STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WEST ALLIS-WEST MILWAUKEE EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF WEST ALLIS-WEST MILWAUKEE, ET AL., 1/ Respondent.	Case XXIII No. 21640 MP-749 Decision No. 15504-A

Appearances:
Perry and First, S.C., Attorneys at Law, by Mr. Richard Perry, Esq., and Mr. Rick L. Oglesby, Executive Director, West Suburban UniServ, and Ms. Karen Kindel, PR & R Chairperson, appearing on behalf of the Complainant.
Foley & Lardner, Attorneys at Law, by Ms. Carolyn C. Burrell, Esq., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

West Allis-West Milwaukee Education Association, hereinafter Association, having filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that School District of West Allis-West Milwaukee, et al., herein the District, has committed certain prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Milwaukee, Wisconsin on June 22, 1977, before the Examiner, and the parties having thereafter filed briefs; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That West Allis-West Milwaukee Education Association is a labor organization with its principal offices at West Allis, Wisconsin; and that the Association is the certified exclusive collective bargaining representative for certain employes, including all non-supervisory certified teachers, employed by the District.

2. That the School District of West Allis-West Milwaukee, et al. is a municipal employer within the meaning of Section 111.70(1)(2) of MERA, with its principal offices in West Allis, Wisconsin; that the District operates a school system in the West Allis-West Milwaukee,

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1/ Respondent's name was amended at the hearing.

Wisconsin vicinity; that Marshall R. Taylor is the District Superintendent; and that at all times material herein, Taylor has acted as the District's agent.

3. That the Association and the District are parties to a collective bargaining agreement which is effective from January 1, 1976 to December 31, 1978; that in the negotiations culminating in said contract, the District proposed that the collective bargaining agreement contain the following proviso:

> "Redesignate item H of Article XV as item I, and insert a new item H to read as follows:
>
> H. Maternity Leave
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> Female teachers shall be afforded all benefits provided by federal and state statutes governing maternity leave, as construed by final judicial determination. Maternity leave is leave for the period of time that a teacher is physically disabled from performing her duties because of pregnancy or complications of pregnancy; it does not extend to any additional period of time devoted to child care or rearing. In the event federal or state statutes are construed by the applicable court of last resort to require sick pay for maternity leave, the Board shall grant such pay, to the extent the teacher is otherwise eligible therefor, for any maternity leave occurring during the term of this Agreement, whether before or after the court decision."

that in the same negotiations, the Association proposed the following provision:

> "MCA, p. 21, Article XV, Leave
>
> 1. Maternity Leave
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> The Board agrees that female employees shall be afforded all benefits provided by federal and state statutes, rules and guidelines govening maternity leave. Maternity leave is leave for that period of time a woman is medically unable to perform her teaching duties because of childbearing or complications of pregnancy. Determination of the time when maternity leave shall begin and end shall be made by the teacher and her physician."

and that the finalized contract agreed to by the parties did not contain either of the two above-noted provisions. 2/

4. That the 1976-1978 contract contained a grievance-arbitration procedure which culminated in final and binding arbitration; and that Article XII of said contract, entitled "Grievance Procedure", states that:

> "A. A 'grievance' is a complaint by a teacher or teachers based upon an alleged wrong suffered in respect of a condition of employment specifically covered by this Agreement, or a complaint by a teacher or teachers based upon an alleged wrong concerning the interpretation or application of provisions of this Agreement

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2/ Additionally, the finalized contract nowhere excludes sick pay for maternity-related disabilities.

or compliance therewith. An 'aggrieved person' is a teacher or teachers having a grievance. Discharge, dismissal, removal, refusal of employment or disciplinary action against a teacher shall be processed as provided in Article XVIII.

B. The purpose of this grievance procedure is to provide a method for speedy and final determination of questions involving the interpretation and application of the provisions of this Agreement and to conditions of employment specifically set forth in this Agreement in order to prevent protracted misunderstandings which may arise from time to time concerning such questions. The grievance proceedings shall be kept as informal and confidential as is appropriate at all levels of the procedure."

and that step 4 of the same article provides:

". . . The arbitrator, however selected, shall be limited to determining questions arising under this Agreement and shall not have authority to modify or change any of the terms of this Agreement. The decision of the Arbitrator, when within the scope of his authority under this Agreement, shall be final and binding upon the parties."

