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., Respondent.	Case XXIII No. 21640 MP-749 Decision No. 15504-B

ORDER AMENDING EXAMINER'S FINDINGS OF FACT, AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

Examiner Amedeo Greco, having, on October 12, 1977, issued his Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum, in the above entitled matter, wherein said Examiner found that the above-named Respondent had committed a prohibited practice within the meaning of the provisions of the Municipal Employment Relations Act by refusing to comply with an arbitration award issued by Arbitrator Byron Yaffe, and wherein said Examiner ordered the Respondent to comply with said award; and on November 1, 1977 the Respondent having timely filed a petition for Commission review of the Examiner's decision, pursuant to Sec. 111.07(5), Stats.; and the Commission having reviewed the entire record, the petition for review, and the brief filed in support thereof, as well as the brief filed in opposition thereto; and the full Commission being satisfied that the Examiner's Findings of Fact be amended to include the award of Arbitrator Yaffe in its entirety; and Chairman Slavney and Commissioner Gratz being satisfied that the Examiner's Conclusion of Law be reversed (Commissioner Torosian dissenting); and Chairman Slavney and Commissioner Gratz being satisfied that the portion of the Examiner's Order requiring that the Respondent comply with the Arbitrator's Award be reversed (Commissioner Torosian dissenting); and Commissioner Torosian and Commissioner Gratz (Chairman Slavney dissenting) being satisfied that the dispute originally submitted to the Arbitrator be remanded to said Arbitrator;

NOW, THEREFORE, IT IS ORDERED

1. That paragraph 10 of the Examiner's Findings of Fact be, and the same hereby is, amended to read as follows:

> "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; and that said award is set forth in full in Appendix I, attached hereto and hereby incorporated by reference herein."

2. That all remaining Findings of Fact contained in the Examiner's decision be, and the same hereby are, affirmed.

Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz, Commissioner

IT IS FURTHER ORDERED that the Examiner's Conclusion of Law be, and the same hereby is, reversed, and that the Commission's Conclusion of Law be, and the same hereby is, instead, as follows:

That the March 23, 1977 arbitration award issued by Arbitrator Byron Yaffe was in excess of said arbitrator's powers, and that therefore the Respondent, by its refusal to comply with the terms of said award, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, or any other provision of the Municipal Employment Relations Act.

Morris Slavney, Chairman

Marshall L. Gratz, Commissioner

I dissent: Herman Torosian, Commissioner

IT IS ALSO FURTHER ORDERED that the Examiner's Order be, and the same hereby is, reversed, and that the Commission's Order be, and the same hereby is, instead, as follows:

That the dispute submitted to Arbitrator Byron Yaffe with respect to which he issued the March 23, 1977 award noted above shall be, and hereby is, remanded to Arbitrator Yaffe for the purpose of the conduct of such rehearing as he deems appropriate and for the purpose of his issuance of an award resolving said dispute in a manner not in excess of his powers under the applicable collective bargaining agreement.

Marshall L. Gratz, Commissioner

Herman Torosian, Commissioner

I dissent: Morris Slavney, Chairman

Dated and sealed at Madison, Wisconsin this 29th day of August, 1978.

SCHOOL DISTRICT OF WEST ALLIS-WEST MILWAUKEE, ET AL., XXIII,
Decision No. 15504-B

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS OF FACT, REVERSING EXAMINER'S CONCLUSION OF LAW, AND REVERSING EXAMINER'S ORDER

The Examiner's Decision:

The proceeding before the Examiner was initiated by a complaint filed by the West Allis-West Milwaukee Education Association, hereinafter referred to as the Association, wherein it alleged that the School District of West Allis-West Milwaukee, et al., hereinafter referred to as the District, committed a prohibited practice by refusing to implement the terms of an arbitration award, wherein said arbitrator found that the District had violated the collective bargaining agreement existing between the parties by denying employes the right to utilize accumulated sick leave benefits for pregnancy-related medical disabilities. In the proceeding before the Examiner the District alleged that the arbitrator had exceeded his authority in that the arbitrator ignored certain pre-contract negotiations which resulted in the collective bargaining agreement finally agreed upon not containing a maternity leave clause. The District also alleged that the arbitrator exceeded his authority by interpreting the contractual provision relating to sex discrimination, in that the provision did not prohibit sex discrimination with respect to working conditions, and in that regard also the District agrued that the arbitrator erred in considering the current status of pertinent federal and state law. Finally, the District argued that the arbitrator had 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.

The Examiner rejected the various arguments put forth by the District, concluding that as long as the arbitrator's decision could be construed as an interpretation of the agreement, the reviewing tribunal should not engage in a plenary review of the merits of that interpretation. In that regard the Examiner concluded that the arbitrator's award could reasonably be construed as an interpretation of the collective bargaining agreement. In doing so, the Examiner reasoned that, since the grievance before the arbitrator centered on a complaint that certain teachers were discriminated against in violation of the sex discrimination clause in the collective bargaining agreement, it was clear that the arbitrator had the power to resolve the issue before him, and further that it was not unreasonable for the arbitrator to consider pertinent legal principles to resolve the matter.

With respect to the District's argument that the arbitrator incorrectly applied legal principles the Examiner concluded 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." The Examiner based such a conclusion on the decision of our Supreme Court in Ray O Vac v. DILHR. 1/ With respect to the contention that the arbitrator exceeded his authority by basing his award on his own perception of what the substantial cost to the employer would be, the Examiner concluded that the District had offered no evidence as to the cost of complying with the award.

In conclusion, the Examiner found there was no basis for overturning the award and, therefore, the District had violated Sec. 111.70

1/ 70 Wis. 2d 919 (1975).

(3)(a)5 of the Municipal Employment Relations Act and ordered the District to comply with the award.

