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MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Fact Finding between:

WOLVERINE COMMUNITY SCHOOLS

and

NORTHERN MICHIGAN EDUCATION ASSOCIATION

Case No. G81 G-811

REPORT AND RECOMMENDATIONS OF FACT FINDER

Appearances:

For the Board:

Harry W. Bishop, Director of Labor Relations for the Michigan Association of School Boards
Nadine Bawkey, Superintendent of Wolverine Community Schools

For the Association:

M. Kay Habitz, Representative of the Michigan Education Association
Ronald H. Stahlbuck
Sue Denise, Teacher
Charles Palmer, Teacher
Deborah J. Sanford, Teacher

Wolverine Community Schools

The NORTHERN MICHIGAN EDUCATION ASSOCIATION (Association) represents the certified and professional personnel in the WOLVERINE COMMUNITY SCHOOLS DISTRICT (Board). A collective bargaining contract between the Board and the Association was in effect from September 1, 1979, to August 31, 1981. There are approximately 365 students in the School District, housed in two buildings: an elementary school and a high school. There are sixteen teachers. The Board and the Association engaged in collective bargaining commencing in April, 1981, but no collective bargaining contract was completed and executed prior to the expiration of the 1979-81 contract.

A mediator appointed by the Michigan Employment Relations

Robert Howlett

Michigan State University
LABOR AND INDUSTRIAL
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Commission met with the Board and Association representatives on several occasions; no contract was completed.

On November 1, 1982, the Michigan Employment Relations Commission appointed the undersigned, Robert G. Howlett, as Fact Finder and Agent to conduct a fact finding hearing pursuant to Section 25 of Act 176 of the Public Acts of 1939 as amended [MCA 423.23; MSA 17.454(27)].

A hearing was held at the Gaylord State Bank in Gaylord, Michigan, on January 11, 1983, at which representatives of both parties presented evidence. At my request briefs were filed on one issue.

Ten unresolved contract issues were presented at the fact finding hearing:

1. Salary Schedule
2. Binding Arbitration
3. Association Dues
4. Teacher Evaluation
5. Personnel Files
6. Calendar
7. Hiring, Vacancies, Promotions, and Transfers[1]
8. Teacher Qualifications and Assignments
9. Reduction in Personnel, Seniority and Recall
10. Teaching Hours

I will discuss the ten issues seriatim.[2]

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1. This is the issue on which I requested that briefs be filed.

2. Mr. Harry Bishop of the Michigan Association of School Boards joined the bargaining as a Board representative in January, 1982. By March, 1982, there had been tentative agreement between the Board and Association representatives on 40 articles. The 40 articles were presented to the Board of Education, which on June 7, 1982, ratified 25 of the articles on which there had been tentative agreement and rejected 15 of them. The Association noted that some of the rejected articles were those proposed by the Board representatives. Apparently, there has been agreement on some of the rejected tentative agreement subjects, as 10 (not 15) issues were submitted to me.

SALARY SCHEDULE

The salary schedule in effect during the term of the 1979-81 contract provided steps starting with the BA degree and continuing to MA plus 20 hours of college or university work. In 1979-80 the entry level (Step 0) for teachers with a BA degree was $10,879. There are six steps (0 thru 5) for the BA degree and thirteen (0 thru 12) for the other categories: BA plus ten, BA plus 20, MA, MA plus ten, and MA plus 20. The top salary for MA plus 20 (Step 12, the thirteenth step) was $19,684.

The comparable bottom and top salaries for 1980-81 were $11,740 and $21,259.

On April 28, 1981, the Association proposed a salary increase of 4% at each step of the salary schedule, plus a cost-of-living adjustment from July 1, 1980, to June 30, 1981, based on the Bureau of Labor Statistics' Reports for All Cities. The Board representatives rejected the proposal.

The history of the proposals and counterproposals following the initial Association proposal which the Board rejected follows.

May 14, 1981, Board proposal: 5% pay cut after the teachers had received their step increase. This would have resulted in a salary increase for two teachers and a salary reduction for the others. The Association rejected the proposal.

July 26, 1981, Board proposal: 4% step increase, plus 2%, for a total of 6%. The Association rejected the proposal.[3]

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3. At this time it appeared that the members of the Board believed that the District budget was in balance or that there was a surplus. Later it was learned that there was a deficit. Exhibits received in evidence disclose that there was a deficit of over $100,000 as of June 30, 1982. Apparently, the proposal was for one year.

December 17, 1981, Board proposal: The salary offer of July 26, 1981, was rescinded. The Board proposed a wage freeze at the September, 1980, level.[4] The Association rejected the proposal.

January 21, 1982, Association proposal: 1981-82, increase each step of the 1980-81 schedule by 7%; 1982-83, increase each step of the 1981-82 schedule by 10%. The Board rejected the proposal.

January 21, 1982, Board proposal: 1981-82, wage freeze; 1982-83, increment only. The Association rejected the proposal.

July 15, 1982, Board proposal: 1981-82, wage freeze[5]; 1982-83, wage freeze; 1983-84, reopen the contract for bargaining over salaries for 1983-84. The Association rejected the proposal.

July 28, 1982, Association proposal: 1981-82, 2% raise; 1982-83, full COLA; 1983-84, full COLA. The Board rejected this proposal.

September 22, 1982, Board proposal: Freeze the salaries for 1981-82, 1982-83, and 1983-84, but discuss salaries effective April 15, 1984. In the meantime, salaries to remain at the 1980-81 school year level. The Association rejected the proposal.