5. That Article I of said contract, entitled "Recognition", provides:

"C. In all contract negotiations and in the administration of this Agreement the following guidelines shall be observed:

. . .

5. Nothing contained herein shall in any way limit the power and duties of the parties as given and prescribed by law.

. . .

D. The Board shall not discriminate against any teacher, with respect to hiring or tenure of employment, because of race, religion, Association activity, sex, marital or relative status, national origin or age, except as otherwise provided by law."

6. That Article II of said contract, entitled "Board Rights", states:

"B. The exercise of the foregoing powers, rights, authority duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin and the Constitution and laws of the United States."

7. That Article XV of said contract, entitled "Leave", provides:

"B. Personal Illness or Injury. A teacher absent from duty because of personal illness or injury shall be paid his full salary for the period of such absence not exceeding a total of ten working days in any one year, except where additional leave time has been accumulated, with a maximum number of days to be accumulated for sick leave of 200. At the beginning of every school year, each teacher shall be credited with that number of days of sick leave to be earned during such school year and shall also be credited with that number of days of earned sick leave not used during prior school years.

. . .

H. General Provisions on Leaves of Absence. Any teacher desiring a leave of absence as heretofore provided or desiring a leave of absence for any other reason, shall apply in writing to the Superintendent specifying the extent of and reasons for such proposed absence. Except as otherwise herein provided approval of all leaves and extensions thereof shall be at the discretion of the Superintendent. If a request for leave of absence is approved, the authorization for leave of absence shall indicate the extent of authorized absence, whether it will or will not be charged against sick leave, and if such leave extends into another school year whether or not the teacher will receive credit on the salary schedule for the period of such absence. Upon return from any authorized leave a teacher shall be credited with all unused accumulated sick leave."

8. That Article XXIV of said contract, entitled "Miscellaneous Provisions", states:

"M. . . . If any article or part of this Agreement is held to be invalid by operation of the law or by any court of competent jurisdiction, or if compliance with or enforcement of any article or part of this Agreement shall be restrained by any court of competent jurisdiction, the remainder of this Agreement shall not be affected thereby."

9. That on or about February 18, 1976, teacher Sandra A. Cavender filed a grievance which requested that she and other teachers similarly situated be granted sick leave pay benefits for absences caused by pregnancy and child birth; that prior to the filing of said grievance, the District had never granted such sick leave benefits for pregnancy; that said grievance was processed through the initial steps of the grievance procedure, without resolution; and that the matter was thereafter referred to arbitration, pursuant to the contractual grievance procedure.

10. That Byron Yaffe was subsequently appointed to arbitrate said grievance; that an arbitration hearing on the matter was held in West Allis, Wisconsin, on September 7, 1976, before Arbitrator Yaffe; that representatives from the Association and the District attended and participated at said hearing; that both parties filed post-hearing briefs; and that Arbitrator Yaffe issued an Arbitration

Award on March 23, 1977; that in rendering his Award, Arbitrator Yaffe noted:

> "Essentially, the issue before the undersigned is whether the District has engaged in unlawful discrimination based upon sex by failing to allow women employes on maternity leave to utilize accumulated sick leave benefits during said leave. That determination requires the undersigned to construe the terms of the parties' collective bargaining agreement in order to assess whether the agreement includes a provision prohibiting such discrimination, and in addition, it requires an assessment of the current status of federal and state law as it affects the parties' rights and responsibilities in this regard.
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> Clearly, Article I, Section D, prohibits sex discrimination by the District, and by virtue of said Article the undersigned has the authority to determine whether the District's conduct constitutes such prohibited discrimination.
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> The more difficult question presented herein requires the undersigned to define the type of discrimination which is prohibited, and that question requires a determination of the current status of pertinent federal and state law. The undersigned is persuaded that the parties intended that the Arbitrator would have the authority to construe the agreement in the context of pertinent state and federal law where necessary. It seems clear that the definition of prohibited discrimination which is needed in the instant dispute requires such a determination.
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> Although the Arbitrator is limited to determining questions arising under the agreement and does not have authority to modify or change the terms of the agreement, it also seems clear that the parties intended that the terms of the agreement would only be enforced if they were consistent with the operation of law, as set forth in the savings clause. Accordingly, because of the reference throughout the agreement to the laws of the state and nation which affect the interpretation and enforceability of said agreement, and because the question presented herein requires an interpretation of the current status of relevant laws, the undersigned must consider the current status of such federal and state law in order to determine the extent of the rights and responsibilities the parties have agreed to in their collective bargaining agreement." (Footnote omitted).