The Petition for Review:

In its petition for review the District, for the most part, put forth the same arguments that it had put forth to the Examiner, namely that the award did not meet the standards set forth in Section 298.10 (1)(d), Stats. in that: (a) the award did not draw its essence from the collective bargaining agreement since the issue presented to the arbitrator was whether the District violated the collective bargaining agreement in denying employes the right to use accumulated sick leave while on maternity leave; (b) the bargaining history leading to the collective bargaining agreement clearly demonstrates the intent of the parties that the sick leave provision did not cover maternity leaves; (c) if the award were only based on the sick leave article, the award would be unenforceable; (d) since the sex discrimination clause found violated limits its proscription to matters of "hiring and tenure", the arbitrator's application thereof to a working condition (sick leave for maternity) based on the broader statutory definition of "discrimination because of sex" impermissibly modifies the sick leave and discrimination provisions of the agreement and thereby exceeds the arbitrator's authority; (e) the arbitrator's award is contrary to the interpretation of the sex discrimination language made by the U.S. Supreme Court in General Electric Company vs. Gilbert, 429 U.S. 125 (1976), wherein the court determined that the treatment of pregnancy related disabilities in a manner different from that provided other disabilities pursuant to a disability plan does not constitute discrimination based on sex; and (f) the arbitrator, in applying the Ray O Vac decision, did not adequately take into consideration "the substantial cost of the employer" test.

The Association's Response:

The Association argues that arbitrators' awards are presumptively valid; that review thereof, whether judicial or administrative, is extremely limited; that even an award containing a mistake of judgment, fact or law is enforceable since such errors are within the parties' arbitral risk; and that a refusal of enforcement is appropriate only where positive arbitrator misconduct or a perverse misconstruction is plainly proven or where the award reflects a manifest disregard of the law, violates public policy, is illegal, or would require violation of the penal laws of the state.

With regard to the instant award, the Association argues that the arbitrator's conclusion that the agreement had been violated was based upon a thorough analysis of the provision of the agreement; that the arbitrator's reference to external law was based upon his finding of authority therefor in several agreement provisions read together; that the arbitrator correctly concluded that Ray O Vac applies to the instant facts and is not preempted by federal law; that there has been no substitution of statutory for an inconsistent contractual standard since there is no express exclusion of maternity from sick leave provisions; that, in any event, the District's contentions amount to mere disagreement with the arbitrator's interpretations of the agreement such that they are without merit and not a basis for a denial of enforcement of the award; and that, therefore, the award is worthy of enforcement regardless of the Commission's de novo views of the merits of the issues submitted to and decided by the arbitrator.

For all of those reasons, the Association urges affirmance of the Examiner's decision.

DISCUSSION

Our respective opinions in support of the individual conclusions we have reached in the instant matter appear below.

Opinion of Commissioner Gratz:

The District's undisputed noncompliance with the instant award would not violate Sec. 111.70(3)(a)5, Stats., if, as the District argues, the Arbitrator, in issuing it, exceeded his powers--one of the grounds for vacating an award set forth in Sec. 298.10, Stats. 2/ Our role in determining whether an award has been issued in excess of an arbitrator's powers is not to engage in a de novo review of the correctness of the arbitrator's resolutions of the issues submitted. Rather it is only ". . . to insure that the parties receive the arbitration that they bargained for." 3/ The limits of an arbitrator's powers were discussed in the Enterprise Wheel 4/ decision, one of the Steelworkers' Trilogy upon which the Commission and the Wisconsin Courts have relied in establishing the scope of review of arbitration awards. In that case, the U.S. Supreme Court stated:

> "[a]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 5/

In the instant case, the Arbitrator concluded that when the District ". . . denied employes the right to utilize accumulated sick leave benefits for pregnancy-related medical disabilities," it violated agreement Article I(D) which provides in pertinent part,

> "[t]he Board shall not discriminate against any teacher, with respect to hiring or tenure of employment, because of . . . sex . . . except as otherwise provided by law."

In essence, the arbitrator reached that conclusion because he found that the District's conduct in question constituted ". . . prohibited discrimination based upon sex in violation of the Wisconsin Fair Employment Act. . . ." While he noted that under agreement Article XII(D) (Step 4) ". . . 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", he explained his heavy reliance on the substantive provisions of law outside the agreement by stating that he was ". . . 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" based on ". . . the reference throughout the agreement to the laws of the state

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2/ See, City of Franklin, (11296) 9/72.

3/ Milwaukee Professional Firefighters v. City of Milwaukee, 78 Wis. 1, 22 (1977).

4/ United Steelworkers of America v. Enterprise Wheel and Car Corp. 36 U.S. 593, 46 LRRM 2423 (1965).

5/ Ibid, 46 LRRM at 2425.

and nation which affect the interpretation and enforceability of said agreement." He found it "necessary" to turn to external law ". . . to define the type of discrimination which is prohibited . . ." by Article I(D) of the agreement. Specifically, he turned to interpretations of the Wisconsin Fair Employment Act which, at Sec. 111.32(5)(g)1, Stats., defines "discrimination because of sex" as, inter alia, "[f]or an employer . . . on the basis of sex . . . to refuse to hire [or] employ [an individual or] . . . to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment. . . ."

In my opinion, the instant award (a copy of which is attached hereto) fails to draw its essence from the agreement because the arbitrator has applied the statutory definition of "discrimination because of sex" without interpreting or applying the parties' own contractual definition of that term. Said contractual definition is reflected in the words ". . . with respect to hiring or tenure of employment . . ." in Article I(D). In other words, the arbitrator has substituted the statutory for the contractual definition of "discrimination because of sex", thereby exceeding his powers and rendering the award unenforceable. I so conclude for the following reasons.

Although the parties' respective proposed statements of the issue for the arbitrator's determination 6/ were framed in terms of whether the District violated the collective bargaining agreement, the Arbitrator begins his discussion by asserting that essentially the case turns on an interpretation of state and federal law--i.e., not on the meaning and application of the term "discrimination because of sex" as defined by the parties in the agreement.