September 22, 1982, Association proposal: 1981-82, 1% increase; 1982-83, COLA with a minimum of 6% and a maximum of 9%;

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4. Apparently, the Board members learned of the deficit between July 26, 1981, and December 17, 1981.

5. The wage freeze proposal included no increment for teachers.

1983-84, COLA with a minimum of 6% and a maximum of 9%. The foregoing increases are in addition to the increments. The Board rejected the proposal.

The Association's principal position is, in common with the position of teachers in other districts, that the Wolverine teachers are entitled to increases. The Association points out that increases received have fallen behind increases in the cost of living:

	Increase	Cost of Living
1977-78	5 %	7.5%
1978-79	7 %	10.3%
1979-80	7.5%	14.6%
1980-81	8 %	10.5%

This evidence was not refuted by the Board.

The Association further points out that in 1981-82 the cost of living increased 6.5%, yet on September 22, 1982, the Association offered to accept a 1% increase for 1981-82 with only cost-of-living for the next two years.

The Association presented evidence comparing the salary ranking of the Wolverine teachers with the other 33 school districts in which the Association represents teachers. All of the districts are located in the northern part of Michigan's lower peninsula.[6] The Board would confine comparisons to Cheboygan

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6. The exhibits offered by the Association are flawed by the fact that of the 34 districts in which the Association is the bargaining unit, only 20 have settled. The Association assumed that the settlements in the other districts will be below the Association listing. Thus, the exhibits are of little assistance in determining the rank of the Wolverine School District. It does appear from the districts that the Wolverine salary schedule is low for beginning teachers but high for long service teachers.

County, in which Wolverine is located, and contiguous counties.[7]

The Board's primary contention is that it is in a deficit position (which is fact), hence it does not have funds to pay salary increases to teachers.

The Association asserts that the Board's deficit position was not caused by the teachers. It offered evidence which tends to prove that there was mismanagement by school administrators in past years prior to the time when the Board and school administrators discovered the deficit. The Board has made arrangements with the Michigan Department of Education to repay the deficit over a three-year period. Until the deficit is repaid, the Board avers, it will not be able to pay any salary increase to its teachers.

The Association also points to the rejection of millage by the electorate of the Wolverine Community Schools District, which if enacted would have provided funds sufficient to pay the deficit. The Association criticizes the Board for using 2.5 mills to retire the deficit when on June 14, 1982, the Wolverine electorate voted one mill to fund the deficit. The additional 1.5 mills, the Association asserts, could be used to increase teachers' salaries.

Cheboygan County, as compared with the contiguous counties, has low per capita personal income and low median household income. It is at above the midpoint on transfer payments and social security as a percentage of personal income. The County is just

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7. The contiguous counties are Charlevoix, Emmet, Montmorency, Otsego, and Presque Isle.

below midpoint of the percent of the total population receiving ADC. In every category, the counties are in a less favorable position than the State of Michigan as a whole. Unemployment in the Wolverine School District and Cheboygan County is high as compared with most other parts of the State of Michigan.

The evidence establishes that the Wolverine School District is in a critical financial situation. The representatives of the parties argued over the District's cash flow. The Association representative contends that the Board has treated amortization costs of buses as an asset, which did not give a true picture of cash which the Board has and which could be used to pay a modest increase for teachers.[8] The Board presented evidence to disclose the generally declining local revenues, state revenues, and federal revenues received by the District from 1977-78 to 1982-83.

From the evidence, I conclude that the Wolverine School District electorate -- or a majority thereof -- have little interest in their schools and a quality development program for the children of the District. Evidence was offered to show the failure of a number of millage votes. As a result, the School District operates on "bare bones" of money.

In June, 1982, the electorate defeated extra millage for maintenance and repair of school facilities, an 11th and 12th grade vocational program, an athletic program, a physical education program, a part-time band program, and a part-time home

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8. The Michigan Attorney General ruled in Opinion No. 4673 under date of September 23, 1971, that a board of education may not lawfully operate at a deficit.

economics program. At the same election, the millage needed to continue the basic education program passed by three votes.[9]

In fairness, it must be stated that the millage levied by the Wolverine School District is high as compared to the districts in the contiguous counties, and the property tax base per pupil is low. It should also be noted that class size is 25-30 students, which compares favorably with many school districts which are hard pressed for funds.

The Board also points to the reductions in state aid and the delay in payments thereof.

The three-year program agreed to by the Board and the Department of Education will eliminate the deficit by the end of the 1983-84 school year. It is estimated that at that time the Board will show a surplus of $25,000. The Board projects a decrease in revenues for 1983-84 as compared with 1982-83. Board Exhibit 28 discloses a decrease from $745,004 in 1982-83 to $724,521 in 1983-84.[10]

One reason for the Board's critical financial condition is the layoff of three teachers contrary to the terms of the collective bargaining contract. The Board was required to recall the teachers, pay them back pay, and return them for the 1981-82 school year.[11] Subsequently, the teachers were laid off

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9. Some of the extracurricular programs have been carried out through the volunteer efforts of teachers and parents. The Association contends that the teachers have done more volunteer work than parents.

10. Both figures are estimates.

11. The representatives of the parties stated that the Board

consistent with the provisions of the contract. The Association asserts this mistake was not the teachers' fault.

The Board has laid off custodians and reduced bus runs and delayed the purchase of supplies in an effort to save funds.

The evidence presented by both the Board and the Association supports their respective positions.

