STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SAUK PRAIRIE EDUCATION ASSOCIATION, Complainant, vs. THE SAUK PRAIRIE SCHOOL DISTRICT and SAUK PRAIRIE BOARD OF EDUCATION, Respondent.	Case XI No. 21351 MP-723 Decision No. 15282-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, REVERSING EXAMINER'S CONCLUSION OF LAW AND ENTERING REMEDIAL ORDER

Examiner Amedeo Greco having, on December 19, 1977, issued his Findings of Fact, Conclusion of Law and Order in the subject case wherein he concluded that the Respondent had not violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA) by refusing to arbitrate a grievance and ordered that the complaint herein be dismissed; and the Complainant having, on January 9, 1978, filed a petition, wherein it requested the Commission to review said decision pursuant to Section 111.07(5), Stats.; and the Complainant and Respondent having filed briefs in the matter; and the Commission having reviewed the record in the matter, including the petition for review and the parties' briefs in support and opposition to said petition, and being fully advised in the premises;

NOW, THEREFORE it is

ORDERED

A. That the Examiner's Findings of Fact be, and the same hereby are, affirmed.

B. That the Examiner's Conclusion of Law be reversed to read as follows:

> "That Sauk Prairie School District, by refusing to submit the Hasheider grievance, along with all procedural arbitrability issues related thereto, to final and binding arbitration, has violated the terms of a collective bargaining agreement and committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the MERA."

C. That the Examiner's order dismissing the complaint herein be set aside and that the following order be entered:

"ORDER

Sauk Prairie School District, its officers and agents shall immediately:

1. Cease and desist from refusing to submit the Hasheider grievance, along with all procedural arbitrability issues related thereto, to final and binding arbitration;

2. Take the following action, which the Commission finds will effectuate the policies of the MERA:

(a) Submit the Hasheider grievance, along with all procedural arbitrability issues related thereto, to final and binding arbitration by selecting an arbitrator in the manner provided in the agreement and participating in the proceedingsbefore the arbitrator so selected.

(b) Notify the Commission within twenty (20) days of the date of this order, in writing, of what steps it has taken to comply herewith."

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Marshall L. Gratz, Commissioner

SAUK PRAIRIE BOARD OF EDUCATION, XI, Decision No. 15282-B

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, REVERSING EXAMINER'S CONCLUSION OF LAW AND ENTERING REMEDIAL ORDER

BACKGROUND:

In March 1976, Crystal Hasheider, an employe represented by the Complainant, was advised that she would be transferred to a different teaching position the following year. Hasheider filed a grievance which was processed on her behalf by the Complainant. On April 27, 1976, the Respondent's Board heard and denied said grievance, which denial was confirmed in writing on April 28, 1976. The negotiated procedure contains a provision calling for submission of grievances involving just cause, which are not resolved after the written answer has been given by the Board, to a local advisory arbitration panel consisting of three members. That provision reads in relevant part as follows:

"ARTICLE VI - GRIEVANCE PROCEDURE

. . .

Section 6.6 Grievances involving just cause which are not resolved in Section 6.5 will be submitted to a local advisory arbitration panel of three members. One member will be appointed by the SPEA and one by the Board. These two members will select the third member. Members must reside in the school district and not be employed by the school district nor be members of the immediate family of school district employees. This includes spouse, children, parents, brothers, and sisters of school district employees.

This panel will meet within ten (10) days to hear the grievance and will submit a written answer to both parties within five (5) days after the meeting."

On or about May 4, 1976 the two panel members selected by the parties met and selected the third panel member and also agreed to meet as a panel on May 13, 1976, which date was within ten days after the selection of the third panel member, but more than ten days after the Board's decision at the prior step. On May 6, 1976, which was the ninth day after the decision of the Board, the Complainant notified the Respondent in writing that it was of the belief that the panel was without authority to act after May 7, 1976, and that since no hearing was scheduled prior to that date, it was demanding immediate final and binding arbitration of the grievance. The panel met on May 13, 1976 as previously agreed. Neither the grievant nor anyone representing the Complainant attended the meeting of the panel. However, the Complainant had previously filed a brief with the panel wherein it objected to the panel's authority to act and set out its version of the facts and arguments relating to the merits of the grievance. On May 13, the panel determined that it had authority to act since, in its opinion, the ten days had not run. The panel also concluded that there was "no grievance upon which to act" because of the absence of the grievant and any representative of the Complainant, and it thereupon adjourned. Since then the Respondent has refused to proceed to arbitration in the matter and, nine months later, on February 14, 1977, the Complainant instituted this proceeding to compel final and binding arbitration.

PETITION FOR REVIEW:

In its petition for review, the Complainant argues that the Examiner's Finding of Fact No. 5 is clearly erroneous to the extent that it implies that the Complainant failed to participate in the hearing before the advi-

sory arbitration panel. The Complainant claims it did participate in said hearing by filing a brief with the panel. In addition, the Complainant argues that the Examiner's Conclusion of Law that the Respondent has not violated Section 111.70(3)(a)5 of the MERA by refusing to proceed to arbitration is in error for the following reasons: 1) such conclusion necessarily rests upon a contractual interpretation that the Examiner was without power to make; 2) even if the Examiner had power to review compliance with the grievance procedure, he exceeded that power by finding that the Complainant failed to exhaust the procedure, since the Complainant facially complied with all steps of the procedure; 3) even if the Examiner had authority to interpret the agreement's procedural requirements, he erred in his interpretation and his conclusion that the Complainant was required to submit the grievance to the panel; and 4) even if the Examiner had authority to interpret the agreement's procedural requirements and he correctly concluded that the panel was not required to meet within ten days of the Board's decision, he erred in his conclusion that the Complainant did not exhaust that step of the procedure since the Complainant properly submitted the grievance to the panel by filing a brief.

BRIEF IN SUPPORT OF PETITION:

In its brief in support of its petition for review the Complainant does not repeat its contention concerning the Examiner's Finding of Fact No. 5 and relies essentially on two arguments: 1) the Examiner erred in even considering whether the grievance had been properly processed to the arbitration step; and 2) even if the Examiner had authority to consider whether the grievance was properly processed to the arbitration step, he exceeded his authority since the Association presented a facially valid argument as to the procedural arbitrability of the grievance.

The Complainant relies on a number of federal and Wisconsin precedents to support its first argument. It points out that in the first two cases of the Steelworkers Trilogy 1/ the Supreme Court held that in actions to enforce agreements to arbitrate the Courts should confine themselves to the question of whether an agreement to arbitrate exists, and if so, whether that agreement is susceptible to a facial interpretation that the dispute in question is arbitrable, with all doubt being resolved in favor of arbitrability; and that in the Wiley 2/ decision the Supreme Court held that if a dispute is arbitrable on its face, any issues as to procedural arbitrability should be resolved by the arbitrator. The Complainant further notes that the Commission has acknowledged adherence to these policies in the administration of the Municipal Employ-

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1/ United Steelworkers of America vs. American Manufacturing Company, 363 US 564, 46 LRRM 2414 (1960); and United Steelworkers of America vs. Warrior and Gulf Navigation Company, 363 US 574, 46 LRRM 2416 (1960).

2/ John Wiley and Sons v. Livingston, 373 US 543, 55 LRRM 2769 (1964).

ment Relations Act, 3/ and that the Wisconsin Supreme Court has sanctioned this adherence in its recent decision in the Jefferson School District case. 4/ Applied to the facts in this case, the Complainant argues that the Examiner improperly considered the merits of the issues of procedural arbitrability raised by the Respondent's defense which are properly for the arbitrator.

In the alternative, the Complainant contends that, even if the Examiner could properly consider the question of procedural arbitrability raised in this case, the test to be applied should be no broader than the test as to substantive arbitrability, i.e., whether the Association presented a facially valid claim that it had exhausted, or should be excused from exhausting, the advisory arbitration panel step of the grievance procedure.

BRIEF IN OPPOSITION TO PETITION FOR REVIEW:

In its brief in opposition to the petition for review, the Respondent argues that since the procedural arbitrability issues in the case are distinguishable from the substantive issues raised by the grievance itself, the policy of ordinarily deferring procedural issues to the arbitrator should be held inapplicable. It is the Respondent's position that the Examiner found, and properly so, that the Complainant failed to "participate" in the advisory arbitration step of the procedure, and that therefore the Complainant ought not now be allowed to attempt to revive the merits of the grievance. According to the Respondent, the Complainant has refused to exhaust the grievance procedure and presents a contradictory position by its present demand for arbitration. The Respondent argues that, if the Commission allows the Complainant to refuse to participate in certain steps of the grievance procedure at will, and still demand arbitration many months later, such a ruling will seriously undermine the principle of finality. According to the Respondent, if the Complainant desired to pursue the merits of the grievance it should have participated in the procedure before the advisory arbitration panel and preserved its objection to the procedure followed.

With regard to the Complainant's alternative argument, the Respondent contends that the Examiner had a sound basis, both in fact and in law, for concluding that the Respondent's interpretation of the effect of the ten-day time limit on convening the advisory arbitration panel was the correct interpretation or a reasonable application under the facts in this case. Contrary to the assertions of the Complainant, the Respondent argues that sustaining the Examiner's opinion would not undermine the grievance and

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3/ The Complainant cites the Examiner's decision in Spooner Jt. School District No. 1, (14416-A) 9/76, wherein he said:

> "The Commission has said many times, too numerous to cite, that the question of whether the Union properly processed the grievance is no defense to an Municipal Employer's refusal to proceed to arbitration."

The Commission first acknowledged its adherence to these policies in the administration of the Municipal Employment Relations Act Amendments to Section 111.70 Stats. in Oostburg Jt. School District No. 14, (11196-A, B) 12/72. The Commission had applied the same policies for many years and administering the provisions of the Wisconsin Employment Peace Act. See for example Dumphy Boat Corp. vs. WERB, 267 US 316 (1954), enforcing Dumphy Boat Company, (3588) 10/53; and Seaman-Andwall Corp., (5910) 1/62.

4/ Joint School District No. 10 v. Jefferson Education Association, 78 Wis. 2nd 94 at 111 (1977).

arbitration procedure but will help insure that both parties observe all of the provisions of that procedure in the future.

DISCUSSION:

We find no error in the Examiner's Findings of Fact No. 5. His finding that the panel "decided that there was no grievance to decide since the Association did not particpate in the scheduled hearing and because there was 'no grievance upon which to act . . .'" is an accurate characterization of the panel's reasoning and action. Paragraph 5 does not contain an ultimate finding or conclusion that the Complainant failed to "participate" in the meeting or that it "defaulted" and we believe, for reasons stated below, that such a finding or conclusion is irrelevant to the issue properly here for decision.

The Examiner's Conclusion of Law that the Respondent did not violate Section 111.70(3)(a)5 of the MERA by its admitted refusal to proceed to binding arbitration was based on the Complainant's failure to exhaust the underlying steps of the grievance procedure. As the Complainant correctly points out, this conclusion is necessarily bottomed on an interpretation and application of the procedural requirements of the agreement which, absent special circumstances not present here, 5/ should be left to the ultimate forum selected by the parties for interpreting and enforcing the terms of the agreement--the arbitrator.

In cases where a collective bargaining agreement does not provide for a final and binding method of resolving disputes over the interpretation and application of its terms, the Commission has consistently held that the complaining party must first exhaust the grievance procedure before the Commission will consider the merits of a claim that the collective bargaining agreement has been violated. 6/ This requirement, which is in accord with federal law, 7/ is based on the strong public policy favoring the voluntary resolution of labor disputes and is clearly within the Commission's jurisdiction to interpret and enforce the terms of the agreement, including its procedural requirements. In addition, the Commission and courts 8/ have held that where an individual employe seeks a determination interpreting or enforcing the terms of the collective bargaining agreement which provides for arbitration, and an objection is raised regarding the exclusive right of the Union to invoke the arbitration step of the procedure, the Complainant must first establish

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5/ E.g. in Milwaukee Board of School Directors, (12028-A, B) 9/74, the Commission interpreted and applied the procedural requirements of the agreement because the dispute over the proper application of those requirements had caused a general breakdown in the operation of the grievance procedure. Here there is no such breakdown and the Complainant does not seek an order interpreting and enforcing those requirements but instead seeks an order for arbitration wherein those requirements can be interpreted and enforced if appropriate.

6/ Stanley Boyd Area Schools, (12504-A) 11/74; Lake Mills Jt. School District No. 1, (11529-A, B) 8/73; American Motors Corporation, (7488) 2/66.

7/ Republic Steel vs. Maddox, 379 US 650, 58 LRRM 2193 (1965).

8/ University of Wisconsin-Milwaukee, (11457-F) 12/77; Mahnke v. WERC, 66 Wis. 2nd 524 (1975); and Vaca v. Sipes, 379 US 150, 58 LRRM 2193 (1965). The Examiner erroneously relied on such a case: American Can Company, (14688-A) 9/76.

that he or she attempted to utilize and exhaust the procedure provided and was frustrated in that effort by the Union's failure to meet its duty of fair representation. However, when a union seeks to invoke its exclusive right to proceed to final and binding arbitration of a grievance, any questions of procedural arbitrability or regularity that may have arisen during the course of the processing of the grievance do not constitute proper grounds for denying an order for arbitration--they are grist for the mill of the arbitrator.

We recognize the potential value that the advisory arbitration panel may have in contributing to a voluntary resolution of the instant grievance, because of its tri-partite nature. However, the fact remains that the advisory panel is merely an intermediate step in the negotiated procedure, which, if the grievance remains unresolved, is itself ultimately interpreted and enforced by the arbitrator. 9/

Here, for reasons that may or may not have been correct, the advisory arbitration panel never ruled on the merits of the grievance. It is apparently the Complainant's theory that the panel step could be bypassed because of its failure to meet within ten days of the answer at the last preceding step. The Respondent obviously disagrees with that interpretation, and apparently believes that, in either event, failure to strictly adhere to the time limit in question does not result in an automatic right on the part of either party to move the grievance to the next step. These issues can be presented to the arbitrator. If the arbitrator agrees with the Respondent's position and concludes that the grievance is not ripe for arbitration because the merits have never been considered by the panel, the arbitrator can, and probably should, remand it to the advisory arbitration panel. 10/ However, we agree with the Complainant that the Examiner's incursion into those issues and the relative equities of the parties' respective positions were outside the appropriate scope of the issue before him.

Because we have concluded that all procedural issues in this case are appropriately for the arbitrator, it is unnecesary to consider the parties' arguments with regard to whether the Complainant "participated" in the proceeding before the advisory arbitration panel, or their respective arguments with regard to the other procedural issues involved. For the above and foregoing reasons we have affirmed the Examiner's Findings of Fact. However we have reversed his Conclusion of Law, and have entered an appropriate remedial order.

Dated at Madison, Wisconsin this 10th day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Marshall L. Gratz, Commissioner

9/ It is partly for this reason that the undersigned must reject the Respondent's claim that the Commission should herein enforce the procedural requirements of the contract in order to preserve the "finality" of the panel's action. In fact, the panel's action may not be final.

10/ See Elkouri and Elkouri, How Arbitration Works, (BNA 1973) at p. 160, n. 229.