by either (1) entering into an "administrative services only" agreement under which a third party would administer the plan but have no liability for incurred but unpaid claims or (2) administering the existing benefit plan itself, the Board asserts that while there may be "incidental" bargainable impact on matters such as speed of claim payment, the decision remains permissive because benefits and administration remain unchanged. In this regard, the Board argues that it is by no means clear that benefits which are statutorily mandated under the existing cost plus arrangement would not also be statutorily mandated under a self insurance situation. Even if becoming self insured may result in loss of benefits, the Board argues that the decision to self insure remains permissive because the MTEA will be able to "impact" bargain over the loss of benefits

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8/ Sec. 146.81(5), Stats., provides:

> (5) "Person authorized by the patient" means the parent, guardian or legal custodian of a minor patient, as defined in s. 48.02 (8) and (11), the guardian of a patient adjudged incompetent, as defined in s. 880.01 (3) and (4), the personal representative or spouse of a deceased patient or any person authorized in writing by the patient. If no spouse survives a deceased patient, "person authorized by the patient" also means an adult member of the deceased patient's immediate family, as defined in s. 632.895 (1)(d). A court may appoint a temporary guardian for a patient believed incompetent to consent to the release of records under this section as the person authorized by the patient to decide upon the release of records, if no guardian has been appointed for the patient.

issue. As to the issue of liability for incurred claims in the event of insolvency, the Board asserts that the distinction between the existing cost plus arrangement and either form of self insurance is inconsequential because of the virtual impossibility that the Board would become insolvent and because insolvency of a "carrier" is also a risk under conventional insurance contracts.

Lastly, the Board disputes the MTEA's argument that under self insurance the Board will have an incentive to conservatively interpret phrases as "usual and customary" to save money. The Board responds by arguing that such an incentive would theoretically also be present under the existing cost plus plan under which the Board currently funds claims.

Given the foregoing, the Board asserts that if the Commission asserts jurisdiction over this issue, the decision to self insure should be found to be a permissive subject of bargaining.

The MTEA contends that the Commission should assert jurisdiction over the self insurance issue. It argues that there is a "dispute" between the parties over this issue noting that the Board contended during bargaining that it need not bargain with the MTEA over a decision to self insure.

The MTEA asserts that the decision to self insure is a mandatory subject of bargaining primarily related to benefit levels and thus to wages. It contends that Sec. 120.13(2)(b), Stats., only provides the previously lacking statutory authority for the Board to self insure but does not wipe out Sec. 111.70, Stats., and the duty to bargain if the decision to self insure primarily relates to wages.

The MTEA asserts that a decision to self insure impacts upon benefit levels in three ways. First, if the Board took over the claims adjudication function currently performed by Blue Cross, the MTEA asserts that benefit levels would change because a different entity would be interpreting key phrases such as "usual and customary." The MTEA argues the Board would have a direct financial incentive to interpret such phrases in a manner which would save money. Second, the MTEA alleges that under self insurance, state mandated benefits could be lost. The MTEA notes that while it is true that it could seek to bargain maintenance of such benefits, there would be no guarantee that such bargaining would be successful. Thirdly, the MTEA avers that under self insurance there is a risk of incurred claims going unpaid due to Board insolvency. Given the foregoing, the MTEA asserts that the predominant wage impact of a decision to self insure is clear.

We initially acknowledge that it is a close question as to whether it is appropriate to resolve the self-insurance issue in a Sec. 111.70(4)(b), Stats., declaratory ruling. However, even if it were concluded that no Sec. 111.70(4)(b) Stats. "dispute" is present, it is clear from the record that the parties have a substantial and ongoing disagreement of state wide import as to the duty to bargain over the decision to self insure which we would resolve under a Sec. 227 declaratory ruling. See Milwaukee, Dec. No. 17504, at 39. Thus, we proceed to the merits.

The record herein demonstrates that the provision of health care benefits through self insurance under Sec. 120.13(2), Stats., 9/ as opposed to a cost plus or conventional insurance carrier may have the following consequences: (1) a

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9/ Sec. 120.13(2)(b) through (f) provide:

120.13(2)(b) Provide health care benefits on a self-insured basis to the employes of the school district if the school district has at least 100 employes. In addition, any 2 or more school district which together have at least 100 employes may jointly provide health care benefits on a self-insured basis to employes of the school district.