Furthermore, the arbitrator's discussion makes no mention whatever of the proper interpretation and application of the terms ". . . with respect to hiring and tenure of employment . . ." in Article I(D). Instead, the Arbitrator simply states:

> "Clearly Article I, Section D prohibits sex discrimination by the District, and by virtue of said Article, the undersigned had the authority to determine whether the District's conduct constitutes prohibited discrimination."

He does so notwithstanding the fact that the District argued to him that he should not be guided by the provisions of external law and instead should interpret the agreement by analyzing its terms in the context of past practice and bargaining history. 7/ He also does so with knowledge of the existence of the ". . . with respect . . ." language. For, the arbitrator included the following passage in his restatement of the Union's position in the award: ". . . Article I, Section D, which prohibits discrimination on the basis of sex with respect to hiring and tenure of employment."

In addition, as noted above, the arbitrator expressly found that the District's policy constitutes prohibited discrimination based upon sex in violation of the Wisconsin Fair Employment Act. He did so in

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6/ This and other points below are predicated upon a review of the file in the arbitration case of which the Examiner took administrative notice during the course of the prohibited practice hearing. Examiner Tr., 3.

7/ Arbitrator Tr., 16, 25.

the same sentence with, and as an integral intermediate finding supporting his conclusion that the District has violated Article I(D) of the agreement. While an arbitrator's resort to legal definitions as a guide to the meaning of a disputed contractual term is certainly not, per se, in excess of an arbitrator's powers, it becomes so where, as here, the arbitrator chooses to apply the legal definition instead of interpreting and applying what appears to be a contractual definition of the term in question. The agreement references to the laws of the state and nation in the provisions noted by the arbitrator under the heading "Pertinent Contract Provisions" do not, either individually or in any combination, constitute a rational (or therefore minimally sufficient) basis for a conclusion that the parties intended that statutory definitions be substituted for those the parties themselves fashioned as part of the agreement. 8/ Moreover, such a substitution would appear to be inconsistent with the parties' intent reflected in Article XII (Step 4) that the arbitrator ". . . shall not have authority to modify or change any of the terms of this Agreement," and therefore not the arbitration that the parties bargained for.

Finally, in fashioning his remedial order in the award, the arbitrator ordered, inter alia, that the District cease and desist from the conduct in question--not until such time as the parties' agreement changed in material ways--but rather ". . . so long as Wisconsin law prohibits . . ." that conduct. Thus, even if the parties saw fit to delete or materially narrow Article I(D), the award by its terms would purport to remain in effect until a material change in external law were effected.

The foregoing factors indicate, to my satisfaction, that "the Arbitrator's words manifest an infidelity to his obligation to cause his award to draw its essence from the agreement." Though he was aware of the ". . . with respect to hiring and tenure . . ." language and of the District's expressed preference that he limit his sources of decisional guidance to the agreement and its history of bargaining and administration, the arbitrator ignored that contractual term of seemingly critical relevance to the intended definition of "discrimination because of sex" and substituted exclusive reliance on statutory and caselaw sources for guidance to the meaning of that term. He did so in the absence of rational contractual authority for such a substitution and in the face of contractual language prohibiting modification or change of the agreement by an arbitrator. Again, for those reasons, I conclude that the Arbitrator exceeded his powers in issuing the instant award.

In my opinion, however, the fact that the instant award cannot be given final and binding effect ought not deprive the aggrieved of the resolution of the submitted dispute by the final and binding arbitration

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8/ The fact that the arbitrator identified those provisions as the justification for his resort to external law as a decisional guide is a telling indication that the arbitrator did not decide that (or whether) "hiring and tenure" includes working conditions. For, if the arbitrator had so decided, his reference to external law to determine the meaning of the term "discrimination because of sex" would have been an entirely conventional and proper approach. (See that portion of Commissioner Torosian's opinion accompanying Notes 15-17, below.) As such, that approach would not likely have promted the sort of search for confirmatory authority that the arbitrator engaged in here.

that the parties did bargain for. Moreover, for the Commission itself to determine that the ". . . with respect to hiring and tenure . . ." language does not include working conditions such as sick leave, would contravene the parties' reservation of contract interpretation to the arbitrator. The proper interpretation of that quoted phrase was not argued to the arbitrator, and, in my opinion it was neither addressed nor decided by him. Therefore, both justice and the effectuation of the parties' intent require that the dispute be remanded to the arbitration forum in order that an award meriting final and binding effect be issued to resolve it. 9/

The statutes support such an approach. Section 298.10(2), Stats., provides as follows:

> "Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

The determination herein that the instant award is not binding on the District is sufficiently akin to a judicial vacation thereof as to make the foregoing discretion to remand appropriately available to the Commission in the instant circumstances. Since there is no time limit for award issuance specified in the applicable Agreement, the attached order remands the matter to the arbitrator, directing that he conduct such rehearing as is appropriate to the end that he issue an award that is within the jurisdiction of an arbitrator under the terms of the agreement.

Dated at Madison, Wisconsin this 29th day of August, 1978.

Marshall L. Gratz

Marshall L. Gratz, Commissioner

Opinion of Chairman Slavney, Concurring in Part and Dissenting in Part

The issue to be determined by the Commission herein is whether the arbitrator exceeded his jurisdiction in concluding that the District violated the sex discrimination provision in the collective bargaining agreement existing between it and the Association, specifically Article I, Section D thereof, which reads as follows:

> "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."

The arbitrator, in discussing said provision, stated:

> "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 prohibits discrimination."

