STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS EDUCATION ASSOCIATION,	:	
Complainant,	:	Case LXXI No. 20447 MP-616
vs.	:	Decision No. 14614-A
MILWAUKEE BOARD OF SCHOOL DIRECTORS,	:	
Respondent.	:	

Appearances:
Perry and First, S.C., Attorneys at Law, by Mr. Richard Perry, on behalf of complainant.
Mr. James B. Brennan, City Attorney of Milwaukee, by Mr. Nicholas M. Sigel, Principal Assistant City Attorney, on behalf of respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 4, 1976, the above-named complainant filed with the commission a complaint alleging that the above-named respondent had committed, and was committing, a prohibited practice in violation of sec. 111.70 of the Municipal Employment Relations Act. By order dated May 13, 1976, the commission appointed Marshall L. Gratz, a member of its staff, to conduct a hearing on the complaint and to consolidate the matter for hearing with Milwaukee Board of School Directors, Case LXIX, No. 20276, FF-670. 1/ Hearing was held in the matter before the examiner (then denominated hearing officer) on June 1 and 2, 1976, at Milwaukee, Wisconsin. During the course of the hearing on June 2, 1976, the examiner limited the hearing to complaint proceeding issues and held in abeyance the fact-finding petition pending the outcome in the complaint proceeding. The parties each waived in writing the necessity, if any, of the distribution to them of an examiner's intermediate report of recommended findings, conclusions and orders; and the commission having considered the evidence and the arguments of counsel and, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee Teachers Education Association, the complainant, is a labor organization and, at all times material herein, has been the collective bargaining representative for certain classifications of employes of respondent. Complainant's principal office and place of business is located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

2. Milwaukee Board of School Directors, the respondent, is a municipal employer. Respondent's principal office is located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

1/ (Dec. Nos. 14562-A, 14614) 5/76.

3. At all material times before July 7, 1975, complainant was the certified representative of the following unit:

> ". . . all regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent of a full teaching schedule or presently on leave including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, (including speech therapists, occupational therapists and physical therapists, community recreation specialist, activity specialists, music teachers 550N) who are otherwise regularly employed in the bargaining unit, excluding substitute per diem teachers, officer and clerical employes, and other employes, supervisors, and executives";

4. On March 4, 1975, complainant and respondent executed a collective bargaining agreement for the term January 1, 1975, through December 31, 1976, which provides in Part II.A.1., that respondent recognizes complainant as the ". . . duly certified exclusive collective bargaining representative for . . ." the employes described in the bargaining unit as set forth in Finding (3) hereof; in part VII, for a multi-step grievance and complaint procedure culminating in final and binding arbitration, with "grievance" being defined as follows in Part VII.B.1;

> "1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this contract or compliance therewith, provided, however, that it shall not be deemed to apply to any order, action or directive of the Superintendent or anyone acting on his/her behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes which have not been set forth in this contract.";

that, in Part VII in respect to gropp grievances;

> "F. GROUP GRIEVANCE
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> "In order to prevent the filing of a multiplicity of grievances on the same question of interpretation or compliance where the grievance covers a question common to a number of teachers, it shall be processed as a single grievance, commencing at the third step. Any group grievance shall set forth thereon the names of the persons or the group and the title and specific assignments of the people covered by the group grievance. Group grievances shall be signed by a principal officer or staff representative of the MTEA.";

and that, in Part VII.D.1., the third grievance procedure step provides that the grievance be submitted to the superintendent or his/her designee, and that the fourth step provides for final and binding arbitration. The agreement also contains numerous provisions referring to "teachers" generally and/or providing special provisions for narrower groups of bargaining unit employes. Among such agreement provisions are Part IV, Section z (Teaching Conditions and Education Improvements), Part IV.S. (Teacher and Social Workers Evaluations) which provides inter alia, that "[w]here teachers work under the direction of an administrator or supervisor other than the principal, the administrator or supervisor in charge of the program shall be responsible for evaulation"; that "[e]valuations of school social workers shall be made by their appropriate supervisors in the Department of School Social Work Services . . ."; and that "[t]eachers and substitutes shall not evaluate each other." Part IV.S. further provides certain procedural requirements for involuntary transfers of "teachers" from building to building. Part VI.T. (Personnel Procedures) outlines procedural requirements in matters of discipline of "teachers". The agreement further provides in Part I as follows:

"G. NEGOTIATIONS OF POSITION DESCRIPTIONS

During the term of this contract, the Board shall retain the right to establish or change position descriptions. Where new position descriptions or changes in existing position descriptions have a major effect on the wages, hours and conditions of employment of members of the bargaining unit, said changes or aspects of new descriptions dealing with wages, hours or working conditions shall be negotiated".

