STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED, Complainant, vs. MADISON METROPOLITAN SCHOOL DISTRICT 1/ CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE: THE BOARD OF EDUCATION OF MADISON METROPOLITAN SCHOOL DISTRICT CITY OF MADISON, ET AL., Respondent.	Case XLII No. 19678 MP-524 Decision No. 14038-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Byron Yaffe having, on August 4, 1976, issued his findings of fact, conclusions of law and order, with accompanying memorandum, in the above-entitled matter, wherein the above-named respondent was found to have committed, and was committing, a prohibited practice within the meaning of section 111.70(3)(a)5 of the Municipal Employment Relations Act by refusing to comply with the terms of an arbitration award, and wherein the respondent was ordered to cease and desist therefrom and to take certain affirmative action with respect thereto; and the respondent having timely filed a petition for review of the examiner's decision pursuant to section 111.07(5) of the Wisconsin Statutes; and thereafter the complainant and respondent having filed briefs in the matter; and the commission having reviewed the entire record in the matter and being satisfied that the findings of fact, conclusions of law and order issued by the examiner should be affirmed;

NOW, THEREFORE, it is

ORDERED

That pursuant to section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby adopts the examiner's findings of fact, conclusions of law and order, issued in the above-entitled matter as its findings of fact, conclusions of law and order, and, therefore, the respondent shall notify the Wisconsin Employment

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1/ The commission has changed the caption of this proceeding to reflect a change in the name of the respondent district.

Relations Commission within ten (10) days of the issuance of this order as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of April, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

MADISON METROPOLITAN SCHOOL DISTRICT, XLII, Decision No. 14038-B

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its petition for review, the respondent alleges that the examiner incorrectly applied the law with regard to the enforceability of the arbitration award. Its argument in this regard is twofold:

1. That the examiner, in applying the standards for review articulated by Judge Aldisert in Honold Manufacturing Company, vs. Fletcher, 405 F. 2d 1123, 70 LRRM 2368, 2371 (3d Cir. 1969), ignored a more relevant statement of the law as it applies to the facts in this case, that being the statement of the law set out in Torrington Company vs. Metal Products Workers Union Local 1645, UAW, 362 F. 2d 677, 62 LRRM 2495 (2d Cir. 1966); and

2. That the examiner incorrectly applied the standard for review articulated in the Honold case.

In its brief in support of its petition for review, the respondent contends that: (1) the arbitrator's award does not draw its essence from the agreement; (2) the examiner adopted an inappropriate standard for review and (3) the arbitration award cannot be upheld if the standard for review is correctly applied to the facts in this case.

The complainant, in its brief in support of the examiner's determination, argues that: (1) the examiner properly applied the law with regard to the review of an arbitration award; (2) the respondent's petition for review is frivolous and wholly without merit; (3) the respondent should be required to pay the complainant's attorneys fees because of its unjustified refusal to comply with the terms of the award.

DISCUSSION:

In reviewing the record in this case, the commission has considered the effect of a recent Wisconsin Supreme Court opinion in this area of the law, that being the case of WERC vs. City of Neenah, 75 Wis. 2d 602 (1977). In that case the court observed, at pp. 609-610:

> "While sec. 111.07, Stats., confers upon the court the power to modify or set aside orders of the WERC, a necessary question remains: What is the appropriate standard of review a court shall use in determining whether to modify or set aside a WERC order. The standard of review should be dependent on the nature of the WERC's order. In this case the WERC's order enforced an arbitrator's award. The WERC does not have the power to review arbitration awards. Sec. 298.09 provides for court review of arbitration awards. The city did not seek such review. However, the WERC does have the statutory authority to enforce the terms of a labor arbitration award where one party to an agreement to arbitrate has refused to abide by an award. Secs. 111.70(4)(a) and 111.07(4). The standards for court review are set out in sec. 298.10(1). WERC determined that the arbitrator had not violated any of those standards. In reviewing the WERC's order, the circuit court was, in essence, reviewing the award of an arbitrator and must follow the statutory standards for court review of arbitration awards. If the

standards of sec. 298.10 and 298.11 were not violated by the arbitrator's award, the circuit court should not have set it aside. . . ."