In the prohibited practice proceeding before the Examiner, the District, in its brief filed with the Examiner, specifically argued, among other things, that the arbitrator "exceeded the scope of his

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9/ Accord, City of Neenah, (10716-B), 10/72.

submission" by extending the application of the sex discrimination article beyond "hire and tenure of employment" to "working conditions," e.g., "sick leave." The Examiner, in supporting the arbitrator's exercise of jurisdiction, stated that "the only issue for consideration is whether the arbitrator's award can reasonably be construed as an interpretation of the collective bargaining agreement." With regard to the contractual provision involved and the contention of the District, the Examiner rationalized as follows:

> "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."

I cannot accept the Examiner's characterization that the sex provision in the contract is "extremely broad on its face." On the contrary, it is not as broad as the provisions of Sub-Chapter II of Chapter III, Wisconsin Statutes, specifically Section 111.32(5)a, wherein the term "discrimination" is defined as meaning "discrimination because of . . . sex . . . by an employer . . . against any employe or any applicant for employment . . . in regard to his hire, tenure or term, condition or privilege of employment. . . ."

The federal sex discrimination act, Title VII of the Civil Rights Act of 1964 provides, in pertinent part, as follows:

> "Sec. 703. (a) It shall be an unlawful employment practice for an employer--
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

Since the arbitrator expanded the contractual sex discrimination provision to include the scope of such discrimination appearing in both state and federal statutes, he exceeded his jurisdiction inasmuch as the agreement does not rationally support the view that the parties intended to authorize the arbitrator to substitute external standards for those expressly set forth in the agreement.

In my opinion, there is no ambiguity in the arbitrator's rationale. He specifically indicated that "Clearly Article I, Section D prohibited sex discrimination." The arbitrator also specifically stated that "by virtue of said Article" he had jurisdiction to determine whether the District violated the collective bargaining agreement by denying sick leave for maternity benefits. The fact that the District, during the proceeding before the arbitrator, did not contend, or specifically point out, that Article I, Section D applied only to "hire and tenure of employment" does not, in my opinion, constitute an expansion of the arbitrator's jurisdiction to apply the provision to cover working conditions. Such a waiver must be clear and unambiguous. The failure of

District to make such a claim before the arbitrator does not constitute such a waiver. The District raised such a defense before the Examiner who, in turn, characterized the provision as "extremely broad on its face."

It is well established that an arbitrator's jurisdiction is limited to the "four corners of the collective bargaining agreement." 10/

It is apparent, at least to the undersigned, that the award herein did not draw its essence from the collective bargaining agreement. Rather than staying within the four corners of the agreement, the arbitrator, by expanding the sex discrimination provision to cover "working conditions," has journeyed from the four corners of the agreement to find his jurisdiction, and the Examiner has followed the same detour. I therefore concur in reversing the Examiner and refusing to enforce the award issued by the arbitrator.

However, since the applicability of Article I(D) to sick leave is clearly negated by the "with respect to hiring and tenure" limitation therein, I find that no useful purpose would be served by the remand ordered by my colleagues. I therefore concur in the reversal of the Examiner's conclusion of law and order, but I would not order that the matter be remanded to the arbitrator for reasons which appear obvious in my rationale, and I would dismiss the complaint.

Dated at Madison, Wisconsin this 29th day of August, 1978.

Morris Slavney, Chairman

Opinion of Commissioner Torosian, Concurring in Part and Dissenting in Part

In my opinion, the award has not been shown to have been rendered in excess of the arbitrator's powers. Therefore, in my judgment, it is worthy of enforcement and the Examiner's decision should be affirmed in all respects. However, in view of the positions taken by my colleagues, I find it necessary to join with Commissioner Gratz in ordering a remand--a result less objectionable to me than outright dismissal of the complaint.

I agree with the majority's conclusion that the Arbitrator referred to external law in reaching his decision, but disagree with the majority's finding that he substituted external law for the terms of Article I, Section D of the agreement. Article I, Section D states that "the Board shall not discriminate against any teacher, with respect to hiring or tenure of employment. . . ." In essence the majority concluded the Arbitrator exceeded his authority by including in said language the requirements of Federal and State Law which also prohibits sex discrimination with respect to working conditions.

I would agree with the majority if that were the case, however the majority ignores the fact that the Arbitrator first concluded, without resort to external law, that sex discrimination, not just sex discrimination with respect to hiring and tenure, is prohibited by the agreement. It is only after reaching that conclusion the Arbitrator for the first time considers external law. For said reason, in my opinion, the Arbitrator did not substitute external law for the

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10/ See, Enterprise Wheel, above, note 5.

contract term but rather looked to outside law for the purpose of guidance in determining if a violation of Article I, Section D occurred.

This is made abundantly clear to the undersigned by the Arbitrator's initial discussion of the issues and his analysis and approach in resolving same. In this regard the Arbitrator states that the issue essentially is whether the District 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. Then, in the following sentence, he states that a determination of such issue requires the Arbitrator to (1) "construe the terms of the parties' collective bargaining agreement in order to assess whether the agreement includes a provision prohibiting such discrimination", and (2) assess "the current status of federal and state law as it affects the parties' rights and responsibilities in this regard."

The Arbitrator does not refer to external law for the resolution of the first issue. He immediately answers said issue in the second paragraph of his opinion by concluding that "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." Thus, while the Arbitrator did not discuss terms such as hire, tenure, or conditions of employment, he nevertheless found a general prohibition of sex discrimination thereby disposing of sub issue 1. Such general prohibition found by the Arbitrator most reasonably must be interpreted to include conditions of employment. The fact that the Arbitrator may have erred in concluding same is not sufficient grounds for the Commission to review and set aside the Arbitrator's award as long as he arrived at his award by interpreting and applying the collective bargaining agreement. 10/

While the Arbitrator did not discuss his reasons or rationale in support of his conclusion, his nonexplication may be explained by the facts that the District in the proceeding before the Arbitrator did not contend that Article I, Section D does not include denials of sick leave for maternity related disabilities; 11/ and further, before the Arbitrator, the District at no time cited the language "with respect to hiring or tenure . . .";

10/ City of Milwaukee, supra, note 3, 78 Wis. 2d at 24-25. In that case the arbitrator was faced with the issue of whether the maintenance of past practice was required under the contract. The arbitrator concluded that past practice had to be maintained but his decision was not based on the terms of the agreement. The Court, in setting aside the award made clear however, that had it been based on an interpretation of the contract, his award would have been enforced. The Court stated:

> ". . . If he decided that the contract did not require the maintenance of past practice, then his answer should have been simply that past practice was not necessarily required. If he concluded past practices were required by this agreement, the proper course would be to direct their maintenance. The arbitrator did not, however, find that the agreement required the maintenance of the past practice, yet he directed that they be maintained. . . ."