5. On July 7, 1975, this commission, upon a petition filed by complainant, issued an order 2/ which amended the description of the bargaining unit, as set forth in paragraph 3 hereof, by excluding reading instructional resource specialists and by including diagnostic instructional specialists, clinicial educators, speech pathologists, itinerant teachers and diagnostic teachers, and on July 25, 1975, the commission issued a further clarification order 3/, based upon a stipulation of the parties filed on that date, to the effect that the classification "speech therapist" had been replaced with the title "speech pathologists," and in said order the bargaining unit description as so clarified and amended was set forth as follows:

". . . all regular teaching personnel teaching at least fifty percent for a full teaching schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialist, activity specialists, music teachers (550N) who are otherwise regularly employed in the bargaining unit, diagnostic instructional specialists, clinical educators, speech pathologists, itinerant teachers, and diagnostic teachers excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors, and executives."

6. On March 10, 1976, complainant delivered to respondent a grievance, which contended that respondent violated Parts I.G., IV.S., and T., as well as other provisions of the collective bargaining agreement, by the decision of its chief negotiator who allegedly stated to representatives of complainant on March 4, 1976:

a. that no provision of the agreement applied to diagnostic instructional specialists, clinical educators, speech pathologists (PPRC) 4/, itinerant teachers and diagnostic teachers, except as respondent might otherwise consent;

b. that diagnostic instructional specialists would be required to evaluate and otherwise supervise other bargaining unit employes on multidisciplinary teams;

c. that bargaining unit employes on multidisciplinary teams would be evaluated, contrary to Part IV, Section S, of the agreement, by bargaining unit employes from among those dealt with in the July 7, 1975, commission clarification order; and

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2/ (Decision No. 13787) 7/75.

3/ (Decision No. 13787-A) 7/75.

4/ See note 5, below.

d. that respondent would treat as in effect a diagnostic instructional specialist job description that was unilaterally modified by resondent so as to include references to supervisory functions.

7. Correspondence ensued between complainant and respondent on March 22, March 30, April 6 and April 8, 1976, in which:

a. Respondent returned to complainant the grievance described in paragraph 6, supra, on the ground that the grievance did not indicate the group which was grieving, as required by Part VIII, F, of the agreement;

b. Respondent asserted that the agreement does not apply to diagnostic instructional specialists, clinical educators, speech pathologists (PPRC), and diagnostic teachers;

c. Complainant asserted that the grievance clearly covers the groups identified in (b) hereof;

d. Complainant invoked the final and binding arbitration provisions of the agreement relative to said grievance; and

e. Respondent refused to proceed to arbitration on said grievance, reasserted its position in (b) hereof, and stated that its position was to resolve the matter by way of fact finding.

8. The complainant and respondent also disagree as to whether said grievance also relates to bargaining unit employes apart from diagnostic instructional specialists, clinical educators, speech pathologists (PPRC), and diagnostic teachers, and respondent continues to refuse to proceed to arbitration on said grievance.

9. The dispute between the complainant and the respondent in respect to the grievance identified in paragraph 6, supra and the issues related thereto, as well as the procedural defenses raised by the respondent, concerns the interpretation and application of the terms of the collective bargaining agreement existing between the complainant and the respondent.

On the basis of the foregoing Findings of Fact the commission makes and issues the following

CONCLUSION OF LAW

Since the dispute between the complainant and respondent concerning the grievance identified in paragraph 6 of the Findings of Fact arises out of a claim which, on its face, is covered by the terms of the collective bargaining agreement existing between the parties, and since the procedural defenses of the respondent identified in paragraphs 7 and 8 of the Findings of Fact relate to matters of procedural arbitrability which are within the power of the arbitrator to decide in connection with his decision on the merits of the grievance identified in paragraph 6 of the Findings of Fact, respondent Milwaukee Board of School Directors, by its continued refusal to proceed to arbitration in the matter of the grievance identified in paragraph 6 of the Findings of Fact, has violated, and is violating, the terms of the collective bargaining agreement existing between it and the complainant Milwaukee Teachers Education Association, and by such refusal has committed, and is committing, a prohibited practice within the meaning of sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

On the basis of the foregoing Findings of Fact and Conclusion of Law the commission makes and issues the following

ORDER

IT IS ORDERED that respondent, Milwaukee Board of School Directors, its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the grievance identified in paragraph 6 of the Findings of Fact, and issues related thereto, to arbitration.