The School District is in a serious financial condition, although it will in the next two years with competent management (which the School District now appears to have) regain its solvency. In the meantime, expenses must be controlled strictly. On the other hand, teachers throughout the State of Michigan have generally received some annual increases. The salaries of the Wolverine teachers have not kept pace with the cost of living.

How are the two pole positions to be resolved?

The Association asserts -- in my opinion, correctly -- that the teachers should not be required to subsidize the taxpayers.

This philosophy was well expressed by Professors Russell A. Smith of the University of Michigan, Charles C. Killingsworth of Michigan State University, and Ronald W. Haughton of Wayne State University in the opinion issued by them on February 27, 1968, in the Detroit Police Officers Association and City of Detroit[12] arbitration. The opinion quoted "Judge Leonard."

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sought legal advice from a lawyer, or lawyers, not knowledgeable in labor law, hence unaware of the fact that some provisions of a collective bargaining agreement remain in effect after the contract expires.

12. Judge Leonard is not otherwise identified. Presumably, he is the late Judge Donald Leonard who was a Judge of the Recorder's Court of Detroit and onetime Superintendent of the Michigan State Police.

In the long run, how much weight should be given the "ability to pay" factor in wage determination for municipal employees? Judge Leonard provided us with an answer from his own extensive background and thinking, as follows:

> "Generally speaking, favorable consideration for pay increases for municipal employees is often rejected by the city on the grounds that it is unable to pay. This is rather an illogical position to assume. A city would not suggest to a private contractor that they reduce the pay to employees performing work under the contract because the city is not in a position to pay the higher rate, nor would the city suggest that discounts be provided for commodities to be purchased by the city on the ground that they could not meet a fairly-established price. Neither should the temporary financial condition of the city be a controlling factor, as there are means of leveling off obligations, or providing for additional revenue. In the last analysis, the city should be a fair and model employer. This, of course, does not suggest that city employees be paid substantially more than outside employees performing the same general type of service, as this would be an unjustified gratuity that the taxpayer should not be expected to provide."[13]

Another quote from the opinion is applicable to the Wolverine School District electorate:

> Nevertheless, it is clear from the record before us that the City had the legal authority to raise substantially more money from property taxes than it elected to raise, and that this added revenue would have been adequate to finance a significant salary increase at least for police officers. In other words, the City's alleged inability to pay increased police salaries is in some measure a self-imposed inability.[14]

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13. The opinion is reprinted in Smith, Edwards, and Clark, Labor Relations Law in the Public Sector 844, 851 (Bobbs-Merrill Co 1974).

14. Id. at 846.

I agree with the philosophy enunciated by Judge Leonard. Balancing the financial condition of the School District against the legitimate financial interest of the teachers requires a value judgment. It requires compromise between that which the teachers would like to have and that which the Board believes it is able to pay. To the extent that the teachers receive increased income, the Board will, of necessity, find it necessary to economize in other areas. I recognize that this, in itself, may disadvantage the education program. On the other hand, salaries which are too low damage employee morale with a concomitant reduction in productivity.[15]

Unfortunately, the Association did not accept the Board proposal of July 26, 1981, and complete the contract at that time.[16]

1981-82 is over. To require the Board to make a retroactive payment would make it difficult, if not impossible, for the Board to effect continuing savings to cover that amount. Any savings for salary increases should have been effected during the 1981-82 year. I recommend, therefore, that no additional payments be made for 1981-82. I do not recall, and do not find in my notes, information as to whether teachers in 1981-82 received their step increases. If they received step increases, my recommendation is that there be no effort to take any funds from the teachers. If they did not receive their step increases, I recommend that the

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15. No evidence was offered on the morale of the teachers. I have the impression from the fact that they are willing to do volunteer work that they are meeting their responsibilities to the students.

16. Had the contract not been completed, it is, of course, possible that the Board would have refused to ratify the agreed to increase on June 7, 1982.

step increases be frozen for 1981-82.

In my opinion, the proposal made by the Association on September 22, 1982, that the teachers receive COLA during 1982-83 and 1983-84 with a minimum and a maximum is an equitable suggestion. In the interest of assisting the Board and the citizens of the School District to solve the District's financial condition, I recommend that the minimum COLA be 5% and the maximum COLA be 8% for each of the two years. Teachers should, in my opinion, receive their step increase which, as the Association noted, is based on experience and long service.

I recognize that my recommendation will not please either the members of the Board or the teachers. In the interest of reaching a solution in this difficult case, I urge them, both the Association and the Board, to accept my proposal. Hopefully in 1984-85, the Board will recognize the sacrifice made by the teachers in 1981-84.

BINDING ARBITRATION

Section 1.6 D.3.f of the 1979-81 collective bargaining contract provides:

> Level 6
>
> If the Association is not satisfied with the disposition of the grievance or if no disposition has been made within the period above provided, the grievance may be submitted to arbitration before an impartial arbitrator. If the parties cannot agree as to the arbitrator within five (5) calendar days from the notification date that arbitration will be pursued, he shall be selected by the American Arbitration Association, in accord with its rules which shall likewise govern the arbitration proceeding. The arbitrator shall have

> no power to alter, add to, or subtract from the terms of this agreement.

The Board proposes to add at the end of the foregoing, "The arbitrator's decision shall be advisory only and not binding on the Board."