11/ The Examiner took administrative notice of the arbitration case file during the course of the prohibited practice hearing. Examiner's Tr. at 3.

and that throughout its processing of the grievance, including in its original denial of Cavender's sick leave request, the District's representatives based their denials not on contractual limitations, but rather on the status of external law. 12/ Similarly, the arbitrator's immediate focusing on issues of external law simply mirrors the approach taken by the District itself in the responses of its representatives during the processing of the grievance. Finally, the nature of the order fashioned by the Arbitrator simply takes for granted the obvious fact that the parties could undercut its effects by changing the provisions of the agreement upon which the award was predicated.

However, regardless of his reasons for not stating supporting rationale for his conclusions, the lack of same, even if it results in an ambiguity, does not justify vacation of his award. The Supreme Court in Enterprise Wheel 13/ stated that:

> ". . . A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions . . . free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. . . ." (Footnote omitted) 14/

The Arbitrator, then, having decided sub-issue 1 by concluding that sex discrimination, including sex discrimination as to conditions of employment, is prohibited looks to external law for the first time as an aid in defining the type of discrimination prohibited by the agreement. In other words, having first concluded that sex discrimination is prohibited by the agreement, does denial of maternity leave under the sick provision, when read in conjunction with Article I, Section D, constitute sex discrimination in violation of said Article? The Arbitrator's referral to external law for guidance in resolving this issue does not, in my opinion, place the Arbitrator outside the four corners of the agreement. While the Supreme Court has stated in Enterprise Wheel, as quoted by the majority above, that the Arbitrator

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12/ For example, the Superintendent's Representative answered the grievance which cited violations of several agreement provisions and of DILHR and EOCC rules and regulations, as follows:

> "Whether or not denial of sick leave pay for pregnancy cases is discriminatory as alleged by the grievance depends upon interpretation of state and federal laws by the courts. The question now pending in both the United States Supreme Court and the Wisconsin Supreme Court and definitive decisions are expected from both bodies no later than June of 1976. As our representatives advised the Association's representatives during the recent negotiations, the District had decided to continue its policy of not paying sick leave for pregnancy until the pending cases are decided and it will then be guided by those decisions."
>
> Exhibit 4 before the arbitrator.

13/ Supra, note 4.

14/ Ibid, 46 LRRM 2425.

is "confined to interpretation and application of the collective bargaining agreement", the Court also recognized that arbitrators in interpreting and applying agreements may "look for guidance from many sources." Indeed, in this regard the court in that case in concluding that the Arbitrator had not exceeded his authority in fashioning a remedy stated the following:

> "It (the arbitrator's award) may be read based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to 'the law' for help in determining the sense of the agreement." (Emphasis added) 15/

Further, the Supreme Court in the companion case, Warrior and Gulf Navigation Company 16/ stated the following with regard to outside sources arbitrators may properly consider:

> ". . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . ." 17/

In conclusion, then the most reasonable interpretation of the Arbitrator's award, in my opinion, is that (1) as a matter of contract interpretation sex discrimination, including sex discrimination with respect to conditions of employment, is prohibited by Article I, Section D; and (2) that denial of maternity leave using external law as a guidance constitutes sex discrimination and is therefore violative of Article I, Section D.

For the foregoing reasons, and because, in my judgment, the District's other arguments for reversal are also without merit, I feel constrained to affirm the Examiner in all respects and enforce the Arbitrator's award, even though the Arbitrator may arguably have misinterpreted the provision invoked, since arbitration is a procedure agreed to by the parties and the Arbitrator's decision, which is based on an interpretation of the parties' collective bargaining agreement, is the decision contracted for by the parties. 18/

15/ Ibid.

16/ United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 46 LRRM 2416.

17/ Ibid, 46 LRRM, at 2419.

18/ See Denhart v. Waukesha Brewing Co., 17 Wis. 2d 44, 51 (1962), where the court said:

> "While this court may disagree with the interpretation of the contract reached by the Arbitrator, the parties contracted for the Arbitrator's settlement of the grievance and that's what they received."

See also, City of Milwaukee, supra, note 3, 78 Wis. 2d at p. 22.

Dated at Madison, Wisconsin this 29th day of August, 1978.

Herman Torosian, Commissioner

"APPENDIX I"

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute between	:
WEST ALLIS-WEST MILWAUKEE JOINT CITY SCHOOL DISTRICT NO. 1	:
and	:
WEST ALLIS-WEST MILWAUKEE EDUCATION ASSOCIATION	:

Appearances:
Mr. Richard Perry, Esq., Perry & First, Attorneys at Law, on behalf of West Allis-West Milwaukee Education Association.
Ms. Carolyn C. Burrell, Esq., Foley & Lardner, Attorneys at Law, on behalf of Board of Education, Joint City School District No. 1, West Allis-West Milwaukee, et. al.