2. Take the following affirmative action which the commission finds will effectuate the policies of the Municipal Employment Relations Act:

   a. Comply with the arbitration provisions of the collective bargaining agreement, with respect to all issues on the grievance involved.

   b. Immediately notify complainant that respondent will proceed to such arbitration on the grievance and all issues concerning same.

   c. Participate with complainant in the selection of an arbitrator to determine the grievance and issues concerning same, and, pursuant to Part VII.D. of the agreement, if the parties are unable to agree upon the selection of an impartial arbitrator within two weeks after the date of this order, join with complainant in filing a written request with the Wisconsin Employment Relations Commission to appoint an arbitrator to determine the matter.

   d. Participate in the arbitration proceeding before the arbitrator so selected, or appointed, on the grievance and issues concerning same.

   e. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date 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 3rd day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

MILWAUKEE BOARD OF SCHOOL DIRECTORS, LXXI, Decision No. 14614-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complainant alleges that respondent has refused to submit to arbitration or otherwise process a grievance filed by it on March 10, 1976, in violation of the terms of the grievance and arbitration procedure in the parties' 1975-76 collective bargaining agreement, and, therefore, in violation of sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). Respondent denies that its refusals constitute either a violation of the agreement or MERA.

BACKGROUND:

On July 7, 1976, the commission issued an Order Clarifying Bargaining Unit, - so as to expressly include diagnostic instructional specialists, clinical educators, speech pathologists, 5/ itinerant teachers and diagnostic teachers in the unit described in paragraph 3 of the Findings of Fact, and referred to herein as the existing unit. Thereafter, complainant requested bargaining, and bargaining information, with respect to said classifications, submitted bargaining proposals, participated in two bargaining meetings with representatives of respondent and requested mediation.

Three mediation sessions were held. During the third such session, on March 4, 1976, the parties' discussion focused upon their disparate views as to the status quo or departure point from which their bargaining was to proceed. The complainant took the view that the employes in the classifications in question were covered by all applicable terms of the existing collective bargaining agreement, even where such terms provided lower levels of benefits than the employes were currently enjoying, and that bargaining was to be from the agreement levels as a departure point. The respondent, on the other hand, contended that bargaining, under the circumstances, was to be from a "clean slate" such that the complainant could propose various benefits and protections provided in the agreement, but that the employes involved were not guaranteed same in the event bargaining did not result in agreement upon same. The March 4 mediation meeting ended without an overall agreement being achieved.

Thereafter, complainant filed a grievance as set forth in the Findings of Fact, and respondent petitioned for fact finding. Respondent, by its chief negotiator, returned the grievance to complainant, and the correspondence reflected in paragraph 7 of the Findings of Fact ensued. The instant complaint was then filed on May 4, 1976.

We ordered that a formal hearing be conducted pursuant to the fact finding petition in order to permit complainant to be heard on its several contentions that fact finding could not, and/or ought not, be ordered under the circumstances. The initial hearing on the petition was adjourned shortly after the parties agreed that the petition should be consolidated with the instant complaint proceeding for purposes of hearing. We ordered such consolidation and appointed the fact finding investigation as the examiner in the complaint case, reserving to ourselves the issuance of initial findings of fact, conclusions

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5/ On July 7, 1975, clarification order related to speech pathologists employed at pupil programming resource centers (PPRC). We further clarified the bargaining unit on July 25, 1976, (Dec. No. 13787-A) pursuant to a stipulation by the parties that "speech pathologist" was now also the title of positions formerly called "speech therapists".

of law and order. The consolidated hearing was conducted on June 1 and part of June 2, at which time the examiner limited further hearing to the complaint proceeding and held the fact finding proceeding in abeyance pending the outcome herein.

POSITION OF THE COMPLAINANT:

The grievance asserts violations of the rights of: (1) diagnostic instructional specialists, clinical educators, speech pathologists (PPRC), itinerant teachers and diagnostic teachers, all of whose coverage under the agreement is disputed and (2) other bargaining unit employes none of whose coverage under the agreement is disputed.

The substantive arbitrability of grievances filed on behalf of group (2) above is clear. Complainant argues that Respondent's contention that the complainant narrowed the grievance to exclude that group by means of the post-grievance filing correspondence is unsupported by either the terms of such correspondence or by the balance of the record, it is attributable to deception on respondent's part, and, in any event, it constitutes a matter of procedural arbitrability, properly to be reserved to the arbitrator for determination.

The complainant contends that the claims made in the grievance on behalf of group (1) above are also arbitrable under the agreement. For, the instant facts are unlike a true accretion, and unlike the commission cases cited by respondent for dicta to the effect that the clarification orders therein did not entail automatic coverage of the affected employes under the pre-existing agreement. Here, unlike those situations, no new positions have been added from outside the bargaining unit. Instead, the commission clarification order merely affirmed the fact that the classifications in question have always been a part of the existing unit. For here, it is argued, respondent merely selected an altered division of labor for the performance of duties historically performed by bargaining unit personnel. Respondent improperly claims that its reshuffling of duties into classifications with new titles strips the employes--who are performing what has historically been bargaining unit work--of the benefits and protections of the existing agreement unless and until respondent again agrees to apply same to them. The broad recognition language and other language in the agreement make clear, however, that the employes and classifications, in group (1) above have long been intended by the parties to be covered by the agreement. Thus, complainant argues, the grievance and respondent's procedural defenses thereto must be adjudicated in the agreed--upon final and binding arbitration forum rather than elsewhere, such as in the fact finding forum sought to be imposed by respondent.

POSITION OF RESPONDENT:

Respondent contends that it was, and is, under no obligation to process or submit to arbitration the merits or arbitrability of the grievance The grievance relates only to alleged violations of rights under the agreement of diagnostic instructional specialists, clinical educators, speech pathologists (PPRC) and diagnostic teachers. The complainant has so identified the aggrieved group in writing in response to respondent's request for greater specificity in that regard and in subsequent correspondence with the respondent. Otherwise, the grievance must be dismissed by the commission for lack of the specificity required in the agreement, Part VII.F.

In addition, respondent argues that the agreement does not apply to diagnostic instructional specialists, clinical educators, speech

pathologists (PPRC), itinerant teachers and/or diagnostic teachers for several reasons. The agreement contains no mention of said classifications in the recognition clause or elsewhere. Said classifications were created and clarification of their unit status sought from the commission prior to the effective date of the agreement. Before the July 1976 commission clarification order, the wages, hours and conditions of employment for employes in said classifications were established in ways other than through collective bargaining between complainant and respondent and such matters were not focused upon in the negotiations that led to the agreement. The July 1976 commission order clarifying bargaining unit amended the unit description set forth in the agreement so as to expressly include said classifications for the first time. By so doing, the commission expanded the existing unit by adding classifications not theretofore included therein; i.e., the unit clarification order effected an accretion to the existing bargaining unit. Commission precedents are clear that the wages, hours and working conditions of classifications so accreted are not automatically governed by the terms of the pre-existing agreement, but rather the parties are to enter into negotiations to determine what such wages, hours and working conditions shall be. 6/

The respondent also contends that the terms of complainant's written requests for such negotiations and for bargaining information concerning said classifications show that the complainant understood that the agreement did not automatically apply to such employes.

Finally, the respondent claims that by filing and seeking arbitration of the grievance, complainant improperly seeks to substitute final and binding arbitration for the statutory fact finding procedure to which the respondent has resorted as a means of resolving the bona-fide impasse reached by the parties in their negotiations concerning wages, hours and conditions of employment for the classifications in question.

DISCUSSION:

Respondent clearly refused to process and submit the grievance to arbitration. The issues in dispute here are, instead, whether the grievance raises matters which on their face are governed by the terms of the agreement 7/ and whether any or all of respondent's stated defenses herein are matters for the commission rather than for the arbitrator to determine. 8/

It is well established that the function of the commission, or of a court in cases of an alleged refusal to arbitrate under a collective bargaining agreement arbitration provision, is limited to

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6/ Citing: City of Sheboygan, Dec. No. 11272, (9/72); Walworth County (Sheriff's Department), Dec. No. 11686, 9394-A, (3/73); City of Racine, Dec. No. 12358, (12/73); Manitowoc County, Dec. No. 13894, (8/75); Outagamie County, Dec. No. 14062, (10/75); Waukesha County, Dec. No. 14157 (12/75); Milwaukee Bd. of School Directors, Dec. No. 13134-A, (1/76).

7/ See notes 10 and 11, below and accompanying text.

8/ See note 12, below, and accompanying text.

ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the agreement. 9/ Doubts as to the coverage of the arbitration clause are to be resolved in favor of arbitration. 10/

Under the agreement, Part VII.B.L. and D. (fourth step) 1., respondent's obligation to arbitrate is limited to grievances which are defined as "issues concerning the interpretation or application of provisions of this contract or compliance therewith . . . ." As we read the grievance, it sets forth each of the claims noted in paragraph 6 of the Findings of Fact. Each of those claims involves a dispute between the parties concerning the proper interpretation and application of one or more provisions of the agreement.

For example, the claim noted in Finding of Fact 6. (a) and the related claim noted in (b) of Finding of Fact 7 involve a dispute between the parties concerning the interpretation and application of the term "teacher" in Part II.A.1., Part VII.F. and other agreement provisions. The complainant, contrary to the respondent, contends that "teacher", as used in the agreement, was intended to include the employes in classifications expressly included in the unit by the July 7, 1975, commission's clarification order. Further, complainant argues that the work performed by employes occupying the positions clarified by the commission was work performed by unit employes prior to the creation of the new positions, and, therefore, the terms of the existing agreement apply to said clarified positions. This contention raises a question concerning the interpretation and application of the agreement, and, therefore, must be arbitrated.

The claim noted in (b) of Finding of Fact 6 involves a dispute between the parties concerning the interpretation and application of, inter alia, the agreement, Part IV.S.1.c. ("Teachers . . .shall not evaluate each other . . . ."). The complainant, contrary to the respondent, contends that said provision applies to the diagnostic instructional specialists so as to protect them against being required to evaluate other members of the bargaining unit, and that respondent's chief negotiator's March 4 statements constitute a repudiation of said agreement provisions in violation of same.

The claim noted in (c) of Finding of Fact 6 also involves a dispute between the parties concerning the interpretation and application of, inter alia, the agreement, Part IV.S.1.c. Complainant contends that said provision protects bargaining unit employes whose coverage by the agreement is not in dispute herein--including classroom teachers, social workers, guidance counselors and others--from being evaulated by diagnostic instructional specialists in connection with their participation on multidisciplinary teams. While respondent has not taken a position on that question herein, it has nevertheless refused

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9/ United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 46 LRRM 2414 (1960); Seaman-Andwall Corp., WERC Dec. No. 5910 (1/62); Oostburg Joint School District No. 14, WERC Dec. No. 11196-B, (12/72), aff'd sub. nom. Oostburg Jt. School District vs. WERC, Sheboygan County Circuit Court, Case No. 2160-2193, (6/74).

10/ United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416, (1960); Seaman-Andwall Corp., above, note 10; Oostburg Joint School District No. 14, above, note 10.

to submit that matter to arbitration on the ground that claims on behalf of such persons were excluded from consideration under the grievance by complainant's post-grievance filing correspondence. That defense is discussed hereinafter.

The claim noted in Finding of Fact 8 involves a dispute between the parties concerning the interpretation and application of the agreement, Part 1.G. Complainant contends, apparently contrary to respondent, that respondent's unilateral change in the job description of diagnostic instruction specialists so as to include certain supervisory functions violates that portion of agreement, Part I.G., which states: "Where . . . changes in existing position descriptions have a major effect on the wages, hours and conditions of employment of members of the bargaining unit, said changes or aspects of new descriptions dealing with wages, hours or working conditions shall be negotiated."

Thus, the grievance contains several claims, which on their face, are governed by the agreement and which, therefore, constitute subject matters within respondent's obligation to arbitrate.

Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions, which grow out of the dispute and bear on its final disposition, should be left to the arbitrator. 11/ We have concluded that respondent's contention that the aggrieved group referred to in the grievance was narrowed by subsequent correspondence is such a procedural matter. Said contention of respondent requires a determination--as between opposing interpretations of the facts--of the impact of the subsequent correspondence on the scope of the grievance. Such a decision does not involve an alleged waiver of the right ultimately to arbitrate the subject matter involved, but rather involves only the procedural sufficiency, under the instant facts, of the grievance as a vehicle to that end.

We also regard any contention by respondent that the grievance is nonarbitrable for lack of specificity (as to the group on whose behalf it is being processed) as a procedural question properly to be determined by the arbitrator, rather than the commission.

Dated at Madison, Wisconsin this 3rd day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

11/ John Wiley & Sons v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964); Seaman-Andwall Corp., above, note 10; Oostburg Joint School District No. 14, above, note 10.