The Board representative asserted that during the term of the contract and for many years prior thereto, the Board was of the opinion that the foregoing contract language provided for advisory, not binding, arbitration. According to the Board representative, a former superintendent of schools told the Board that when the contract provision was agreed to some years ago, they had not agreed to binding arbitration.

The above quoted provision does not affirmatively state that an award in a grievance arbitration case is binding. Reference to the American Arbitration Association rules could logically lead one to the opinion that arbitration is binding. In any event, the language should be clarified.

Since the National War Labor Board promoted grievance arbitration during World War II, arbitration has become a procedure to resolve issues which arise during the term of a collective bargaining agreement -- a procedure which has been accepted by both management and labor. Nearly all private sector contracts provide for binding arbitration. There has been increasing acceptability of binding arbitration in the public sector.[17]

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17. Mr. Bishop, Board representative, stated that currently 86% of public sector contracts include binding arbitration. Because of the time limits in issuing my report and recommendations, I have not checked Mr. Bishop's statement; but from my experience, I am sure it is correct.

Binding arbitration is a "civilized" method for resolving disagreements over the interpretation and application of a collective bargaining contract. The alternatives are litigation or, where legal, a strike. Neither of these alternatives is as viable as binding arbitration.

I note the evidence that all the other school districts where the teachers are represented by the Association have binding arbitration.

I recommend that the Board and Association rewrite the Level 6 clause of the contract to make it clear that the subsection provides for binding arbitration of grievances.

ASSOCIATION DUES

Section 1.5 of the 1979-81 contract provides for an agency shop. Subsection B of Section 1.5 includes the following:

> B. Any teacher who is not a member of the Association in good standing or who does not make application for membership within the thirty (30) days from the date of commencement of assigned duties or ratification of this Agreement, whichever is later, shall, as a condition of employment pay service fee to:
>
> 1. The American Cancer Society or
> 2. Heart Foundation
> 3. Scholarship Fund
> 4. Any other I.R.S. recognized Charity

The Association proposes to remove the provision. The Association proposes that the service fee be paid to the Association.

The Board representative pointed out that the Association's proposed change was not raised until after the Board of Education accepted 25 of the articles on which there had been tentative agreement and rejected fifteen of the articles on which there had

been tentative agreement. Both the Association and Board representatives spent a considerable amount of time arguing the merits and demerits of this Board action. I am not concerned with it. My responsibility is to recommend to the Board and the Association contract provisions for the ten issues which, after receiving evidence and argument, are, in my opinion, advantageous for both parties and the Wolverine teachers.

The Supreme Court of the United States has authorized the agency shop in the public sector.[18]

The Association representatives stated that of the 34 bargaining units, 26 have the agency shop. Of the 26 units, two allow the fee to be paid to charity; the others require that it be paid to the Association.

In my opinion, based on over four decades in labor law and labor relations, every contract in the private and public sectors should provide for an agency shop, i.e., every employee in a bargaining unit should be required to pay the cost of collective bargaining and administration of the contract.

There should be no requirement that an employee join a union. Indeed, under nearly all -- if not all -- collective bargaining relationships, such a contract would be illegal.[19] However, when a majority of the employees in a bargaining unit select a labor organization as the employees' exclusive representative, the labor

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18. Abood v Detroit Bd of Educ, 431 US 209, 52 L Ed 2d 261, 97 S Ct 1782, 95 LRRM 2411 (1977).

19. Even in the private sector under a union shop agreement, consistent with the National Labor Relations Act, an employee is not required to join a union. His only obligation is to tender his dues.

organization is required to represent all employees in the bargaining unit whether they belong, or do not belong, to the labor organization. Thus, everyone should pay for the service. There is no difference between paying for this service than for the other service or product received by a customer, e.g., air transportation, electricity, water, rubbish pickup.

I am opposed to the concept that an employee should not be required to pay a service fee to a labor organization because of religious objections. There is nothing religious about union representation of employees in a bargaining unit. I recognize, however, that Congress has made that exception a policy in the private sector.[20]

In view of the Congressional policy in the private sector, the Association and Board may wish to include such exception in Section 1.5 of the contract.

This matter appears to be of minimal importance at the Wolverine School District, as, the Association representative advised me, all teachers are members of the Association.

I recommend that subsection B of Section 1.5 of the contract be rewritten to provide for an agency shop, except that the Board and Association should discuss the advisability of including a religious objection provision consistent with that enacted by Congress in the Labor-Management Relations Act.

TEACHER EVALUATION

The Association proposed to add language to Section 2.6 of

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20. 29 USC 169; PL 96-593; 94 Stat 3452, enacted December 24, 1980.

the 1979-81 contract, which is entitled TEACHER EVALUATION. I quote subsections C. and D. of Section 2.6 with the material which the Association proposes to add underlined.

> C. The work performance of all teachers shall be evaluated in writing. Probationary teachers shall be evaluated a minimum of three times during the year; no earlier than one month following the teacher's commencement of service, and no later than ninety days prior to the end of the probationary school year. Tenure teachers shall be evaluated at least once every year. Evaluation is an ongoing process. <u>Tenure teachers shall be evaluated at least once every year prior to March 15. Said written evaluation shall be given to the teacher no later than March 17.</u>
>
> D. Each observation shall be made in person for a minimum of thirty consecutive minutes. All monitoring or observation of the work of the teacher shall be conducted openly and with full knowledge of the teacher. The use of eavesdropping, closed circuit television, public address or audio-visual systems and similar surveillance devices unless approved by the teacher involved will be strictly prohibited. <u>Teachers who are to be evaluated shall receive (5) five work days notice, designating the date, time, and place of the evaluation.</u>

Section 2.6 is one of the contract provisions ratified by the Board of Education on June 7, 1982. The Association had accepted the 1979-81 contract language. The Association proposal quoted above was made after the Board ratification. Because of this, the Board avers this is not a negotiable proposal.