(c) Any self-insurance plan under par. (b) which covers less than 1,000 employes shall include excess or stop-loss reinsurance obtained through an insurer authorized to do business in this state, for the purpose of covering all eligible claims incurred during the term of the policy or contract.

(Footnote 9 continued on page 111)

change in the entity that interprets the provisions of the plan; (2) the loss of state mandated benefits; and (3) the risk that incurred claims would not be paid in the event of employer insolvency. In our judgement, if any or all of these potential consequences were to be the actual consequences of a decision to self-insure, the relationship of the decision to wages would predominate over its relationship management policy and thus the decision would be a mandatory subject of bargaining.

We have drawn the distinction in our analysis between potential and actual consequences because it would appear from the record that the Board could package self-insurance in such a way as to eliminate the wage relationship of the decision. We have also done so because although our decision in Madison Metropolitan School District, Dec. No. 22129 (WERC, 11/84), aff'd 113 Wis.2d 462 (CtApp, 1986), cert denied, (WisSupCt, 1/87), finding the identity of an insurance carrier to be mandatory has been affirmed, the "interpretive entity" factor identified above as consequence (1) which was critical to the result reached in Madison would need to be re-established through proof regarding whether this aspect of the health insurance industry continues to be present. Madison, at 11.

Looking first at the "interpretative entity" factor, if the Board were to self-insure in a manner which would have an entity other than Blue Cross interpreting policy provisions such as "usual and customary", a clear impact on benefits and wages would be created if the Madison Schools proof burden noted above was met. However, if the Board were to self-insure and retain Blue Cross as the "interpretative entity", this benefit consequence would not be present.

As to the consequences of self-insurance vis-a-vis state mandated benefits, the record does not definitely establish whether the Board would be obligated under existing insurance statutes and administrative rules to maintain statutorily mandated benefits if it were to self-insure. If indeed loss of state-mandated benefits were a consequence of self insurance, the benefit impact becomes obvious and substantial. The fact that the MTEA could seek to recover such lost benefits is of no consequence in a mandatory permissive analysis. However, if the Board were to self-insure and still retain state-mandated benefits, the benefit/wage consequence identified as (2) above would be eliminated.

The record does not establish whether the Board could self insure but obtain supplementary "insolvency" insurance to neutralize the incurred but unpaid claim factor noted as (3) above. Sec. 120.13(2)(c) Stats. seems to suggest that such "reinsurance" is available. If such insurance could be obtained, self-insurance would not necessarily have the otherwise automatic benefit/wage consequence which Board insolvency under self insurance as opposed to cost plus or conventional insurance would create.

Thus, as the foregoing indicates, if the Board decision to self-insure were to have any or all of the three consequences noted above, we would conclude that on balance, the wage impact predominated over the management interests identified by the Board herein. However, if self-insurance can be accomplished in a manner which would retain Blue Cross as the "interpretative entity", retain state

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9/ (Continued)

(d) The commissioner of insurance may prescribe detailed requirements for reinsurance under par. (c) by rule or by order. The commissioner of insurance may promulgate rules governing self-insurance plans under pars. (b) to (f) to ensure that they comply with all applicable provisions of chs. 600 to 647.

(e) All personally identifiable medical and claims records relating to any self-insurance plan under par. (b) shall be kept confidential by the administrator of the self-insurance plan and shall be exempt from disclosure pursuant to s. 19.36(1). This paragraph does not prohibit the release of personally identifiable records to school district personnel, to the extent that performance of their duties requires access to the records, but only with the prior written informed consent of the insured.

(f) A separate audit of the self-insurance plan shall be conducted annually and the results shall be made available to the school district and the department.

mandated benefits and insure against the nonpayment of claims in the event of Board insolvency, then the wage impact demonstrated by this record would have been eliminated, the management interests would predominate, and the decision would be permissive.

Dated at Madison, Wisconsin this 27th day of February, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

I dissent as to proposal 11.

By _____
Herman Torosian, Chairman

I separately concur as to proposal 11.

_____
Marshall L. Gratz, Commissioner

I separately concur as to proposal 11.

_____
Danae Davis Gordon, Commissioner