ARBITRATION AWARD

Pursuant to a request by West Allis-West Milwaukee Joint City School District No. 1, hereinafter referred to as the District, and West Allis-West Milwaukee Education Association, hereinafter referred to as the Association, to appoint an impartial arbitrator to determine a dispute existing between said parties, the Wisconsin Employment Relations Commission assigned the undersigned to hear and decide the issue. A hearing was held on September 7, 1976 at West Allis, Wisconsin, during the course of which the parties brought forth evidence and made such arguments as were relevant. Thereafter briefs were filed by both parties. Upon review of the evidence, arguments and briefs, the undersigned renders the following award.

ISSUES:

The issues to be arbitrated are as follows:

1. Whether the District violated the collective bargaining agreement when it denied the request of Sandra Cavender to use accumulated sick leave during her maternity leave?

2. Whether the grievance filed by Sandra Cavender constituted a class grievance covering all teachers who took maternity leave since August 30, 1972?

3. If either or both of the above issues are answered in the affirmative, what should be the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

"ARTICLE I

RECOGNITION

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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.

ARTICLE II

BOARD RIGHTS

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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.

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ARTICLE XII

GRIEVANCE PROCEDURE

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C. In order to prevent the filing of a multiplicity of grievances on the same question, where a grievance covers a question common to a number of teachers, it shall be processed as a single grievance. Any grievance or complaint based upon action of authority higher than a principal or supervisor shall be initiated directly with the Superintendent.

D. Steps in Grievance Procedure. Grievances shall be resolved, except as otherwise provided, in accordance with the following procedure. Time limits indicated at each step of the proceedings are directory and every effort shall be made by the parties to comply with such time limits. Such time limits may be extended by mutual agreement of the parties.

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Step 4. . . . 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.

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ARTICLE XV

LEAVE

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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 the 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.

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ARTICLE XXIV

MISCELLANEOUS PROVISIONS

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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."

BACKGROUND:

The Association and the District entered into a collective bargaining agreement covering the period January 1, 1976 through December 31, 1978, which includes the above-mentioned provisions.

The grievant, Sandra Cavender, has been employed by the District since 1969 as an English and Journalism teacher at West Allis Nathan Hale High School.

Ms. Cavender requested and was granted maternity leave from February 9, 1976 to April 15, 1976, for a total of 49 school days. On none of said days was Ms. Cavender allowed to utilize accumulated sick leave which she accrued during her employment. At the time Ms. Cavender requested maternity leave she was suffering from edema and preeclampsia, both pregnancy-related medical complications. Upon her doctor's recommendation, she requested the leave to commence one month before her due date.

On January 8, 1976, Ms. Cavender gave written notice to District Superintendent Marshall Taylor, requesting maternity leave from February 9, to April 16, for a total of 50 days, 20 of which she requested to be deducted from her accumulated sick leave days. In a letter dated January 15, 1976, Superintendent Taylor granted the request for the leave, but denied her the use of any sick leave benefits. Superintendent Taylor based the denial on the District's past practice of not granting sick leave benefits for maternity leave, stating that the practice would remain unchanged pending a definitive ruling in the state and federal courts regarding the question whether pregnancy-related disabilities must be treated like other medical disabilities in employe benefit plans.

On February 18, 1976 Ms. Cavender filed a grievance with the District requesting sick pay benefits for herself and all teachers absent due to pregnancy and child birth after August 30, 1972. Doctor Szudy, Director of Administrative Services, rejected the grievance in writing on March 2, 1976, citing past District practice which had remained unchanged pending resolution of the sick leave/ maternity leave issue in state and federal courts.

On March 26, 1976, the grievance was rejected by the Board of Education, which reaffirmed the District's policy of not granting sick leave for pregnancy until the Wisconsin Supreme Court decided the legal questions related thereto. Said grievance is the subject matter of this dispute.

POSITION OF THE PARTIES:

Association Position

First, the Association contends that this is a class grievance disputing the application of a general policy which has affected all women who have taken maternity leaves since August 30, 1972; said date being significant because contract language relating to the District's leave policies has remained consistent since 1972, and the Association has repeatedly raised the issues since that time. The Association asserts that the grievance and the subsequent meetings held by the Association and Administration representatives on this matter clearly reflect the Association's expressed intent to seek broad relief affecting the entire class of employes, and that the correct procedure for the processing of a class grievance was followed. The Association requests that back pay be granted to all women who took unpaid maternity leaves since August 30, 1972, and in addition, a cease and desist order requiring the District to allow teachers to utilize accumulated sick leave during maternity leaves.

The Association also argues that the Arbitrator has a duty imposed by the collective bargaining agreement to interpret the contract provisions in a manner which is consistent with established state and federal law. Several contract provisions are cited in support of this belief: First Article I, Section D, which prohibits discrimination on the basis of sex with respect to hiring and tenure of employment. Second, the provisions in the agreement which refer to the relationship between the contract and the laws of the state and the nation, (Article I, Section C 5 and Article II, Sections A and B), and thirdly, the savings clause contained in Article XXIV, Section M. The Association also contends that Article XII, Section B, Step 4 grants broad powers to the arbitrator to determine all questions arising under the agreement with a limited restriction prohibiting the arbitrator from modifying or changing the terms of the agreement. Similar provisions in other collective bargaining agreements have not prevented arbitrators from construing such contracts in a manner which complies with state and federal laws, and the same principle of contract construction should apply here.

The Association argues further that there is sufficient clarity in the law related to sex discrimination and maternity leaves at this time to allow the Arbitrator to make a definitive decision in this regard. The issue has been fully litigated and decided by the Wisconsin Supreme Court in the Ray O Vac 1/ case, and that decision should be considered final and binding on the District. In addition the Association argues that the federal courts have been in full accord with the guidelines of the EEOC which require disabilities related to pregnancy and child birth to be treated the same as are other temporary disabilities.

In applying the standards set forth in Ray O Vac to the instant case, the Association contends that there is no justification for the District's policy since there has been no showing of a prohibitive cost to the District which might justify, under Ray O Vac, denial of sick leave benefits to women on maternity leave. The Association calculates the maximum additional cost at less than two-tenths of one percent of the total school year expenditures; less than one-half of one percent of the District's total teacher salary expenditure, and less that two percent of the total fringe benefit expenditure for teachers. Thus, the cost to the District is negligible, and accordingly, under Ray O Vac, said cost cannot be utilized to justify the exclusion of pregnancy and child birth related disabilities from sick leave coverage.

Even if the Arbitrator were not to consider and decide the legal status of the issue, the Association submits that the collective bargaining agreement itself requires that pregnancy disabilities be treated as personal illness under Article XV, Section B. In this regard, the Association relies on Article I, Section D, which prohibits sex discrimination with respect to hiring or tenure of employment. It argues that this provision must be interpreted in conjunction with the sick leave provision, Article XV, Section B, which does not exclude pregnancy-related disabilities from coverage thereunder. The Association further argues, in Ms. Cavender's case, that her pregnancy and child birth disabilities should be covered by the contractual definition of personal illness since her doctor stated that she was physically unable to perform her job functions because of medical complications.

District Position

The District argues that the leave provisions in the contract have been consistently applied to allow women to take maternity leaves without pay pursuant to Article XV, Section H. The District submits that its past practice should be used to interpret the contract language. Furthermore, Article XII, Section D, Step 4 of the contract prohibits the Arbitrator from modifying the parties' agreement as reflected by a clear past practice by now requiring the District to begin allowing teachers on maternity leave to utilize their accumulated sick leave.

The District also contends that neither federal nor state law requires that employes on maternity leave be allowed to utilize paid sick leave benefits. With respect to the federal substantive law, the District notes that in Geduldig vs. Aiello 2/ the U.S. Supreme Court permitted state disability plans to exclude pregnancy coverage, and that various federal courts have reserved ruling on related issues

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1/ 70 Wis. 2d 919, (1975).

2/ 417 U.S. 484, (1974).

pending a definitive ruling on the matter by the U.S. Supreme Court. 3/ With respect to the status of Wisconsin law on this matter, the District argues that the Department of Industry, Labor and Human Relations regulations pertinent to the Wisconsin Fair Employment Act are invalid, and that the Ray O Vac decision by the Wisconsin Supreme Court is unclear, at least with respect to the standard to be applied in determining whether sufficient economic and business considerations exist to excuse an employer from including pregnancy coverage in disability plans which are provided to employes. The District therefore concludes, in light of the Ray O Vac decision, that there has been no clear and definitive judicial determination with respect to the matter in dispute which requires that the Arbitrator find that the District's unwillingness to allow women employes on maternity leave to utilize accumulated sick leave benefits violates both the contract and state law.

In response to the Association's request that any remedy afforded in this proceeding be applicable to all women who took maternity leave since August 30, 1972, the District asserts that the grievance filed herein is an individual, not a class grievance. In support of this contention, the District argues that at all times pertinent herein the parties treated the grievance as an individual grievance filed by Sandra Cavender since she was named specifically in the grievance, and only she was present at the meetings in which the merits of the grievance were discussed.

DISCUSSION:

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.

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.

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.

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, 4/ it also seems clear that the parties intended that the terms of the agreement would only be

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3/ Briefs in this proceeding were filed prior to the U.S. Supreme Court's recent decision in General Electric vs. Gilbert, 13 FEP Cases 1657.

4/ Article XII, Section D, Step 4.

enforced if they were consistent with the operation of law, as set forth in the savings clause. 5/ 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.

There are two substantive bodies of law which appear to be pertinent to this proceeding: The federal substantive law under Title VII of the Civil Rights Act of 1964, and Wisconsin State Law under the Wisconsin Fair Employment Act. 6/

After the filing of briefs in the instant proceeding the U.S. Supreme Court in General Electric vs. Gilbert, 7/ decided that Title VII of the Civil Rights Act was not violated by the exclusion of pregnancy-related disabilities from an employer's disability plan. Because Title VII of the Civil Rights Act is applicable to public employers which employ more than 25 employes, said ruling is clearly relevant to the instant proceeding. Accordingly, under Gilbert, the failure of a public employer such as the District to allow women employes on maternity leave to utilize paid sick leave benefits for pregnancy-related disabilities does not constitute the type of sex discrimination prohibited by Title VII of the Civil Rights Act.

If the above ruling preempted all conflicting state rulings and legislation, the undersigned would be compelled to find that the District's policy at issue herein does not constitute unlawfully prohibited sex discrimination, even though such discrimination is prohibited by the parties' collective bargaining agreement in addition to Title VII of the Civil Rights Act.

It is the undersigned's belief, however, that the Gilbert decision, which was rendered pursuant to Title VII of the Civil Rights Act, does not preempt conflicting and contrary state rulings based upon relevant state statutes. In that regard, it must be noted that the state of Wisconsin has also enacted legislation prohibiting discrimination in the form of the Fair Employment Act, 8/ which has on two recent occasions been interpreted by the Wisconsin Supreme Court 9/ as being applicable to the issue raised herein. In the Ray O Vac decision, the Wisconsin Supreme Court held that reduced disability benefits for pregnancy and child birth constituted unlawful and prohibited discrimination on the basis of sex in violation of the Wisconsin Fair Employment Act. However, the Court also concluded in Ray O Vac

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5/ Article XXIV, Section M provides that if the agreement is held to be invalid by operation of law or by a court of competent jurisdiction, the remainder of the agreement would not be affected thereby.

6/ Wisconsin Statutes, Sections 111.31 through 111.37.

7/ Supra.

8/ Supra.

9/ Wisconsin Telephone Company vs. DILHR, 68 Wis. 2d 345 (1975), and Ray O Vac vs. DILHR, 70 Wis. 2d 919 (1975).

that greatly increased costs should be considered a factor excusing such a discriminatory practice. 10/

Therefore, under the Ray O Vac ruling, the Wisconsin Supreme Court has indicated that employers covered by the Wisconsin Fair Employment Act 11/ must demonstrate that they have an adequate business justification if they are to be excused from a finding that they have engaged in prohibited discriminatory conduct where they refuse to afford women employes disability benefits resulting from pregnancies, while at the same time providing employes such benefits for other physical or medical disabilities. The standard set forth by the Wisconsin Supreme Court in Ray O Vac requires that the employer demonstrate that granting such benefits would result in a substantial increase in cost.

For all of the aforementioned reasons, the undersigned is persuaded that relevant federal substantive law does not require that the District afford employes pregnancy-related disability or sick leave benefits similar to the benefits provided to other employes for other physical or medical disabilities. However, the federal law does not preempt relevant state law, which currently requires that covered employers afford employes the same benefits for pregnancy-related medical disabilities which are afforded employes for other medical and physical disabilities, unless said employers can demonstrate a substantial increase in the cost for such expanded benefits.

It should be noted that tribunals in other jurisdictions have also held that the Gilbert decision does not preempt states from utilizing different legislative and judicial standards in determining what constitutes prohibited discrimination based upon sex. 12/

In the undersigned's opinion, the evidence presented in the instant proceeding does not demonstrate that there would be a substantial increase in cost to the District if it allowed women employes on maternity leave to utilize accumulated sick leave benefits for pregnancy-related medical disabilities.

In the first place, the projected cost figures presented by the District in all likelihood are inflated in that they appear to be based upon an assumption that all accumulated sick leave days would have been utilized by teachers if the benefit were granted. This estimation would, in all likelihood, prove to be erroneously inflated in view of the remedy provided herein, which limits the right of

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10/ In the facts presented in the Ray O Vac case, however, the employer did not present sufficient evidence to substantiate its claim that a substantial increase in cost would have resulted from providing employes said benefits, and therefore, an adequate business justification did not exist to excuse and relieve the employer from the consequences of its discriminatory policies.

11/ Which is applicable to public employers, including the District.

12/ See Brooklyn Union Gas Company vs. Appeal Board, 14 FEP Cases 42 (1976) in which the New York Court of Appeals held that under the New York State Human Rights Law an employer must provide the same benefits to pregnancy-related disabilities as are granted for other temporary disabilities. This decision was handed down by the New York Court of Appeals after the Gilbert decision was issued by the U.S. Supreme Court.

employes on maternity leave to utilize accumulated sick leave benefits only for the period of time that the employe's physician certifies that the employe is unable to work because of medical reasons.

The economic data presented by the District, which for the above-mentioned reasons is probably inflated in terms of estimated potential cost, reflects an estimated increase of approximately 12.4 percent in the cost of sick leave benefits based upon 1975-1976 school year statistics. This same data also reflects a projected two percent increase in the total cost of fringe benefits, a one-half of one percent increase in the total cost of teacher salaries, or two-tenths of one percent of the total school district expenditures.

This data, in the undersigned's opinion, does not represent a substantial increase in cost for expended benefits as contemplated by the Wisconsin Supreme Court in Ray O Vac. This is particularly true in view of the fact that there is no evidence on the record that the additional cost would affect in any significant manner, the quality of the educational program offered by the District. In view of the lack of evidence of any program impact, and also in light of the fact that the estimated costs are probably inflated, the undersigned is persuaded that the record fails to demonstrate that there is sufficient economic and/or business justification for the District to continue a policy which has been deemed by the Wisconsin Supreme Court to constitute unlawful discrimination based upon sex pursuant to the Wisconsin Fair Employment Act.

Having found that the District's policy constitutes prohibited discrimination based upon sex in violation of the Wisconsin Fair Employment Act, and also having found that the District has failed to demonstrate that there is a substantial business reason in the form of substantial increased costs resulting from the expanded benefit which would affect the quality of the educational program offered by the District, the undersigned concludes that the District, by failing to afford teachers the right to utilize accumulated sick leave for pregnancy-related medical disabilities, has violated Article I, Section D of the parties' collective bargaining agreement.

Having so found, a second issue now arises for the undersigned's disposition, and that is whether the grievance and violation is limited to the grievant Sandra Cavender, or whether said grievance constitutes a class grievance covering the entire class of employes affected by the Employer's discriminatory policy. The Association argues that the grievance is a class grievance and that relief should be afforded all employes who took maternity leave since August 30, 1972, the date when the pertinent contractual provisions were placed into the parties' collective bargaining agreement.

The record indicates that the grievance filed with the District by the Association clearly states that although the grievant was named as Sandra Cavender, the remedy being sought by the Association and by Ms. Cavender was for the class of teachers who were affected by the District's policy. 13/ Responses by the District to the grievance relied upon the District's policy of not allowing individuals on maternity leave to utilize accumulated sick leave. On the basis of the entire grievance record, the undersigned believes that it is reasonable to construe the grievance as a class grievance, and the remedy will therefore be directed to all teachers of the affected class.

13/ Article XII, Section C, of the parties' agreement specifically provides for the filing of class grievances in such cases.

Although the Association requests relief for all teachers who have been granted maternity leave since August 30, 1972, the undersigned is of the opinion that his jurisdiction and authority is limited by Article XII, Section D, Step 4, which limits the Arbitrator's jurisdiction to a determination of questions arising under this agreement. In light of that limitation, the undersigned is persuaded that the only affected class over whom he has jursidiction in this proceeding is the class of employes who have been granted maternity leave during the life of the 1976-1978 collective bargaining agreement. Accordingly the remedy provided hereinafter shall be applicable only to teachers who have requested and been granted maternity leave since the inception of the current collective bargaining agreement on January 1, 1976.

AWARD

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 employes 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.

Dated at Madison, Wisconsin this 23rd day of March, 1977.

By Byron Yaffe
Byron Yaffe, Arbitrator