and that in said Award, Arbitrator Yaffe ruled:

> "Based upon all of the foregoing, the District violated Article I, Section D, of the parties' 1976-1978 collective bargaining agreement when it denied employes the right to utilize accumulated sick leave benefits for pregnancy-related medical disabilities. Accordingly, the District is hereby ordered to pay to all teachers who have been granted maternity leave since January 1, 1976, a sum equivalent to the amount they would have received had they been allowed to utilize accumulated sick leave benefits for pregnancy-related medical disabilities. The affected employes, in order to be entitled to such relief, must present to the District, within thirty (30) days of the issuance of this Award, documentation signed by their physician, that they would not have been able to work during a specified period of time because of

pregnancy-related medical disabilities. Since it is undisputed that Ms. Cavender was unable to perform her work because of pregnancy-related medical disabilities, the District is hereby ordered to pay Ms. Cavender a sum equivalent to the pay she would have received had she been granted the 21 sick leave days she had accumulated. It also should be clear from this Award that the affected employees shall have deducted from their accumulated sick leave the number of days for which they will receive compensation pursuant to this Award.

The District is also ordered to cease and desist from refusing to allow employes on maternity leave to utilize accumulated sick leave benefits where such employes can prove by a doctor's certificate that they are unable to perform their work because of pregnancy-related medical disabilities, so long as Wisconsin law prohibits employers from treating pregnancy-related disabilities differently than other physical and medical disabilities, absent evidence of a good and substantial business reason for treating them differently, (such as a prohibitive cost burden).

In the event the parties are unable to resolve questions concerning the amount of compensation due individuals pursuant to this Award, the undersigned will retain jurisdiction over this matter for sixty (60) days to determine any issues arising therefrom."

11. That by letter dated April 26, 1977, District Superintendent Taylor advised Rick L. Oglesby, the Executive Director of West Suburban UniServ, that:

"The Board of Education has reviewed the arbitration decision dated March 23, 1977 of Arbitrator Byron Yaffe in the above matter and has decided to defer its compliance with the award because Arbitrator Yaffe's decision is based not on his interpretation of the contract, but rather his interpretation of the law, specifically the Wisconsin Fair Employment Act, which he applied through Article I, Section D of the contract.

In his decision, Arbitrator Yaffe relies on the Wisconsin Supreme Court decision, Ray-O-Vac v. DILHR. Ray-O-Vac was decided prior to the United States Supreme Court decision in General Electric Co. v. Gilbert. The court in Ray-O-Vac relied on the federal district court decision in Gilbert in reaching its decision. This decision has now been reversed by the United States Supreme Court. In view of these facts, Arbitrator Yaffe's interpretation of Wisconsin law is not definitive.

A definitive ruling on the status of Wisconsin law will ultimately be made by the Wisconsin Supreme Court. If the Court decides to interpret the Wisconsin Fair Employment Act in a manner inconsistent with the interpretation given by the United States Supreme Court in General Electric Co. v. Gilbert, then of course that decision will be final and would be consistent with Arbitrator Yaffe's decision. If the Wisconsin Supreme Court decides to follow the United States Supreme Court decision in interpreting Wisconsin law, then Arbitrator Yaffe's decision would make no sense.

The Board, in reaching its decision, is not expressing dissatisfaction with the arbitration process but in this particular situation it believes that there is a question of law which really can only be disposed of by the courts."

and that at all times material herein, the District has failed to comply with the terms of the above-noted March 23, 1977 Arbitration Award.

Based upon the foregoing Findings of Fact, the Examiner makes and renders the following

CONCLUSION OF LAW

That the March 23, 1977 Arbitration Award issued by Arbitrator Byron Yaffe was not in excess of the Arbitrator's powers and that, therefore, the District, by its refusal to comply with the terms of the Award, committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of MERA.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the District, its officers and agents, shall immediately:

(1) Cease and desist from refusing to comply with the terms of the March 23, 1977, Arbitration Award issued by Arbitrator Byron Yaffe.

(2) Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Comply with the March 23, 1977, Arbitration Award by compensating the individuals on behalf of whom said grievance was filed, in accordance with the terms of said Award.

(b) Notify all employes by posting in conspicuous places in its offices where employes are employed, copies of the notice attached hereto and marked Appendix "A". That notice shall be signed by the District, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the District to ensure that said notices are not altered, defaced or covered by other material.

(c) 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.

Dated at Madison, Wisconsin this 12th day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL implement the terms of the March 23, 1977 Arbitration Award issued by Arbitrator Yaffe by compensating the individuals on behalf of whom said grievance was filed, in accordance with the terms of said Award.

2. WE WILL NOT refuse to comply with the terms of a valid Arbitration Award.

By_____
School District of West Allis-West Milwaukee, et al.

Dated this ____ day of _____, 1977.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Association contends that the District has refused to implement the terms of Arbitrator Yaffe's March 23, 1977 Arbitration Award and that said refusal is violative of Section 111.70(3)(a)5 of MERA.

While admitting that it has failed to comply with the Award, the District contends that the Award is invalid on the ground that Arbitrator Yaffe exceeded his authority in rendering said Award.

In ruling on the enforceability of an arbitration award, it must first be noted that the Commission applies 3/ the standards set forth in Section 298.10(1) of the Wisconsin Statutes, which provide that an arbitration award can be vacated on the following grounds:

> "(a) Where the award was procured by corruption, fraud, or undue means;
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

Here, the District relies only on the last ground enumerated above, i.e., the claim that Arbitrator Yaffe exceeded his authority and that his Award ignored certain alleged material evidence.

When such a claim is made, the Commission as a reviewing tribunal is precluded from merely substituting its own interpretation of an agreement for that of an Arbitrator. For, so long as the Arbitrator's decision can be construed as an interpetation of the agreement, reviewing tribunals, under both federal 4/ and state labor law policy, should not engage 5/ in a plenary review of the merits of that interpretation. Accordingly, when called to pass upon the enforceability of an arbitration award, the Commission does not engage in a de novo determination of the issues that were before the Arbitrator. Instead, the only issue for consideration is whether the arbitrator's award can reasonably be construed as an interpretation of the collective bargaining agreement. With the foregoing in mind, it is now time to consider the District's specific objections to Arbitrator Yaffe's Award.

3/ See, for example, WERC v. Madison Metropolitan School District, City of Madison et al. (14038-B) 4/77.

4/ Steelworkers v. Enterprise Wheel & Car Corp. 353 U.S. 593, 46 LRRM 2423 (1960).

5/ Supra, footnote 2.

Thus, the District contends that Arbitrator Yaffe erred in ignoring certain pre-contract negotiations which show that Complainant proposed the maternity leave clause noted in Finding of Fact number 3, supra. The District contends that since the finalized contract did not contain such a clause, that the parties thereby agreed that no such benefits should be paid, pursuant to past practice.

There are a number of difficulties with this allegation. Thus, the District ignores the fact that the contract nowhere excludes sick pay for maternity related disabilities. Secondly, it ignores the fact that the District in those same negotiations also proposed a contract provision dealing with maternity leave, as set forth in Finding of Fact number 3, and that that provision was omitted from the finalized contract. In such circumstances, the Arbitrator may have concluded that the pre-contract negotiations were immaterial. Additionally, as to the District's past practice, such a practice is immaterial where, as here, the Arbitrator has concluded that the denial of pregnancy benefits is unlawful. Furthermore, although the Arbitrator did not discuss past collective bargaining negotiations between the parties, there is no requirement that he do so, as an arbitrator is not required to comment on every piece of evidence offered at a hearing. Accordingly, based on these considerations, the District's claim is rejected.