This language is taken to mean that the standard for court review of a commission order enforcing an arbitrator's award which is governed by ch. 298, Stats. 2/ is that set out in sec. 298.10(1) Stats., rather than the usual standard for review of the orders of an administrative agency and not judicial disapproval of the commission's practice of applying the standards for review set out in sec. 298.10(1) in determining whether it will enforce a particular arbitration award. Otherwise the commission would find itself in the unenviable position of being required to enforce arbitration awards which were: (1) procured by corruption, fraud, or undue means; (2) the result of evident partiality or corruption; (3) based on improper procedures or (4) in excess of the arbitrator's power or imperfectly rendered.

The commission's practice in applying the standards set out in sec. 298.10(1) is based on its assumption that awards which do not meet those minimum standards would not be enforced by the courts regardless of whether common law, federal labor law, or the provisions of sec. 298.10(1) applied to a particular case. Consequently we have in this case again applied the standards set out in sec. 298.10(1) as did the examiner.

We agree with the examiner that the thrust of the respondent's argument is that the arbitrator exceeded his lawful authority. In the terminology of sec. 298.10(1)(d), the contention is essentially that he "exceeded his power." Furthermore, we agree with the examiner that said standard is consistent with the standards applied by the federal courts in reviewing arbitration decisions under sec. 301 of the Labor Management Relations Act and articulated by Judge Aldisert in the Honold case. However, it might be observed that, inasmuch as this case arises under sec. 111.70(3)(a)4 Stats., Wisconsin law rather than federal labor law ultimately governs this case. Consequently, the outcome of this case is in no way dependent upon reconciling the difference, if any, between the two courts of appeal cases referred to in respondent's argument. 3/

2/ It should be noted that in reaching the conclusion that it did, in Neenah, the court failed to note the fact that since the arbitrator in that case was appointed section 111.70(4)(c)2 has been added to the statutes, and based its reasoning on section 111.10 of the Wisconsin Statutes. The latter section, unlike section 111.70(4)(c)2, specifically provides that arbitration "proceedings" shall be governed by ch. 298 when the commission appoints the arbitrator. The court in footnote 3 assumed without deciding that the word "proceedings" used in section 111.10 includes the provisions found in ch. 298 governing court review of arbitration awards generally.

3/ Because the commission is called upon to enforce arbitration awards which are governed by federal law, as well as Wisconsin law (See Tecumseh Products Company vs. WERB, 23 Wis. 2d 118, 126 N.W. 2d 520, 1964), it sees no valid reason to apply a standard for enforcement of awards under sec. 111.70(3)(a)5, which differs in any material way from the standard applied by the commission and the courts in cases arising in interstate commerce unless the law compels such a different standard.

The essence of the respondent's position is that Arbitrator Raskin added a new term to the labor agreement when he concluded that the contract prohibited the respondent from assigning bus supervision duty to the teachers at the Cherokee Middle School notwithstanding his conclusion that the contract language was silent on the issue of bus duty. This interpretation of Arbitrator Raskin's award, in the respondent's view, brings it within the facts in the Torrington case and makes the award unenforceable under the standard applied in that case.

Without evaluating the merits of the Torrington case on the facts presented therein, it is clear that the respondent's contention that the facts in this case are similar requires an unwarranted reading of the award of Arbitrator Raskin. A fair reading of Arbitrator Raskin's award indicates that it is based on the following rationale:

1. The practice of assigning bus loading supervision to teachers was not a District-wide practice, but was unilaterally implemented by the principal at the Cherokee Middle School.

2. The agreement contained no express provision which specifically covers the assignment of that duty to teachers. 4/

3. The agreement contained reference to a number of similar, student supervision type activities which are by agreement, voluntary, and provide for additional compensation.

4. In addition, the agreement provides for the performance of other non-teaching activities which are performed on a voluntary compensated basis.

5. The presence of these latter two types of provisions in the agreement, lead to the conclusion that the parties recognized that certain work of a non-teaching nature has to be performed from time to time by teachers or others, and that the terms for the performance of such work by teachers, were negotiated and set out in the agreement.

6. That, therefore, by agreeing in the management rights clause, that the respondent had the right to make "work assignments", the parties did not agree that it had the right to unilaterally assign work of the type in question, and that had the respondent desired the right to assign bus loading supervision to teachers, it was obligated to negotiate the "rules" of such an assignment, under subparagraph c of the management rights provision.

It is clear that the award in question draws its essence from the provisions of the agreement. Unlike the arbitration award in Torrington, the arbitrator here did not conclude that the employer was obligated to provide a fringe benefit or maintain a working condition which had been (as the court found) intentionally excluded from the agreement. Arbitrator Raskin found that the agreement contained an implied limitation on the assignment of the type of work in question, and that the

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4/ The respondent, in its arguments places considerable weight on this finding of the arbitrator. It is clear, however, that if such a provision were contained in the agreement, there probably would have been no need for arbitration of the dispute. The arbitrator was therefore compelled to, and did, look to other provisions of the agreement.

respondent had an obligation under subparagraph c of the management rights provision to negotiate with regard to the "rules" for the assignment of that work before making such an assignment to teachers.

The respondent argues that, even if the arbitrator based his award on an interpretation of the agreement, the arbitrator's construction of that agreement does not meet the rational standard test the examiner sought to follow. Respondent points to language in the agreement reserving to the board the right to make assignments; it notes that no language in the agreement restricts that right in respect to bus duty; and it states that there was a long period of inaction by the union between the time bus duty assignments were being made and the time it first filed a grievance. The arbitrator, however, construed the assignment of bus duty as coming within the language in the management rights clause which limits management's rights, viz., that management may establish and "provide supervision under agreed upon rules for such programs of an extra-curricular nature . . . ." (Emphasis added.) Such construction of the agreement does not lack the minimal rationality necessary for enforcement, and the commission could refuse enforcement of this award only by substituting its interpretation for that of the arbitrator.

While the commission is satisfied that the respondent's claim that the examiner improperly applied the law is without merit, we are not persuaded that its affirmative defense or its arguments in support of its petition for review are frivolous as contended by the complainant. 5/ Because of the acknowledged absence of any specific provision contained in the agreement limiting the respondent in the assignment of such work, and in view of the specific reference to management's right to "assign work" found in the management rights clause, it was not frivolous of the respondent to argue that the arbitrator based his decision on the terms of the agreement or some other consideration. We are persuaded, as was the examiner, that the award was based on the arbitrator's interpretation of the agreement, and that said interpretation could, in the words of Judge Aldisert, "In a rational way, be derrived from the agreement viewed in the light of its language, its context, and any other inditia of the parties' intention."

Because the commission is satisfied on the record in this case 6/ that the respondent's refusal to abide by the award in question is not

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5/ The respondent has a right to file a petition for review of an examiner's decision if it is dissatisfied with the decision of the examiner. Section 111.07(5), Wisconsin Statutes. In its petition for review, the respondent focused its arguments on the examiner's analysis of the law.

6/ The complainant asks the commission to take notice of two other cases pending before the commission wherein the respondent allegedly refused to abide by the terms of an arbitration award without justification. This argument and request for attorneys fees was raised for the first time in the complainant's brief in response to the respondent's brief in support of its petition for review. Although the commission is satisfied that it could consider the record in other cases pending before it, and could order payment of attorney's fees, it could not in fairness do so in this case without advance notice to the respondent with opportunity to be heard.

taken in bad faith or based upon legal arguments which are insubstantial and without justification, 7/ that it would be inappropriate to order respondent be directed to pay the complainant's attorney's fees and other costs of litigation incurred in this matter.

Based on the above and foregoing, and on the record as a whole, the commission has affirmed the examiner's Findings of Fact, Conclusions of Law and Order.

Dated at Madison, Wisconsin this 5th day of April, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

7/ See for example, Olin Corporation vs. Chemical Workers, 89 LRRM 2378 (DC Ill. 1975), and District 50, UMW vs. Bowman Transportation, Inc., 421 F. 2d 934, 73 LRRM 2317 (5th Cir. 1970). But see Local 149 UAW vs. American Brake Shoe Company 298 F. 2d 212, 49 LRRM 2480 (4th Cir. 1962).