The Board is, of course, incorrect in its position that the proposal is not bargainable. However, I question the wisdom of the Association in bringing forward the proposed changes in Section 2.6 at such a late date.

The Association avers that in 1981 several elementary teachers were evaluated on the last day of school when it is not possible to secure a true overview of a teacher's teaching procedures and qualifications.

If teachers were evaluated on the last day of school, the superintendent should direct the evaluating supervisors to change their procedures. As the Section was ratified by the Board of Education and the proposed changes are of relatively minor significance, I recommend that the Association withdraw the proposed amendments to subsections C. and D. of Section 2.6.

PERSONNEL FILES

Subsection B of Section 2.7 of the 1979-81 contract, entitled PERSONNEL FILES AND RECORDS, reads:

"Any material contained in the teacher's personnel file which is more than three years old shall, upon the request of said teacher, be removed."

The Association proposed to change "three years" to "one year."

Section 2.7 is one of the provisions ratified by the Board of Education on June 7, 1982. For that reason the Board representative asserts that the issue is not bargainable.

The Association representative stated that the Association was concerned, because there was "some indication" that information in teachers' personnel files has been shared with parents in the community. The purpose of the proposed revision is to have material removed at an earlier date so that it may not be used for any improper purpose.

As the Board ratified Section 2.7 and as the Association did not make its proposal until after the Board ratification and as the matter is of relatively minor significance, I recommend that the Association withdraw its proposal to change the time element in subsection B of Section 2.7.

CALENDAR

Section 6.2 of the 1979-81 contract contains the school calendar for 1979-80 and 1980-81. 1979-80 consisted of a total of 183 days, during which time the teachers were with their students for 179 full days and eight half days. In 1980-81 the total days were reduced from 183 to 182, with the teachers being with students for 178 full days and eight half days.

The Association proposed for 1981-82 and 1982-83 a total of 181 days, with the teachers having students for 175.5 full days and eleven half days.[21]

The calendar provision proposed by the Association was ratified by the Board of Education.

Following the rejection of fifteen articles, the Association offered a new proposal: A total of 180 days, with the teachers having students 174.5 full days and eleven half days.

The Association avers:

1. If the salary increase is "less than adequate," the teachers are entitled to a "shorter work year."

2. School law requires only 180 days of instruction.

3. The Board currently has teachers leave room for

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21. This would appear to be 175 full days and 12 half days.

approximately three days prior to Christmas when parents on a voluntary basis "can do music programs."[22]

The Association appears to have made its proposal after the ratification turndown more out of pique than on any legitimate basis. I am disturbed that the Association suggests less student contact. Teachers should be interested in affording students as much education as possible.

I recommend that the Association withdraw its proposal and that the Board ratify the contract provision to which its negotiators had agreed.

HIRING, VACANCIES, PROMOTIONS, AND TRANSFERS

Section 2.1 of the 1979-81 contract sets out the procedure for teacher assignments following a request by a teacher for a transfer, and filling vacancies during the school year, both temporary and permanent. Proposals and counterproposals were made during bargaining between May, 1981, and June 23, 1981. At that time, the Association dropped its proposed changes in language and the representatives of the Board and the Association agreed to the 1979-81 language. This provision was rejected by the Board of Education on June 7, 1982. After the rejection, both the Board and the Association proposed new language.

The principal disagreement between the Board and the Association is the Association's desire to delete the word "qualifications" where it appears in the subsections of the contract and

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22. It appears that the parents used one hour per day during the three days for the music program. It is difficult to see how this is a justification for a shorter work year.

insert "certification or minor field of study." The Board would also delete the word "not" in the subsection which provides that temporary vacancies need not be posted.

The Association's principal concern is that under the Board's proposal, a senior staff member could be laid off while a position for which the teacher is certified is held by a less senior employee.

The Board's concern seems to be that Section 2.1 of the 1979-81 contract is contrary to Section 5 of Article 4 of the Teacher Tenure Act [MCLA 38.105; MSA 15.2005], which provides:

"Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified."

This, the Association asserts, would afford "super seniority" to a laid off teacher vis-a-vis a teacher already working, as a teacher on layoff could be returned to work to replace a senior teacher.

After listening to the representatives' presentations, I requested that they send me memoranda and any relevant material they might have bearing on the issue raised by the proposed changes.

I have read the material presented, including the excellent brief submitted by Timothy P. Greeley of Foster, Swift, Collins & Coey, counsel for the Association, and the excellent monograph on "Considerations on Layoff and Recall" by Faith E. Bishop. In addition to the two documents, both parties submitted to me a

number of decisions by the Tenure Commission and a copy of Chester v Harper Woods School District, 87 Mich App 235 (1978).

It is clear from this material that a school board has almost total discretion in determining qualifications of teachers in their relationship to teaching school subjects. It is also clear that a school board has power to contract with a union with respect to layoff and promotion procedures. The court states in Chester, as does the Tenure Commission in opinions presented to me, that unless a school board's action is arbitrary, unreasonable, or in bad faith, the board's decision may not be reversed by the Tenure Commission.

This rationale is consistent with decisions of the Michigan Supreme Court and the Michigan Court of Appeals in noneducation cases. The courts have held that the Public Employment Relations Act prevails over conflicting statutes.[23] The courts have also held that the Public Employment Relations Act prevails over city charters.[24]

I have considered the suggested changes by both parties. I recommend that the parties adopt the 1979-81 contract language as the representatives of the parties tentatively agreed on June 23, 1981.

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23. Detroit Bd of Educ v Parks, 98 Mich App 22 (1980); Central Mich Univ Fac Ass'n v Central Mich Univ, 404 Mich 268 (1978); Nat'l Union of Police Officers Ass'n Local 507M v Bd of Comm of Wayne County, 92 Mich App 70 (1979); Clinton Twp v Contrera, 92 Mich App 297 (1979).

24. Detroit Police Officers Ass'n v City of Detroit, 41 Mich App 723 (1972), reversed in part on other grounds 391 Mich 44 (1974); Pontiac Police Officers Ass'n v City of Pontiac, 397 Mich 674 (1976); and Mt Clemens Fire Fighters Union Local 838 IAFF v City of Mt Clemens, 58 Mich App 635 (1975).

I note the Union's proposal that temporary vacancies be posted. This appears to me to be an unnecessary administrative burden.

If there is any question concerning a teacher's qualifications, the matter may be submitted to binding arbitration. The parties are free to adopt an expedited procedure so that a decision is secured in a short time, if this becomes necessary.

TEACHER QUALIFICATIONS AND ASSIGNMENTS

Section 2.5 of the 1979-81 contract is entitled TEACHER QUALIFICATIONS AND ASSIGNMENTS.

Subsection E of Section 2.5 reads:

> E. All returning teachers shall be given written notice of their tentative assignments for the forthcoming year no later than the last day of school. In the event that changes in such assignments are proposed, all teachers affected shall be notified promptly and consulted. In no event will changes in teacher's schedules be made later than the 15th day of August preceding the commencement of the school year, unless an emergency situation requires same, and the Association shall be notified in each instance.

On June 23, 1981, the Board proposed to change subsection E to read:

> All returning teachers shall be given written notice of their tentative assignments for the forthcoming year no later than the last day of school whenever possible. In the event that changes in such assignments are proposed, all teachers affected shall be so notified.

On July 31, 1981, the Board dropped its proposal. The representatives of the parties agreed to the 1979-81 language. On June 7, 1982, the Board refused to ratify Section 2.5.

After the rejection of the 1979-81 language, the Board

proposed a change in subsection C of Section 2.5. Subsection C of Section 2.5 of the 1979-81 contract reads:

> C. Since pupils are entitled to be taught by teachers who are working within their areas of certification, teachers shall not be assigned, except for good cause and with the consent of the teacher, outside the scope of their teaching certification or their minor field of study.

The Board proposed that subsection C read as follows:

> Secondary teachers shall not be assigned, except for good cause and with the consent of the teacher, outside the scope of their major or minor field of study. Elementary teachers teaching in the regular Elementary classroom setting shall not be assigned outside the scope of the certification.

The Board further proposed a change in subsection D of Section 2.5. Subsection D of Section 2.5 of the 1979-81 contract reads:

> D. Any assignments in addition to normal teaching schedules during the regular school year, including adult education courses, driver education, extra-curricular duties enumerated in Appendix B-1, shall be with the consent of the teacher. Preference in making such assignments should be given on seniority basis to degree teachers regularly employed in the district, if properly certified and qualified. If no member of the bargaining unit elects to take the assignment, the Board can offer the assignment to someone outside the bargaining unit.

The Board proposed to change the last sentence of subsection D and add a subsequent sentence, as follows:

> If no member of the bargaining unit elects to take the assignment the least senior teacher who is certified and qualified shall be required to fill the assignment. If no teacher in the bargaining unit is certified and qualified to fill the position then the Board may offer the assignment to someone outside the bargaining unit.

On January 21, 1982, the Board proposed a memorandum of understanding as follows: "Any teacher presently employed in a position will continue to be qualified for that position regardless of any changes in a job description." This proposal was withdrawn on February 8, 1982, when the Board withdrew its proposals for a change in contract language.

On September 22, 1982, the Association proposed that the language proposed by the Board on January 21, 1982, be included in the contract.

Neither the Board nor the Association representative offered any persuasive evidence or argument to support a change in the current language. The changes suggested by the Board appear to be for the same reason that the Board suggested a change in Section 2.1 of the contract.

The Association notes that the Board's last proposal is the same proposal which had previously been withdrawn.[25]

I recommend that the 1979-81 contract language of Section 2.5 be retained.

REDUCTION IN PERSONNEL, SENIORITY AND RECALL

Section 2.8 of the 1979-81 contract reads:

REDUCTIONS IN PERSONNEL,
SENIORITY AND RECALL

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25. There was considerable argument by the representatives of the parties as to whether parents or teachers had spent more time in operating a sports program without compensation. This argument is a non sequitur. I trust that both teachers and parents will cooperate in providing activities for the Wolverine School District students which will assist in their development.

A. Layoffs shall be defined as reduction in work force due to reasons such as declining student enrollment or shortage of revenues.

B. In the event of or need to lay off, the Board will not lay off teachers having valid contracts during the school year. Teachers who will be laid off for the following school year will receive notice 30 days prior to the end of the current school year.

C. Layoffs, when necessitated, shall be effectuated in the following manner:

   1. The Board may consult with the Association as to programs for the following year. The list of district staff positions shall be sent to the Association prior to layoffs.

D. Laid-off teachers shall be recalled to the first vacancy for which they are certified in reverse order of layoff.

E. A laid-off teacher shall be considered laid-off until she/he is reinstated in the district. Refusal of an offer from the Board of a position for which the laid-off teacher is certified, or failure to respond within thirty (30) days of the receipt of a written offer of a position made by the Board shall be cause for termination.

F. Notifications of a recall shall be in writing with a copy to the Association. The notification shall be sent by certified mail to the teacher's last known address. It shall be the responsibility of each teacher to notify the Board of any change in address.

G. Laid-off teachers shall continue to receive full fringe benefits throughout the summer months.

H. A laid-off teacher may continue his/her insurance benefits by paying monthly normal per subscriber group rate premium for such benefits to the Board as determined by insurance carrier.

I. During a period of impending layoffs, the Board agrees to grant all requests for voluntary leave of absence to teachers who make such requests.

The Board would rewrite Section 2.8 to read:

REDUCTIONS IN PERSONNEL, SENIORITY AND RECALL

A. Layoffs shall be defined as reduction in work force due to reasons such as declining student enrollment or shortage of revenues.

B. Layoffs when necessitated shall be effectuated in the following manner:

(1) The Board shall notify the Association they are considering a staff reduction

(2) Teachers who are to be laid-off shall receive a minimum of ten (10) calendar day's notice.

C. Laid-off teachers shall be recalled to the first vacancy for which they are certified and qualified in reverse order of layoff.

D. A laid-off teacher shall be considered laid off until she/he is reinstated in the district. Refusal of an offer from the Board of a position for which the laid-off teacher is certified and qualified, or failure to respond within thirty (30) days of the receipt of a written offer of a position made by the Board shall be cause for termination.

E. Notifications of a recall shall be in writing with a copy to the Association. The notification shall be sent by certified mail to the teacher's last known address. It shall be the responsibility of each teacher to notify the Board of any change in address.

F. Teachers who have completed the academic year prior to layoff shall continue to receive their scheduled fringe benefits during the months of June, July and August.

G. A laid-off teacher may continue his/her

insurance benefits by paying monthly normal per subscriber group rate premium for such benefits to the Board as determined by insurance carrier.

H. During a period of impending layoffs, the Board agrees to grant all requests for voluntary leave of absence to teachers who make such requests.

The Board's concern arises, in part, from the unfortunate experience, discussed above, in which three teachers were laid off contrary to the contract, hence it was necessary for the Board to reinstate them with back pay and continue them for the remainder of the school year. The Board further asserts that its financial situation is so precarious that it should be able to lay off teachers if necessary at any time during the school year. The Board also argues that the year-end layoff provisions, which are common in teachers' collective bargaining contracts, were adopted before school districts were short of funds, now generally the case in the State of Michigan.

I asked why the Board could not "pink slip" teachers under the 30-day provision and then recall them in the event the Board found it had sufficient funds to continue them on the payroll. The Board representative stated that to do so made it possible for the pink-slipped teacher to apply for and receive unemployment compensation. The Board representative also answered that managers of school districts do not know by the end of the school year how much they will receive in state and federal aid.

The Association argues that teachers should, in fairness to them, be retained for a full school year. I agree.

It is necessary to balance the interests of the Board and

the interests of the teachers. While a school board often may not know with certainty before the end of the school year the funds it will receive for the succeeding school year, intelligent school administrators can make an informed estimate. If the administrators believe it necessary to pink slip teachers, this should be done. If the teacher is not recalled, the teacher is entitled to unemployment compensation. If the teacher is recalled, but has received unemployment compensation, it is, in my opinion, a small price to pay for fairness to the teachers. Indeed, the teachers, if recalled, should return any unemployment compensation received to the State of Michigan. On balance, I find the Association position the more reasonable.

Apparently (although the Association representative did not make a point of it), the Board would eliminate subsection C of Section 2.8.

I see no objections to it. Competent administrators should consult the employee representatives prior to layoff.

A comparison of the language in the 1979-81 contract and the Board proposal reveals that the Board would add the words "and qualified" after the word "certified" in subsection D (subsection E in the 1979-81 contract). Consistent with my discussion under "Hiring, Vacancies, Promotions, and Transfers," I see no reason to insert the proposed change.

A comparison of the contract language in the 1979-81 contract and the Board proposal discloses that the Board proposes a revised subsection F (subsection G in the 1979-81 contract), with subsection H becoming subsection G.

As I am of the opinion that the layoff provision proposed by the Board should not be adopted, I recommend that the changes proposed by the Board not be included in the contract.

For the reasons discussed above, I recommend that Section 2.8 of the 1979-81 contract be continued in the new contract.

TEACHING HOURS

Subsection B of Section 3.5 of the 1979-81 contract reads:

> B. The normal weekly teaching load in the junior and senior high schools will be 25 teaching periods and five unassigned preparation periods. Without his/her consent, no teacher shall be assigned to more than 25 hours of pupil contacts per week. Assignment to a supervised study period shall be considered a teaching period for purposes of this Article. The normal teaching load in the elementary schools shall not exceed 25 hours of pupil contact per week.

The Board proposes to amend subsection B to read as follows (the proposed changes are underlined):

> The normal weekly teaching load in the junior and senior high schools will be <u>30</u> teaching periods and five unassigned preparation periods <u>at the end of the students' day</u>. Without his/her consent, no <u>junior or senior high school</u> teacher shall be assigned to more than 25 hours of pupil contacts per week. Assignment to a supervised study period shall be considered a teaching period for purposes of this article. The normal teaching load in the elementary schools shall not exceed <u>27½</u> hours of pupil contact per week.

Originally, the Board proposed no change in Section 3.5, except the deletion of the last sentence in subsection C as being redundant. On July 31, 1981, the representatives of the parties reached tentative agreement to continue the 1979-81 contract language. On January 21, 1982, the Board withdrew the tentative

agreement and proposed a change similar to that quoted above. The Association rejected the proposed change. The Board at its June 7, 1982, meeting did not adopt continuation of the language of the 1979-81 contract.

The Board's principal interest is providing six periods in the high school rather than the five periods currently in effect. Under the proposal, it would be necessary for the teachers -- at least, in most instances -- to have their preparation periods at the end of the school day.

The Association points out that increasing the elementary teachers' student contact period from 25 hours per week to 27½ hours per week results in an increase of 87.5 hours for each teacher based on a 35-week school year.

The Association asserts that the Board proposal conflicts with Section 3.4 of the 1979-81 contract, entitled TEACHING FACILITIES. I have read and reread Section 3.4; I find no inconsistency between the section and the Board proposal for a revision of Section 3.5.

As discussed above, the evidence establishes that the Board is in a difficult financial position. I am persuaded by the evidence and the arguments of the Board representative that the Board proposal may afford some relief to the Board's financial situation, although I am also persuaded that it is not advantageous to the students as it will cut down the hours of each class period. I recommend, however, that the Board proposal be adopted for the 1983-84 school year, at which time the Board will have, or should have, resolved its financial difficulties, at which

time the parties can give consideration to returning to the 1979-81 contract procedure.

There was inconclusive discussion by the representatives of the parties as to whether the school day would be changed by reason of the Board's proposal. This is one of the subjects discussed in the Association brief filed with the Michigan Employment Relations Commission in Case No. C81 K-425, which involves a charge filed by the Association against the Board and the issuance of a complaint on the charge by MERC. I have read the brief. Whether or not the Board did place its proposal in effect without bargaining, thereby committing an unfair labor practice under the Public Employment Relations Act, is not my province in this case. I reach the conclusion from the discussion by the representatives of the parties at the fact finding hearing that the Board's proposal to increase the number of classroom periods will not change the length of the teaching day.[26]

COMMENT

I trust that the Board and the Association, whatever their prior problems, will now be able to resolve the issues separating them. This is in the interest of the "customers" whom both the Board and the teachers have the obligation to serve, i.e., the students of the Wolverine School District.

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26. Other charges were discussed in the Association brief to MERC. The charges are not within my jurisdiction as fact finder.

RECOMMENDATIONS

1. SALARY SCHEDULE: The School District and the Association should agree on wage increases for the school year 1982-83 and the school year 1983-84 in an amount equal to the cost of living (using the same procedures previously discussed by the representatives of the parties) for each of the two school years with a minimum of 5% and a maximum of 8% for each of the two years. In addition, teachers should receive their step increases as provided in the 1979-81 contract. No increases should be placed in effect retroactively for the school year 1981-82.

2. BINDING ARBITRATION: The arbitration provision of the collective bargaining contract between the Board and the Association should provide for binding arbitration. The Board and Association should rewrite the language of Section 1.6 D.3.f of the 1979-81 collective bargaining contract to make it clear that the contract provision provides for binding arbitration. The rewritten provision should be included in the contract to be effective as of September 1, 1981.

3. ASSOCIATION DUES: Subsection B of Section 1.5 of the 1979-81 collective bargaining contract should be rewritten to provide for an agency shop under which any teacher who does not become a member of the Association shall pay to the Association the cost of collective bargaining and the administration of the collective bargaining contract. The Board and Association representatives should discuss the advisability of including a

religious objection provision consistent with that enacted by Congress in the Labor-Management Relations Act.

4. TEACHER EVALUATION: The Association should withdraw the proposed revisions of subsections C and D of Section 2.6 of the 1979-81 collective bargaining contract.

5. PERSONNEL FILES: The Association should withdraw its proposed revision of subsection B of Section 2.7 of the 1979-81 contract to substitute "one year" for "three years."

6. CALENDAR: The Association should withdraw its proposed revision of Section 6.2 of the 1979-81 collective bargaining contract, and the Board should ratify the contract provision to which its negotiators and the negotiators for the Association have previously agreed.

7. HIRING, VACANCIES, PROMOTIONS, AND TRANSFERS: The parties should retain the language of Section 2.1 of the 1979-81 collective bargaining contract in the contract which becomes effective as of September 1, 1981.

8. TEACHER QUALIFICATIONS AND ASSIGNMENTS: The proposals made by the Board and Association to revise Section 2.5 of the 1979-81 collective bargaining contract should be withdrawn, and Section 2.5 of the 1979-81 contract should be included in the contract which becomes effective as of September 1, 1981.

9. REDUCTION IN PERSONNEL, SENIORITY AND RECALL: Section 2.8 of the 1979-81 collective bargaining contract should be continued in the collective bargaining contract to become effective as of September 1, 1981.

10. TEACHING HOURS: The Board's proposal to revise

Section 3.5 of the 1979-81 collective bargaining contract should be adopted for the 1983-84 school year.

Robert G. Howlett, Fact Finder

Issued at Grand Rapids,
Michigan
January 21, 1983