Additionally, the District contends in its brief that the Arbitrator erred in concluding that the contractual general prohibition of sex discrimination ". . . does not prohibit sexual discrimination with respect to working conditions." Thus, the District seems to be saying that while the contract prohibits certain kinds of sex discrimination, the contract nonetheless allows the District to engage in certain other kinds of discrimination. In short, the District appears to argue that under the contract a little bit of sex discrimination is permitted, but not too much. This contention, however, overlooks the fact that the contractual sex discrimination prohibition is extremely broad on its face and that the Arbitrator concluded that it covered the denial of maternity benefits. Since the Arbitrator had it within his power to make such a conclusion, this contention is likewise rejected.

Along this same line, the District contends that the Arbitrator erred in considering "the current status of pertinent federal and state law" and that, moreover, the Arbitrator failed to apply established law.

This contention implies that an arbitrator is precluded from considering pertinent law when called upon to interpret a collective bargaining agreement. The District, however, offers no authority for this novel claim. Moreover, the District offers no explanation as to how the contractual prohibition on sex discrimination can be applied if one were to ignore pertinent legal principles bearing on that issue. Additionally, the contractual grievance procedure is exteremly broad as it defines a grievance as:

> "A complaint by a teacher or teachers based upon an alleged wrong suffered in respect of a condition of employment, specifically covered by this agreement, or a complaint by a teacher or teachers based upon an alleged wrong concerning the interpretation or application of provisions of this Agreement or compliance therewith."

Since the grievance before Arbitrator Yaffe centered on the complaint that certain teachers were discriminated against in violation of the sex

discrimination prohibition found in Article I, it is clear that Arbitrator Yaffe had the power to resolve that issue presented before him. As it was not unreasonable for Arbitrator Yaffe to consider pertinent legal principles in resolving that issue, the District's claim that he was precluded from doing so must be rejected.

Alternatively, the District alleges that Arbitrator Yaffe applied the incorrect legal principles. Since Arbitrator Yaffe extensively dealt with this issue, and as his analysis of the applicable law is not unreasonable, there is no basis for overturning his Award on this ground. That is particularly so where, as here, the Wisconsin Supreme Court has expressly held that an employer's denial of maternity benefits is violative of the Wisconsin Fair Employment Act. 6/ Indeed since the issuance of Arbitrator Yaffe's Award, the Wisconsin Department of Industry, Labor and Human Relations has held that an employer violates the Wisconsin Fair Employment Act 7/ when it denies maternity benefits to teachers. Accordingly, it appears that the thrust of the District's objection is not that the Arbitrator applied the incorrect legal principles, but rather, that the Arbitrator applied well recognized legal principles in the State of Wisconsin, principles which the District believes are wrong, and which should be reversed at a later date. 8/ That, of course, is no basis for overturning the Arbitration Award.

Finally, the District asserts that the "Arbitrator exceeded his authority by basing his award on his own perception of what a substantial cost to the employer of providing maternity benefits would be under the state law."

On this point, Arbitrator Yaffe expressly considered the District's economic data, found that the data was "probably inflated", and concluded that the data "does not represent a substantial increase in cost for expanded benefits as contemplated by the Wisconsin Supreme Court in Ray O Vac." Here, the District has offered absolutely no evidence as to the cost of complying with the Arbitrator's Award and it has failed to produce even an iota of evidence in support of its claim that Arbitrator Yaffe erred in finding that there would be no substantial cost to the District. As a result, the District's baseless allegation is rejected.

In light of the above-noted considerations, which show that Arbitrator Yaffe did not exceed his power and that his Award was not imperfectly executed, it must be concluded that there are no grounds for overturning the Award under Section 298.10 of the Wisconsin Statutes. Accordingly, since his Award was valid, the District has violated Section

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6/ Ray O Vac v. DILHR 70 Wis. 2d 919 (1975).

7/ Racine School Dist. #1 ERD Case 7301001, and Waukesha Jt. School Dist. #1 ERD Case 7301539.

8/ Indeed, the District at the hearing acknowledged that it is unaware of any legal authority in Wisconsin to the effect that the District is relieved from granting the kind of maternity leave benefits involved herein.

111.70(3)(a)5 of MERA by failing to comply with its terms. To rectify that unlawful conduct, the District shall take the remedial action noted above.

Dated at Madison, Wisconsin this 12th day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner