STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of the<br><br>WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYES (WCCME), LOCAL 1752D<br><br>Requesting a Declaratory Ruling Pursuant to Section 227.06(1) Stats., Involving A Dispute Between Said Petitioner and<br><br>THE SCHOOL DISTRICT OF WAUSAUKEE | Case VII<br>No. 24112 DR(M)-114<br>Decision No. 17576 |

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, on behalf of the Union.

Condon & Hanaway, Ltd., by Mr. Donald J. Hanaway, on behalf of the District.

## DECLARATORY RULING

Wisconsin Council of County and Municipal Employees (WCCME) Local 1752D on February 2, 1979, filed a petition with the Wisconsin Employment Relations Commission, herein the Commission, wherein it requested the issuance of a declaratory ruling pursuant to Section 227.06(1) Stats., to determine whether an interest arbitration award issued under Section 111.70(4)(cm) Stats. was valid. On February 26, 1979, the School District of Wausaukee filed a response to said petition wherein it requested that the petition be dismissed. On June 18, 1979, hearing was held on said matter at Marinette, Wisconsin, before Examiner Amedeo Greco, a member of the Commission's staff. Thereafter, both parties filed briefs and reply briefs. Based upon the record herein, the Commission makes and issues the following

## FINDINGS OF FACT

1. Wisconsin Council of County and Municipal Employees (WCCME) Local 1752D, herein the Union, is a labor organization which represents a bargaining unit consisting of "all regular full-time and all regular part-time custodial and maintenance employees, including clerical employees, bus drivers, bus supervisor, cooks and nurse" employed by the School District of Wausaukee.

2. The School District of Wausaukee, herein the District, is a municipal employer which operates a school system in Wausaukee, Wisconsin.

3. During the early parts of 1978, the parties engaged in collective bargaining negotiations for an initial contract. Throughout those negotiations, the parties reached tentative agreements on a number of contract items, including provisions relating to health insurance and holidays.

4. On May 2, 1978, the parties jointly filed a petition for mediation-arbitration pursuant to Section 111.70(4)(cm), Stats. Thereafter, the parties on May 8, 1978, met with an investigator from the Commission's staff, for the purpose of determining whether an impasse had arisen in the collective bargaining negotiations between the parties. At that time, the parties executed a joint stipulation of agreed upon items, including Article XXI, entitled "Separability", which stated:

> If any provision of this Agreement shall be held invalid or in conflict with any Federal or State Law, the remainder of this Agreement shall not be affected thereby.

5. After an unsuccessful attempt at mediation, the parties on May 8, 1978, exchanged final offers. In submitting its final offer, the District for the first time withdrew its tentative agreements on health insurance and holidays and submitted different proposals on those issues. The District's final offer also contained a retirement proposal, Article IX, entitled "Wisconsin Retirement Fund", which stated:

> The Employer shall pay on behalf of each participating employee to the Wisconsin State Retirement Fund the full Employer contribution to said Retirement Fund.
>
> Effective upon acceptance by the State Retirement Fund. (sic) It is agreed that no 'prior service' as defined in Section 41.02(12) Wis. Statutes. (sic)

The Union's proposal on this issue provided:

> Article IX - Wisconsin Retirement Fund
>
> The Employer shall pay on behalf of each participating employee to the Wisconsin State Retirement Fund the full Employer and employee cost to said Retirement Fund.
>
> Effective as soon as accepted by State Retirement Fund.

6. The District's retirement proposal also stipulated that all unit employes, including cooks, would be accorded retirement coverage in the first year of the contract. In the second year of the contract, however, the District proposed to exclude cooks from retirement coverage, while at the same time according coverage to its remaining employes. The Union, in turn, proposed that all employes, including cooks, be covered under the State Retirement Fund.

7. On May 22, 1978, the Commission certified that the parties were at impasse in their negotiations and ordered the initiation of mediation-arbitration. Thereafter, the parties jointly selected Milo G. Flaten as the mediator-arbitrator.

8. On August 23, 1978, Arbitrator Flaten conducted a mediation session between the parties, after which time he conducted an arbitration hearing on the outstanding issues. At the hearing, Union representative James W. Miller and Donald J. Hanaway, the attorney for the District, agreed that they would file delayed exhibits with Arbitrator Flaten after the hearing. The deadline for filing such exhibits, along with briefs, was apparently set for September 5, 1978. There was no agreement by the parties that either party would be permitted to respond to the other's exhibit. The Union's delayed exhibit consisted of the Union's final offer cost analysis of its proposal. The District's delayed exhibit consisted of a fringe benefit comparison with other school districts. Miller subsequently sought and obtained an extension from Arbitrator Flaten to file his brief. The Union thereafter apparently filed its brief and exhibit with Arbitrator Flaten on September 12, 1978. It appears that Miller at about that time sent Hanaway a copy of his exhibit, but not his brief. By letter dated September 12, 1978, Hanaway advised Arbitrator Flaten that he would be receiving a copy of the District's brief in a few days. On September 15, 1978, Hanaway forwarded a copy of the District's delayed exhibit to Miller, and on the

same day advised Miller that he would be filing his brief with Arbitrator Flaten on September 18, 1978. It appears that Hanaway subsequently filed his brief on September 22, 1978. On September 26, 1978, Arbitrator Flaten exchanged briefs between the parties. Shortly after he had received a copy of the District's brief, Miller telephoned Flaten and asked that he be accorded an opportunity to comment on the District's delayed exhibit. Miller also advised Flaten that the District's brief mischaracterized the Union's position on holidays which were to be granted under the Union's proposal, and that the District also erred in stating the health insurance issue. Flaten refused such request on the ground that the arbitration award was being prepared.

9. On October 9, 1978, Arbitrator Flaten issued his Award wherein he ruled that the District's final offer should be incorporated into the contract. On the question of retirement coverage, Arbitrator Flaten noted in pertinent part:

> It should be remembered that the Board in its final offer agreed to pay the employer's share of 5% for all employees except cooks. This proposal is actually greater than most of the 10 surrounding school districts used by the parties in their comparisons when a close look is given to those districts' actual plans. That is, although five of those school districts make no retirement contribution whatsoever for their employees and three pay the employer share only, (5%), the latter pay only for the full-time employees whereas the Wausaukee Board's final offer will pay 5% to the Wisconsin Retirement Fund for all employees, be they full-time or part-time, except cooks. (Emphasis added)

10. Arbitrator Flaten's award also incorporated the District's final offers on health insurance and holidays. As noted above, said offers were different from the ones tentatively agreed to by the parties in their negotiations. Said decision also misstated the position of the parties on the disputed insurance and holiday issues.

11. Following the issuance of Arbitrator Flaten's award, the District typed a complete contract which incorporated the terms of said award and tendered it to the Union on November 17, 1978, for its signature. As of the time of the instant hearing, the Union has refused to sign said proferred contract.

12. On November 17, 1978, David Ludke, the District's Administrator, contacted the Wisconsin Department of Employment Trust Funds and asked how the District could place the employes herein under the Wisconsin Retirement Fund. Ludke was advised by John Zimbeck, Administrator of Municipal and State Government Division, Department of Employee Trust Funds, that since the District had not applied for such coverage before November 15, 1978, the employes could not be covered until January 1, 1980. Subsequent to the receipt of Arbitrator Flaten's award, the Union never advised the District that it had to file for coverage by that date.

13. Pursuant to an oral agreement reached at the instant hearing, the District on August 8, 1979, adopted the necessary resolution needed for making an application to the Wisconsin Department of Employee Trust Funds for placement of all eligible employes in the Wisconsin Retirement Fund, effective January 1, 1980. The District thereafter made application for such coverage. On August 17, 1979, the Wisconsin Department of Employee Trust Funds accepted such application. As a result, all of the bargaining unit employes were eligible for inclusion in the Wisconsin Retirement Fund effective January 1, 1980. 1/

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1/ The parties on October 8, 1979, executed a joint stipulation of the above-noted facts and submitted it to the Commission. Said stipulation is made part of the record.

14. As of the instant hearing, the District had implemented the remainder of Arbitrator Flaten's Award, along with those earlier tentative agreements which were not in dispute.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

## CONCLUSIONS OF LAW

1. The interest Arbitration Award herein is reviewable by the Commission under Section 227.06(1) Stats.

2. As there are insufficient grounds to overturn said award under the standards set forth in ERB 31.18, said award was lawfully made under the provisions of Section 111.70(3)(b)6 and Section 111.70(4)(cm) Stats.

Upon the basis of the above and foregoing Findings of Fact, Conclusions of Law, the Commission makes and issues the following

## DECLARATORY RULING

Having exercised its discretionary jurisdiction to review said interest Award under Section 227.06(1), the Commission finds that the Flaten Award was not violative of ERB 31.18 and that it was lawfully made pursuant to the provisions of Section 111.70(3)(b)6 and Section 111.70(4)(cm), Stats.

Given under out hands and seal at the city of Madison, Wisconsin this 30th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The Union requests that the Commission review the interest arbitration award issued by Arbitrator Milo Flaten, and that following said review, the Commission should then issue a declaratory ruling wherein it vacates that award because of several alleged irregularities, and that the Commission should then order the District to implement the Union's final offer submitted to Arbitrator Flaten.

The District opposes those requests on the grounds that: (1) Commission reveiw of the instant award is not permitted under ERB 31.18; and (2), even if such review were permissable, the alleged irregularities herein do not warrant vacating the award.

As to the question of Commission review, the record establishes, contrary to the District's claim, that the Union has not requested review of Arbitrator Flaten's Award under ERB 31.18, per se, but rather, under Section 227.06(1) Stats. which provides:

> (1) Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.

Relying on this provision, the Union basically contends that it is not required to execute a proferred collective bargaining agreement which incorporates certain alleged illegal provisions contained in Arbitrator Flaten's award and that, moreover, said award was tainted by other alleged irregularities.

The Union's contentions therefore involve the interpretation of Section 111.70(3)(b)6 and Section 111.70(4)(cm) Stats.,which provide for interest arbitration, and rules promulgated pursuant to Section 111.70(4)(cm)(8), which states that the Commission shall adopt rules providing for "the enforcement of arbitration decisions of the mediator-arbitrator." Pursuant to this latter proviso, the Commission adopted ERB 31.18 which provides for the standard of review which is to be used in passing upon the lawfulness of such awards. As a result, it is clear that the Union's request for a declaratory ruling does relate to certain facts which involve the applicability of rules and statutes enforced by the Commission. Accordingly, and because the issues posed herein go the lawfulness of the Flaten Award, and because the Union may not otherwise seek review of that award, the Commission concludes that it is proper to exercise its discretion under Section 227.06(1) Stats. to review the Union's challenges to the award. 2/

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2/ For a discussion of the Commission's discretion under Section 227.06(1) Stats., see The Milwaukee Board of School Directors, CVIII, CIX, CX, CXI, CXII, (12/79).

Turning to the merits of those challenges, the Union argues that said award should be vacated because it contains several illegal provisions. One challenge centers on the fact that the award provides for issues which were tentatively agreed to by the parties in their negotiations. Thus, the Union argues that the parties tentatively agreed to proposals on holidays and health insurance, that the District thereafter withdrew its agreement on those two items and submitted different proposals in its final offer, and that Arbitrator Flaten subsequently incorporated the District's offers in his Award. In support of its position, the Union relies on Milwaukee Deputy Sheriff's Association v. Milwaukee County, 64 Wis 2d 651 (1974), and Sheboygan County (15380-B), affirmed Circuit Court of Dane County, Case No. 163-032 (12/79).

Contrary to the Union' claim, the instant case is not controlled by Milwaukee Deputy Sheriff's Association, as in that case a party attempted to raise a new issue before an arbitrator after negotiations had closed. Here, the parties did bargain over the questions of health insurance and holidays in their negotiations and the District's ultimate health insurance and holiday proposals were presented to the Union in the District's final offer, before the matter was closed and submitted to Arbitrator Flaten. As a result it appears that the Union had knowledge of the District's positions on these issues and that it had an opportunity to respond thereto when it filed its final offer.

The Union's reliance on Sheboygan County is likewise misplaced. There, the parties tentatively agreed to certain proposals in their negotiations and thereafter submitted unresolved disputed items to final and binding arbitration. After the Arbitrator found for the union, the employer refused to include the previously agreed to tentative items in a contract on the ground that they were not included in the arbitrator's award. The Commission found that the employer's refusal was unlawful because such tentative items were not in dispute and therefore need not have been included in the award. In so finding, however, we cited our earlier holding in Stevens Point (12369-B) and (12652-C) 10/74 and made it clear that parties in certain circumstances could retract their prior tentative agreements and submit those issues to arbitration. In the Stevens Point case we stated that the withdrawal of a tentative agreement, as such, was not a per se violation of a party's duty to bargain in good faith, but instead, each case must be considered on its own facts to determine if such action constitutes a refusal to bargain.

In the instant case, neither party told the other during negotiations that its acceptance of tentative agreements was conditioned upon reaching total agreement on a new contract. Furthermore, neither party told the other that such tentative agreements "could not be used at any later hearing." To that extent, then, the facts herein are somewhat different from those in Stevens Point, supra.

Here, on the other hand, there was no clear understanding between the parties as to the nature of the "tentative" agreements. Thus, Miller was asked at the hearing whether there was any agreement by the parties to the effect that such tentative agreement could not be reconsidered later in negotiations and thereafter submitted to arbitration. Miller acknowledged that there was no such agreement. As a result, the record fails to establish that the parties ever agreed that any final offers in mediation-arbitration would be limited to those items over which there had been no prior tentative agreements. Accordingly, under the facts herein, acceptance of the Union's proposal would, as the Commission noted in affirming the Examiner in Stevens Point, supra:

> ...have the result of converting a tentative agreement on certain proposals to an agreement on such proposals by the filing of a petition for arbitration. In our opinion, such a result would discourage the parties, in their negotiations, from reaching tentative agreements on various, if not all, issues involved.

Since the parties here never agreed that tentative agreements would become finalized upon filing of a petition for mediation-arbitration, it would be likewise improper for the Commission to unilaterally impose such a significant bargaining requirement on the District. Accordingly, we find that the District was entitled to retract its prior tentative agreements on health insurance and holidays and to submit final offers which included those revisions. 3/

We therefore find that the District could submit a health insurance and holiday proposal in its final offer which was different from the one which it had tentatively agreed to with the Union, and that the subsequent inclusion of those proposals in Arbitrator Flaten's Award was not illegal.

The Union also argues that the District's proposal on retirement coverage was illegal and that the inclusion of that proposal in Arbitrator Flaten's award renders the entire award illegal. In this connection, the Union points out that the District's proposal included all employes in the Wisconsin Retirement Fund for the first year of the contract and then excluded the cooks from such coverage in the second year of the contract.

In considering this allegation, the Commission first notes that the parties tenatively agreed to a separability provision in their negotiations and that they executed a joint stipulation on May 8, 1978 which reflected that agreement. Article XXI, entitled "Separability", of that joint stipulation provided:

> If any provision of this Agreement shall be held invalid or in conflict with any Federal or State law, the remainder of the Agreement shall not be affected thereby.

Following the issuance of Arbitrator Flaten's Award, the District tendered a collective bargaining agreement to the Union which contained Article XXI. Since this provision is part of the contract by virtue of the prior agreement of the parties, if follows that even if one provision of the contract may be unlawful, that fact, standing alone, does not affect the legality of the remaining parts of the contract.

As to the merits of the Union's claim, it is true that a municipal employer cannot seek to exclude some of its employes from the Wisconsin Retirement Fund, once it decides to cover its remaining employes. Thus, John Zimbeck, Administrator of Municipal and State Government Division, Department of Employee Trust Funds, testified at the hearing that on the question of inclusion, "It's all or nothing." Going on, Zimbeck stated that the District's proposal to exclude cooks from coverage in the second year of its contract was contrary to the statutes and could not be accepted by his department. 4/

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3/ Our holding in this case is predicated upon the fact that the District's conduct did not constitute a per se refusal to bargain when it withdrew its tentative agreements in the mediation-arbitration process. We therefore do not pass judgment as to whether the withdrawal of tentative agreements under different circumstances would constitute an unlawful refusal to bargain.

4/ The District stipulated that Zimbeck was an expert witness on the Wisconsin Retirement Fund. Moreover, the District conceded in its brief that its retirement proposal "erroneously excluded the cooks from WRF in the second year of the contract."

However, Zimbeck went on to significantly qualify his testimony by stating that: (1) the provisions of a collective bargaining contract are not binding on whether his office will accept or reject a municipal employer's application; (2) his office would only look at an employer's application to determine whether it was proper; and (3) the District was therefore free, irrespective of what was provided for in the collective bargaining agreement, to apply to include all of the employes herein under the Wisconsin Retirement Fund. By virtue of this testimony then, it is clear that the District could correct its original error by requesting all of its employes to be so covered.

That is exactly what has happened. For, the parties agreed at the hearing that the District should make such an application after the termination of the hearing. On October 8, 1979, the parties executed a joint stipulation that: (1) the District had applied to the Wisconsin Department of Employee Trust Funds for placement of all eligible employes in the Wisconsin Retirement Fund, effective January 1, 1980; and (2) such application had been accepted by the Wisconsin Department of Employee Trust Funds so that all such employes would be so covered by January 1, 1980. In light of these subsequent facts, it is clear that the District has corrected its proposal and that it has placed the employes herein, including the cooks, in the identical position that they would have enjoyed had the District initially sought to place all employes under the Wisconsin Retirement Fund.

In so finding, the Commission rejects the Union's additional contention that the District's retirement proposal provided for retroactive retirement coverage of its employes back to 1977, coverage which the Union says is illegal. In fact, the District's final offer retirement proposal stated that it would be "Effective upon acceptance by the State Retirement Fund." The Union's final offer on retirement similarly provided that it would be "Effective as soon as accepted by State Retirement Fund." Union representative James Miller testified at the hearing that under the Union's proposal retirement coverage could not have been effective until January 1, 1979. Here, Arbitrator Flaten issued his Award in October 9, 1978. Zimbeck testified that in order to include employes under the Wisconsin Retirement Fund, a municipal employer must file an application by November 15 in order for coverage to be effective on the following year. As a result, the District had approximately five (5) weeks to meet the November 15, 1978, deadline in order to cover its employes by January 1, 1979, which was the earliest date that they could have been covered under the Union's proposal.

The District obviously failed to meet that deadline. However, the record shows that the District did not learn of that deadline until November 17, 1978, at which point it was told by a representative from the Department of Employee Trust Funds that it was too late to obtain retirement coverage by January 1, 1979. In addition, the Union never advised the District of that deadline and it made no attempt whatsoever following receipt of the Flaten Award to have the District file its application by the November 15, 1978, deadline. Accordingly, based on these facts, we conclude that the District did not act unreasonably in filing its subsequent application for retirement coverage and that it was not precluded from doing so under the terms of the District's final offer retirement proposal which was accepted by Arbitrator Flaten, as said offer did not provide for an express date on which such coverage would be effective.

Since, the District did cure its original error of excluding cooks from the Wisconsin Retirement Fund, and as that error was not prejudicial to any of those employes, 5/ and in light of the separa-

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5/ The Union was asked at the hearing what harm employes would suffer under the District's original error of excluding cooks from retirement coverage, if the District subsequently chose to place the cooks under the Wisconsin Retirement Fund. The Union was unable to cite any such detriment.

bility provision in Article XXI, the Commission rejects the Union's contention that the District's original retirement proposal warrants setting aside the Flaten Award.

The Union next argues that the Arbitrator permitted an unlawful ex parte contact by the District after the close of hearing. The Union points out that the District filed an exhibit with Arbitrator Flaten subsequent to the arbitration hearing which contained a comparison of the District's fringe benefit offer vis-a-vis the benefits offered by other school districts. Thereafter, Union Representative Miller telephoned Arbitrator Flaten in late September, 1978, and there asked for an opportunity to reply to that exhibit. Arbitrator Flaten denied that request on the ground that the award was being prepared. The Union argues that said denial was improper since the District responded to the Union's delayed exhibit when it filed its brief with the Arbitrator.

As noted in Finding No. 8, the record also establishes other salient factors which bear on this issue. Thus, the Union and the District expressly agreed at the arbitration hearing that each would file a delayed exhibit after the hearing; that the parties apparently did not then agree that they would be accorded an opportunity to respond to each other's exhibit; that Miller received the District's exhibit on or about September 15, 1978; that Miller did not attempt to respond to the District's exhibit until after he received a copy of the District's brief on September 26, 1978; and that, but for the District's erroneous characterization of the health insurance and holiday issues in said exhibit, it appears that the data regarding comparable school districts in said exhibit was accurate.

Since the District did comment on the merits of the Union's delayed exhibit when it filed its brief with the Arbitrator, we agree that the Union also should have been accorded a similar opportunity to respond to the District's exhibit. Here, the record shows that the comparable data on the District's exhibit was apparently correct, and that the only problem with the exhibit was the District's erroneous characterization of proposals on holidays and health insurance. However, Miller admitted at the hearing that he telephoned Arbitrator Flaten after receipt of the District's delayed exhibit and at that time specifically told Flaten of the errors on the delayed exhibit. Accordingly, Flaten at that point was put on notice of the problem and he was therefore free to make his own assessment of the issues.

In such circumstances, especially which show that Flaten was made aware of the erroneous characterizations on the District's exhibit, we conclude that the Arbitrator's refusal to allow Miller a further opportunity to file a written reply to said exhibit was not prejudicial to the Union's case and that said refusal did not constitute the kind of misconduct which warrants the vacating of the Award under ERB 31.18 6/ For, as noted by the Supreme Court in Scherrer Construction Co. v. Burlington Memorial Hospital, 64 Wis 2d 720 (1974):

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6/ Since the parties herein jointly agreed to file delayed exhibits, the Union's reliance on Manitowoc v. Manitowoc Police Department 70 Wis. 2d 1006, 1014, (1975) is misplaced as the parties in the latter case, unlike here, did not agree to the filing of any post-hearing exhibits.

> ...to vacate an arbitration award, the court must find not merely an error in judgment, but perverse misconstruction or positive misconduct... plainly established, manifest disregard of the law, or that the award itself violates public policy, is illegal, or that the penal laws of the state will be violated. (citation ommitted.)

Applying that standard here, we do not believe that Arbitrator Flaten's refusal to permit a response to the District's delayed exhibit, under the unique facts herein, falls within the tests enunciated in Scherrer for vacating an arbitration award.

Lastly, the Union argues that Arbitrator Flaten erred in resolving the holiday pay and health insurance proposals submitted to him for resolution. On the holiday issue, the Union correctly notes that the Arbitrator failed to specifically address the question of how many holidays should be granted -- the Union had proposed eight (8) paid holidays, and the District had proposed seven (7). In addition, the arbitrator erroneously stated in his Award that the Union wanted "all of its employees paid for all eight holidays regardless of whether the employe was scheduled to work during the period or not." In fact, the Union was not seeking holiday pay for those employes who were not scheduled to work. Turning to the health insurance proposal, the Union also argues that the arbitrator incorrectly stated the Union's position and that he failed to note that under the District's proposal employes who worked between thirty (30) to thirty-five (35) hours would have sixty (60) percent of their premiums paid, and that employes who worked less than fifteen (15) hours per week would not have any of their health insurance premiums paid by the District.

As to the health insurance issue, it appears that the parties agreed in their negotiations that employes would receive health insurance premiums based upon their scheduled hours of work. That is why the District did not raise that issue before the Arbitrator and why the District on page 22 of its brief to the Arbitrator stated that the parties had agreed to " ... Health insurance based on a work schedule." The Union's brief to the Arbitrator on page 4 also recites that there was an agreement between the parties on health insurance which provided for "payment based on the numbers of hours worked per week." Accordingly, and because the final offers of the parties did not raise that issue, it must be concluded that the question of prorated health insurance premiums was not before the Arbitrator.

However, the record further reveals that the Arbitrator did mischaracterize the Union's health insurance proposal by stating that the Union wanted the District to pay 100% of the insurance premiums for certain employes, when in fact the Union proposed the same 90% employer contribution towards premiums as proposed by the District.

Turning to the holiday issue, it must first be noted that Arbitrator Flaten discussed the question of holiday eligibility because the District had raised that issue before him. But, the fact remains that Arbitrator Flaten: (1) mischaracterized the Union's position on the question of eligibility; and (2) failed to answer whether the Union's request for one more holiday was more reasonable than the District's proposal.

Nonetheless, the record fails to clearly establish that these errors on health insurance and holidays were necessarily prejudicial to the ultimate disposition of the two final offers submitted to the Arbitrator. Thus, these two proposals were but two of the twelve disputed items submitted to the arbitrator for resolution, and the award itself does not show that the arbitrator's ultimate decision hinged on a resolution of these two issues. In such circumstances, we

conclude that the Union has failed to establish that the errors complained of were prejudicial to the arbitrator's ultimate award under ERB 31.18, and that such errors are insufficient to warrant vacating that Award under the tests enunciated in Scherrer, supra.

For the reasons noted above, the Commission therefore finds that: (1) it should exercise its discretionary jurisdiction under Section 227.06(1) Stats. to review Arbitrator Flaten's Award, and (2) the claimed irregularities surrounding said award are not the kind of prejudicial misconduct which warrant vacating of said award under ERB 31.18 and that as a result, said award was lawfully made under Section 111.70(3)(b)6 and Section 111.70(4)(cm), Stats.

Dated at Madison, Wisconsin, this 30th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner