STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 177 No. 36469 MP-1816 Decision No. 23592-A

Appearances:

Mr. Richard Perry, Perry, First, Lerner, Quindel & Kuhn, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, appearing on behalf of Milwaukee Teachers' Education Association.

Ms. Anne L. Weiland, Attorney for the Board, Milwaukee Public Schools, with Ms. Deborah A. Ford, Labor Relations Specialist, Division of Human Resources, Milwaukee Public Schools, 5225 West Vliet Street, P.O. Drawer 10-K, Milwaukee, Wisconsin 53201-8210, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Milwaukee Board of School Directors (MBSD) filed, on January 23, 1986, a petition for declaratory ruling with the Wisconsin Employment Relations Commission (Commission), in which the MBSD requested the Commission to issue a declaratory ruling pursuant to Secs. 111.70 (4) (b) and 227.41, Stats., determining whether individuals who are employed as members of the staff of the recreational programs of the Division of Municipal Recreation and Community Education of the Milwaukee Public Schools and who are also (in connection with their regular employment) employed by the MBSD as certificated teachers are members of the bargaining unit represented by District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local #1616 (AFSCME), or members of the bargaining unit represented by the Milwaukee Teachers' Education Association (MTEA) during the period of time and for the hours within which they are employed as members of the staff of the recreation programs of that Division, and further determining which collective bargaining agreement applies to such individuals during the period of time within which they are employed in such capacity. The MTEA, on February 3, 1986, filed a complaint of prohibited practice with the Commission in which the MTEA alleged that the MBSD had violated Sec. 111.70 (3) (a) 5, Stats., by refusing to complete a grievance arbitration hearing commenced on January 16, 1986. On February 6, 1986, the MTEA filed with the Commission a motion to dismiss the MBSD's petition for declaratory ruling, contending that the petition presented matter which was more appropriately the subject of a unit clarification proceeding and was in fact the subject of the complaint filed by the MTEA on February 3, 1986, and contending in the alternative that if the declaratory ruling petition was not dismissed, the petition should be consolidated with the complaint of prohibited practice. On February 7, 1986, AFSCME filed with the Commission a motion for extension of time to file a response to the petition for declaratory ruling, which the Commission granted on February 7, 1986. On February 18, 1986, AFSCME filed a response to the MBSD's petition for declaratory ruling, in which AFSCME contended that it was the exclusive collective bargaining representative for the positions at issue; that an existing contract between AFSCME and the MBSD barred the petition for declaratory ruling; that AFSCME was not a party to the prohibited practice complaint which accordingly should not be consolidated with the declaratory ruling petition and that the petition, if addressed, could be appropriately addressed only under Sec. 227.41, Stats. AFSCME also, on February 18, 1986, filed a motion to dismiss the MBSD's petition for declaratory ruling. On February 21, 1986, the MBSD responded to the various motions made by the MTEA and by AFSCME by asserting, among other things, that the matter could be properly addressed either as a

request for unit clarification or for declaratory ruling; that the prohibited practice complaint should be separately heard after the declaratory ruling petition; and that the MBSD may not have any objection to AFSCME's contention that the declaratory ruling was barred by contract. The Commission, by letter dated March 24, 1986, informed the parties that it would appear that the dispute could be more clearly resolved if the MBSD were to withdraw its declaratory ruling petition and file a unit clarification petition. On April 3, 1986, the MBSD filed the document previously filed as a petition for declaratory ruling as a petition for unit clarification. The MBSD and the MTEA, in letters filed with the Commission between April 4 and April 17, 1986, disputed whether the unit clarification or the prohibited practice should be heard first. On April 14, 1986, the Commission determined not to consolidate the petition for unit clarification and the complaint of prohibited practice. On April 14, 1986, AFSCME filed with the Commission a motion to dismiss the unit clarification petition together with a supporting affidavit, in which AFSCME asserted that the petition was barred by contract, raised no genuine question concerning representation, and would be rendered moot by the pending complaint of prohibited practice. On May 1, 1986, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner regarding the prohibited practice complaint, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.70 (4) (a), and Sec. 111.07 of the Wisconsin Statutes. The MBSD filed an answer and a motion to dismiss the complaint of prohibited practice on June 24, 1986, alleging, among other things, that the Commission lacked jurisdiction over the subject matter of the complaint since it involved the grievance arbitration provisions of a collective bargaining agreement not applicable in any respect to individuals for whom relief was sought in the complaint. Hearing on the unit clarification petition was conducted on July 15, July 16, September 29 and October 28 of 1986, in Milwaukee, Wisconsin, before Richard B. McLaughlin. By letter dated October 30, 1986, to AFSCME's counsel, with a copy sent to counsel for the MBSD and for the MTEA, Examiner McLaughlin confirmed that AFSCME did not consider itself a party to the complaint of prohibited practice. Hearing on the complaint of prohibited practice was conducted on November 25, 1986, in Milwaukee, Wisconsin, before Examiner McLaughlin. A transcript of the November 25, 1986, hearing was provided to the Examiner by December 22, 1986. The parties filed briefs on the prohibited practice by July 23, 1987. The Commission issued *Findings of Fact, Conclusions of Law and Order Dismissing Petition to Clarify Bargaining Unit* on February 8, 1988. In a letter dated February 12, 1988, to the parties to the prohibited practice complaint, Examiner McLaughlin offered those parties the opportunity to submit further argument in light of the Commission's decision in the unit clarification. The parties submitted such argument by April 1, 1986.

FINDINGS OF FACT

1. The Milwaukee Board of School Directors, referred to below as the MBSD, is a municipal employer which has its offices located at 5225 West Vliet Street, Milwaukee, Wisconsin 53201.

2. The Milwaukee Teachers' Education Association, referred to below as the MTEA, is a labor organization which has its offices located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

3. District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local #1616, referred to below as AFSCME, is a labor organization which has its offices located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

4. The MBSD, among its functions, operates a public school district known as the Milwaukee Public Schools, and conducts, through various schools in that district, a course of instruction which is subject to the regulation and oversight of the State of Wisconsin's Department of Public Instruction, which is referred to below as the DPI. Also among its functions, the MBSD operates the Division of Municipal Recreation and Community Education, which is referred to below as the Recreation Division.

5. The MTEA and the MBSD have been parties to a number of collective bargaining agreements, including one which was in effect, by its terms, from July 1, 1982, to June 30, 1985. That agreement contains, among its provisions, the following:

PART II

A. RECOGNITION

1. The Board of School Directors (hereinafter referred to as the Board) recognizes the Milwaukee Teachers' Education Association (hereinafter referred to as the MTEA) as the duly certified exclusive collective bargaining representative for all regular teacher personnel (hereinafter referred to as teachers) teaching at least fifty percent (50%) of a full teaching schedule or presently on leave, as well as those teaching on a regular part-time basis less than fifty percent (50%) of a full teaching schedule, (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialists, activity specialists, music teachers 550N who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, diagnostic teachers, vocational work evaluators, community human relations coordinators, human relations curriculum developers, mobility and orientation specialists, community resource teachers, program implementors, curriculum coordinators and Montessori coordinators), excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors and executives. This clause shall not be interpreted for purposes other than identifying the bargaining representative and the bargaining unit.

2. The Board shall furnish the MTEA sufficient information to enable them to know when it is establishing new positions. Upon demand by the MTEA, the Board shall, if it agrees that the positions are in the bargaining unit, write to the WERC requesting a modification of certification. Upon receipt of the amended certification, the Board and the MTEA shall negotiate wages, hours, and working conditions.

3. In the event there is disagreement between the MTEA and the Board concerning the unit placement of newly created positions, the dispute shall be submitted to the WERC for resolution. While such proceedings are pending, the Board shall not place the employe in any unit.

. . .

PART VI

SUMMER SCHOOL

A. ASSIGNMENT

No available position in the Milwaukee summer schools shall be filled by a teacher not employed by the Board during the regular school term, if there is a qualified applicant for such position who is employed by the Board.

B. LENGTH OF ASSIGNMENT

When the applications from qualified teachers employed by the Board for summer school teaching positions exceed the job positions available, all applicants not assigned to the summer school staff in any year shall be considered first for assignment during the following summer school program if they apply. To assure some continuity, teachers assigned to the summer school staff shall be eligible to serve for two (2) successive summer school terms, provided summer school subjects or programs for which they qualify are being offered the second year. Teachers will not be eligible for assignment

the third successive summer term, except where a lack of eligible applicants necessitates such assignment. In interpreting the above language, the following priority shall be used when filling summer school teaching assignments.

1. Any teacher who has completed the first year of a two (2)-year term must be given first priority if the teacher applies for the second year.

2. Any teachers who applied for the previous year and were not assigned and who have again applied are given second priority.

3. Any other teacher applicants who qualified and who were not assigned the previous year shall be given third priority. These may be experienced teachers who have not applied for a year or two (2) or who have applied the previous year but refused the assignment after May 1 if offered prior to that date.

4. Teacher applicants who have completed two (2) successive years or more of summer employment shall be given fourth priority.

5. Administrative applicants for teaching assignments shall be given fifth priority.

6. Late applicants shall be given sixth priority.

Each teacher assigned to a summer school staff shall notify the superintendent of his/her desire to accept such assignment no later than May 1 of the year in which said teacher has been assigned a position.

Hiring of teachers within each of the above priorities shall be based on hiring those teachers who have taught the least number of summer schools within the last five (5) years first, and if that is equal, the teachers shall be hired in order of seniority, from the most senior to least senior.

A person who works as a substitute replacing a teacher hired from the priority list shall not have that employment count as a summer school taught for determining his/her priority for the following summer. A substitute for purposes of this paragraph shall not mean a teacher hired to replace another from the priority list within the first three (3) days of summer school.

A teacher who is absent sixteen (16) or more days due to verified personal or immediate family illness will not have that employment count as a summer school taught. The person will retain for the following summer the priority he/she had when selected the previous summer.

It shall be the responsibility of the teacher to indicate this fact on the subsequent summer school application.

A teacher employed from the priorities who is employed for fifteen (15) or more days and who must drop the assignment for personal or immediate family illness or other reasons shall have that employment count for determining his/her priority for the following summer.

C. ORIENTATION

If orientation for summer school is conducted, it shall be held on a day following the regular school term or the day preceding commencement of summer school.

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E. PAYROLL AND HIRING PRACTICES

1. Teachers who are resigning, but who teach until the close of the semester in June, may be hired for summer school if they have applied and are hired according to the priorities for summer school employment set forth in Part VI, Section B.

2. Teachers who resign and who do not teach until the close of school in June will not be hired for summer school if there is a qualified applicant who is employed by the Board who has applied.

3. Teachers returning from a sabbatical or an approved study leave or on maternity leave receive seventy percent (70%) of their updated salary for summer school teaching as of June, should they be hired under the priorities for summer school employment as set forth in Part VI, Section B.

4. Salary deductions for absence or tardiness are based on a five (5)-hour day as compared to an eight (8)-hour day during the regular school year.

PART VII

GRIEVANCE AND COMPLAINT PROCEDURE

A. PURPOSE

The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this contract, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of a teacher with some aspect of employment.

B DEFINITIONS

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

2. A complaint is any matter of dissatisfaction of a teacher with any aspect of his/her employment which relates primarily to wages, hours and working conditions and which does not involve a grievance as defined above. It may be processed through the application of the third step of the grievance procedure.

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D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

. . .

FOURTH STEP. If the grievance is not adjusted in a manner satisfactory to the MTEA within twenty (20) working days of

the written disposition of the superintendent, it may be presented to final binding arbitration in accordance with the following procedures.

The final decision of the impartial referee, made within the scope of his/her jurisdictional authority, shall be binding upon the parties and the teachers covered by this contract.

1. "Jurisdictional authority" is limited to consideration of grievances as herein above defined.

. . .

F. GROUP GRIEVANCE

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

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APPENDIX "A"

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SUMMER SCHOOL - Daily summer school salaries will be computed on a basis of seventy percent (70%) of the certificated employe's regular daily rate of pay in effect at the close of the regular school term.

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APPENDIX "C"

. . .

14. After School Instructional Pay Rates.

Bargaining unit employes employed in the after-school vocational skills program, or employed in similar teaching situations after the regular work day, or in after-school curriculum development shall be paid their individual hourly rate for each hour of such employment.

This provision will not apply to activities paid under Schedule E, drivers education or the instrumental music program.

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6. The Examiner adopts as his own Finding of Fact 8, Finding of Fact 9 and Finding of Fact 10 from the Commission's unit clarification decision captioned as Case 181, No. 36769, ME-85, Decision No. 25143, which was issued by the Commission on February 8, 1988. Findings of Fact 8, 9 and 10 from that decision read as follows:

8. That the Recreation Division offers various recreational and instructional programs throughout the calendar year, which are not typically subject to regulation by the DPI; that the Recreation Division is an autonomous division of the MBSD's overall operation, and has been in existence since 1911; that the Recreation Division is financed in major part by a tax levy which is separate from that necessary to operate the DPI regulated course of instruction

offered through the Milwaukee Public Schools; that the Recreation Division maintains its own program budget which is distinct from the budget for the MBSD's DPI regulated course of instruction; that the Recreation Division typically charges a user fee for the programs it offers; that the Recreation Division has its own administrative structure, which was headed, as of July 15, 1986, by the position of Assistant Superintendent of Schools in charge of the Division of Municipal Recreation and Community Education of the Milwaukee Public Schools; that the Recreation Division hires instructors for the instructional and recreational programs it offers; that such hiring is effected by administrative personnel within the Recreational Division; that instructors hired by the Recreational Division are limited term, part-time employes; that the Recreation Division has considered hiring, and has hired, DPI certified teachers as instructors for some of its programs; that some of these DPI certified teachers are also employed by the MBSD to teach in its DPI regulated instructional program; that the MBSD hires DPI certified teachers for its DPI regulated instructional program through its Division of Human Resources, which is administratively separate from the Recreation Division; that the Division of Human Resources hires employes to fill the positions of Community Recreation Specialist and Activity Specialist, which are the only full-time instructional positions in the Recreation Division; that the quality of performance of employes who serve as instructors in Recreation Division programs is overseen by Recreation Division personnel; that Recreation Division programs are offered to Milwaukee residents generally; that Recreation Division programs are typically created and maintained in response to community interest and are not typically integrated with course offerings of the MBSD's DPI regulated course of instruction; that the Recreation Division does not receive State of Wisconsin educational aids for its programs with the exception of a program devoted to swimming instruction; that Recreation Division programs do not have an attendance requirement, and do not typically employ any grades or exams, excepting, for example, courses in swimming or driver's education; that the Recreation Division has, since 1981, offered a program known as Foreign Language Exploration, hereinafter referred to as the FLEX program; that the Recreation Division has, since the summer of 1983, offered a program known as Computer Camps; and that the Recreation Division has considered the hire of, and has hired, DPI certified teachers, who are also employed by the MBSD as teachers in its DPI regulated instructional program, to instruct these programs.

9. That the MBSD operates a course of instruction during the summer months when its public schools are not in normal school year operation; that these summer school courses constitute a regular feature of the MBSD's DPI regulated instructional program; that summer school courses are funded in major part by State of Wisconsin educational aids; that the MBSD does not charge a fee for its summer school courses to public or non-public school students whose parents reside in the City of Milwaukee; that summer school courses are taught by DPI certified teachers and are typically taught by teachers who are employed by the MBSD to teach during its regular school year DPI regulated course of instruction; that the MBSD offers summer school course to students from public and non-public schools in grades K through 12; that attendance is required of summer school students; that a student's performance in a summer school course may be graded depending on the particular course involved; that students in grades 9 through 12 can earn credits for meeting graduation requirements through satisfactory completion of summer school courses; that elementary and middle school students do not earn credits but can be promoted from one grade level to another through satisfactory completion of summer school

courses; that the MBSD reflects the variety of student pruposes by offering enrichment courses through which students functioning at or above their grade level can enhance a particular skill, and by offering promotional/make-up/strengthening courses through which students who have received failing grades can address an area of weakness, make-up for a failed course, or qualify for promotion to the next grade level; that the MBSD has, since at least 1982, offered summer school courses in computer education and in foreign languages.

10. That the Recreation Division's FLEX and Computer Camp programs were initiated by the governing board of the MBSD, which does consider the instructional value of the programs; that the FLEX program was first offered as an after school program in the fall of 1981, and was again so offered in the spring of 1982; that the after school program met from 4:15 to 6:15 p.m. two times per week, for ten weeks; that the FLEX program was offered by the Recreation Division as summer program in 1982, and was described in the relevant advertising circular thus: ". . . a program for children, grades K-6, to learn a foreign language and cultures. Languages to be explored are: French, German, Spanish, Chinese and Japanese . . .;" that the FLEX program has been described in subsequent advertising circulars in substantially the same way; that the 1982 summer FLEX program met for two hours, twice per week, for five weeks; that the FLEX program has not been offered as a summer program since the summer of 1982; that in the fall of 1982, the Recreation Division offered the FLEX program as an after school program which met from 4:00 to 5:30 p.m. once or twice a week for nine weeks; that in the spring of 1983, the Recreation Division offered the FLEX program as a noon hour program; that the Recreation Division presently offers the FLEX program as a noon hour program which meets for from twenty to thirty minutes once or twice a week; that throughout its history, the FLEX program has been offered at schools within the Milwaukee Public School District; that the MBSD has hired DPI certified teachers to serve as instructors of the FLEX program, including teachers employed by the MBSD to teach in its DPI regulated instructional program; that the Recreation Division has hired instructors for the program whose qualifications turn on their fluency with the language involved; that the Recreation Division does not regard a DPI teaching certificate as a condition of hire for the FLEX program; that the MBSD offered summer school "Additional Elementary Programs" in 1985 and in 1986 entitled "English as a Second Language" and "Foreign Language" which were described in the relevant advertising circulars thus:

> English As a Second Language - Available to non-English speaking pupils from first through grade six. . .
>
> Foreign Language-This three-week . . . summer school program is desinged for pupils in kindergarten through grade six who would like to have a foreign language learning experience. The program will introduce pupils to French, German, or Spanish through class activities and field experience. . .

that the Recreation Division has offered Computer Camps as a summer program since 1983; that the relevant advertising circular described the program thus: "an experimental program to introduce computer concepts to children and youth in grades 4-9;" that the 1983 Computer Camps included beginning and intermediate sections; that the 1983 Computer Camps were divided into two separate afternoon sessions of two weeks duration, meeting two hours per day, five days per week; that the Recreation Division employed as instructors for the 1983 Computer Camps only DPI certified teachers who also taught for

the MBSD in its regular year, DPI regulated instructional program; that the MBSD offered computer education classes in its summer schools in both 1982 and 1983; that such summer school classes were taught between the hours of 8:00 a.m. to 12:00 p.m., five days per week for six weeks; that the Recreation Division has offered the Computer Camps as a summer program in 1984, 1985 and 1986; that the advertising circular for the 1984 Computer Camps contained the same program description as had the 1983 circular; that the advertising circular for the 1985 and 1986 Computer Camps described the program thus: "An introductory two-week program to acquaint students in grades 4-9 with the computer;" that the Computer Camps offered by the Recreation Division in the summers of 1984, 1985 and 1986 consisted of two separate afternoon sessions of two weeks duration, meeting for two hours per day, five days per week; that the MBSD's summer school computer education program included various courses for students in grade levels K through 12, including a course entitled Computer Day Camp which was offered to students in grades 4-8; that the summer school courses for 1984, 1985 and 1986 were taught between 8:00 a.m. and 12:00 p.m., with classes typically meeting for about two hours per session, five days per week, for six weeks; that Dennis Lypek and Charles Zinser have served as instructors in the Recreation Division's Computer Camps and in computer education courses offered through the MBSD's summer school; that both Lypek and Zinser have been employed by the MBSD as DPI certified teachers in the MBSD's DPI regulated instructional program for at least the last thirteen school years; that Lypek served as an instructor in the Recreation Division's Computer Camps program in the summers of 1983 and 1984, and served as an instructor for the MBSD's DPI regulated summer school computer education courses in 1982, 1983 and 1984; that Zinser served as an instructor in the Recreation Division's Computer Camps program in the summers of 1983, 1984, 1985 and 1986, and served as an instructor for the MBSD's DPI regulated summer school computer education courses in 1982, 1983, 1984 and 1985; that both Lypek and Zinser have taught material in the Recreation Division's Computer Camps which is similar to that taught by them in courses offered through the MBSD's DPI regulated summer school courses except for the amount of time available to teach the material; that the Recreation Division has, since the summer of 1983, employed instructors for its Computer Camps who are not certified to teach by the DPI; that the Recreation Division has not, at least since 1983, required a college degree as a condition of hire for the Computer Camps, and has hired instructors for the Computer Camps based on the familiarity of an instructor with computers; that the Recreation Division has never required a Computer Camp instructor to follow a specific or standardized curriculum; that the Recreation Division has allowed its instructors to instruct a Computer Camp however the individual instructor deems appropriate; that the content of an individual Computer Camp varies with the individual instructor; that DPI certified instructors employed by the MBSD in its summer school computer courses have had considerable impact on the MBSD's development of curricula for such courses; and that Recreation Division advertising circulars for the FLEX and Computer Camp programs do not specify the identity or qualifications of a particular instructor.

7. AFSCME has served as the exclusive collective bargaining representative for employes occupying limited term, part-time instructional positions in the Recreation Division from at least August of 1979 until the present. Included among such employes have been employes who are also employed by the MBSD as DPI certified teachers in its DPI regulated course of instruction. The MTEA has served as the exclusive collective bargaining representative for employes of the Recreation Division occupying the full-time positions of Community Recreation Specialist and of Activity Specialist from at least July of 1982 until the present. Collective bargaining agreements covering employes in the AFSCME

bargaining unit have been in effect from August of 1979 through the present. The MBSD has, in entering contracts with AFSCME and with the MTEA agreed to different levels of wages and different types of benefits for each bargaining unit.

8. The MTEA filed with the MBSD a grievance dated June 14, 1983, which is referred to below as the grievance or the grievances, and which consists of two parts which read thus:

> 1. What is the action or situation about which you have a grievance?
>
> Foreign Language Exploratory Program (FLEX):
>
> The administration, through the MPS Division of Municipal Recreation and Community Education, has instituted the Foreign Language Exploratory Program which instructs elementary school students in foreign languages. The duties involved in teaching these classes have been assigned to both teacher bargaining employes as well as non-bargaining unit employes. The administration, in staffing the teaching positions in the FLEX Program, has failed to observe the After School Instructional Pay Rates found in Appendix "C", paragraph 14, page 149 (sic) of the contract.
>
> 2. What do you think should be done about it?
>
> The administration should pay all employes in accordance with Appendix C, paragraph 14 of the contract - After School Instructional Pay Rates.
>
> 3. State Board Rule number and/or agreement number you feel has been violated:
>
> Appendix "C", paragraph 14 - After School Instructional Pay Rates of the 1980-82 MTEA/MBSD Teacher Contract
>
> . . .
>
> 1. What is the action or situation about which you have a grievance?
>
> Summer Computer Camp (Grades 4-9):
>
> The administration, through its Municipal Recreation and Community Education Division, has employed teacher bargaining unit employes to perform bargaining unit duties in instructing students (grades 4-9) in computer science in its 2 week summer computer camp programs. The administration has failed to follow the contractual summer school hiring priorities and the contractual pay rates for summer school instruction.
>
> 2. What do you think should be done about it?
>
> The administration should hire employes utilizing the contractual summer school hiring priorities and pay the employes the contractual pay rates for summer school instruction.
>
> 3. State Board Rule number and/or agreement number you feel has been violated:
>
> Appendix "A" - Summer School, Part VI - Summer School of the 1980-82 MTEA/MBSD Teacher Contract

The grievances were processed through the grievance procedure mentioned in Finding of Fact 5, and were set for hearing before Arbitrator Barbara W. Doering on January 16, 1986. During the course of that hearing, counsel for the MBSD acknowledged that the grievances met the contractual definition of "grievance" set forth in the contract noted in Finding of Fact 5, but raised a series of

objections to the Arbitrator's jurisdiction over the grievances, and ultimately left the hearing, before evidence regarding the merits of the grievances had been fully submitted. The MTEA does not challenge that the MBSD representatives left that hearing due to a good faith belief that the grievances were not arbitrable.

9. On January 23, 1986, the MBSD filed with the Commission a request for declaratory ruling which, in the view of the MBSD, posed the unit placement issues that rendered the June 14, 1983, MTEA grievances non-arbitrable. The MTEA filed the complaint initiating the present matter with the Commission on February 3, 1986. On April 3, 1986, the MBSD resubmitted, as a Petition To Clarify Bargaining Unit of Municipal Employes, the document by which it had made the January 23, 1986, request for declaratory ruling. On February 8, 1988, the Commission issued Dec. No. 25143 on the MBSD's April 3, 1986, petition for unit clarification. Included in that decision were the following "Conclusions Of Law:"

> 1. That none of the employees hired by the MBSD's Recreation Division to instruct its Computer Camp and FLEX programs constitute a "Professional employe" within the meaning of Sec. 111.70(1)(L), Stats., during the period of time they are so employed.
>
> 2. That the Commission can not, under the provisions of Sec. 111.70(4)(d)2, a, Stats., order the placement of employes hired by the Recreation Division to instruct its Computer Camp and FLEX programs in the bargaining unit represented by the MTEA and mentioned in Finding of Fact 6 above, because such employes are not professional employes.

The Commission's February 8, 1988, unit clarification decision precludes the arbitration of unit placement issues posed by the grievances noted in Finding of Fact 8. The Commission's February 8, 1988, unit clarification decision does not preclude the arbitration of the issue of whether the MBSD violated its collective bargaining agreement with the MTEA by the MBSD's actions in employing and in compensating certain teachers, who are represented by the MTEA while functioning in a professional teaching capacity during the MBSD's DPI-regulated regular and summer school instructional year, for service as instructors in the MBSD's Recreation Division's Computer Camp and FLEX programs.

CONCLUSIONS OF LAW

1. The MTEA is a "Labor organization" within the meaning of Sec. 111.70 (1) (h), Stats.

2. The MBSD is a "Municipal employer" within the meaning of Sec. 111.70 (1) (j), Stats.

3. The MBSD, by unilaterally leaving an arbitration hearing on January 16, 1986, and by refusing, since that date, to complete the arbitration process on the grievances filed by the MTEA on June 14, 1983, regarding the MBSD's Computer Camp and FLEX programs, has refused to "arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement," in violation of Sec. 111.70 (3) (a) 5, Stats.

ORDER 1/

To remedy its violation of Sec. 111.70 (3) (a) 5, Stats., the MBSD, its officers and agents, shall immediately:

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

(Footnote 1 continued on Page 12.)

1. Cease and desist from:

   a. Refusing to complete the arbitration of the FLEX and Computer Camp grievances filed by the MTEA on June 14, 1983, and heard, in part, on January 16, 1986.

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

   a. Proceed to arbitration on the FLEX and Computer Camp grievances filed by the MTEA on June 14, 1983, and heard, in part, on January 16, 1986. The MBSD's obligation to proceed to the arbitration of these grievances shall be limited to the issue of whether the MBSD violated the MTEA/MBSD collective bargaining agreement by its actions in employing and in compensating certain teachers, who are represented by the MTEA while functioning in a professional teaching capacity during the MBSD's DPI-regulated regular and summer school instructional year, for service as instructors in the MBSD's Recreation Division's Computer Camp and FLEX programs. The MBSD's obligation to arbitrate these grievances shall extend to this issue and to any directly related issue such as remedy. The MBSD's obligation to arbitrate these grievances shall not extend to any MTEA claim to represent the entire class of Recreation Division Computer Camp and FLEX program instructors as part-time MBSD employes, or to any MTEA claim that the Computer Camp and FLEX instructional positions, as a class, or the duties of that class of positions belong in or to the MTEA represented teacher bargaining unit.

   b. Notify the MTEA, in writing, of its willingness to proceed to arbitration on the grievances as noted in Paragraph 2, a, of this Order.

(Footnote 1 continued from Page 11.)

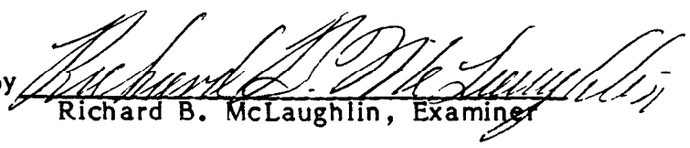
Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

c. Notify the Wisconsin Employment Relations Commission, in writing, within twenty days following the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin, this 2nd day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions

The MTEA contends the present complaint poses the following issues:

> 1. Does the (Commission) have jurisdiction to determine whether the (MBSD) violated Section 111.70 (3) (a) 5, Stats., by violating its collective bargaining agreement with the MTEA by:
>
> (a) failing to pay certain teachers in accordance with the applicable contractual rates for certain teaching duties in the . . . (FLEX) program and summer computer camps, as set forth in Grievance 83/117; and
>
> (b) refusing to complete the arbitration hearing relating to Grievance No. 83/117 which commenced on January 16, 1986, before arbitrator Barbara Doering?
>
> 2. Did the MBSD violate Section 111.70 (3) (a) 5, Stats., by unilaterally refusing to participate in and complete the arbitration process commenced on January 16, 1986?

After a review of the record, the MTEA contends that it is undisputed that the grievances filed in June of 1983 were properly processed through the grievance procedure, and that the grievances alleged violations of contractual provisions relating to:

I. hourly certificated rate for after school instruction

II. contractual wage provisions relating to summer school employment

III. contractual provisions relating to the seniority or hiring priorities for summer school employment

The MTEA contends that these undisputed facts establish that: "While one can argue with the MTEA's position with respect to the merits of the grievance, there is simply no rational way one can dispute that the grievance sets forth three specific provisions of the collective bargaining agreement which it contends the Employer has violated . . . " Relevant federal 2/ and state case law 3/ establish, according to the MTEA, four principles which dictate that the MBSD must be ordered to complete the greivance arbitration process. That the MBSD believes the grievance is meritless or that the MBSD firmly believes it is under no obligation to participate in its arbitration is, according to the MTEA, irrelevant to the resolution of the present complaint. Beyond this, the MTEA asserts "there can be no doubt that the parties are in serious disagreement concerning the interpretation and application of the part-time certificated rate for after school instruction, the summer school wage rates, and the summer school hiring priorities, as set forth in the grievances." Specifically, the MTEA asserts that Part VI, Section A, of the parties' collective bargaining agreement poses the following issue: "Did the Employer violate this section when it hired outside the MTEA bargaining unit to staff the summer computer camps at two Milwaukee high schools and one middle school?" In addition, the MTEA contends that MBSD concerns regarding the presence of an AFSCME contract are fully resolved by Carey v.

2/ Citing Steelworkers v. American Mfg. Co., 363 US 564, 46 LRRM 2414 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574, 46 LRRM 2416 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593, 46 LRRM 2423 (1960).

3/ Jt. School Dist. No. 10 v. Jefferson Ed. Asso., 78 Wis.2d 94 (1977).

Westinghouse Electric Corp., 375 US 261, 55 LRRM 2042 (1964), Columbia Broadcasting System, Inc., 414 F.2d 1326, 72 LRRM 2140 (2d Cir., 1969), and Laborers, Local 309 v. W.W. Bennett Construction Co., Inc., 686 F.2d 1267, 111 LRRM 2311 (7th Cir., 1982). After an extensive review of these cases, the MTEA concludes:

> In the instant case, it is clear that . . . (t)he Commission must issue an order compelling the Employer to arbitrate the alleged violations of the MTEA collective bargaining agreement.
>
> With respect to the fact that AFSCME has not joined in the arbitration process, the MTEA . . . continues to take the position that, while it prefers bipartite arbitration of violations of its contract, it has no objection to AFSCME's participation in the instant dispute. The Employer has refused to proceed to arbitration, but neither the Employer nor AFSCME has sought tripartite arbitration to resolve the dispute. Therefore, the Commission is left in the position that it must order bipartite arbitration.

After a review of the facts it views as relevant, the MBSD initiates its argument by contending that "(a)n employer cannot be compelled to arbitrate the threshold question of whether the collective bargaining agreement grants to an arbitrator the jurisdiction to arbitrate a particular dispute." Citing the same line of federal case law as the MTEA, the MBSD contends that the principles relevant to the present complaint are that "a party can not be required to submit to arbitration any dispute which he has not agreed to so submit," and that "questions of arbitrability of a particular grievance are matters to be decided by the courts rather than arbitrators." The present facts establish, according to the MBSD, that it had a valid concern that the grievance asserted by the MTEA is not substantively arbitrable, and since "an employer can refuse to arbitrate questions of arbitrability without committing a prohibited practice under (Sec.) 111.70 (3) (a) (5)" it follows that the MBSD can not be found to have committed any prohibited practice. The MBSD's second major line of argument is that "(b)y the terms of their collective bargaining agreement, the parties did not create a duty to submit questions of representation or work assignment to the jurisdiction of an arbitrator." The MBSD argues that it "does not dispute the presumption of arbitrability," and that Part VII, Section D, Fourth Step, of the parties' collective bargaining agreement is broad enough to accomodate the MTEA's grievance. However, according to the MBSD, the parties, in Part II, Section A (1) and (3), of the collective bargaining agreement "intentionally withdrew both questions of bargaining unit placement and bargaining unit work from the jurisdiction of the arbitrator and placed it squarely in the hands of the WERC." In addition to these contractual provisions, the MBSD cites Sec. 111.70 (4) (d) 2, Stats., to establish the Commission as "the sole authority to make determinations as to the placement of positions within bargaining units." The MBSD's next major line of argument is that "(t)o the extent the Complainant relies upon the case of Carey v. Westinghouse to support it position that the Employer committed a prohibited practice under Section 111.70 (3) (a) 5, that reliance is misplaced." The MTEA's reliance on that case is misplaced, according to the MBSD, for two reasons:

> First, the issue presented in the instant case was never addressed by the Supreme Court in Carey v. Westinghouse.
>
> . . .
>
> Second, Carey v. Westinghouse arose under an entirely different statutory scheme than that provided under Section 111.70, Wisconsin Statutes.

The MBSD's final line of argument is that "(t)he Respondent did not commit a prohibited practice under Section 111.70 (3) (a) (5) by refusing to submit to arbitration the question of whether the bargaining unit placement of recreation department instructor is arbitrable." Viewing the record as a whole, the MBSD concludes that no prohibited practice has been proven by the MTEA, and that the complaint must be dismissed.

In written argument filed after the Commission's issuance of the unit clarification decision, the MTEA contends that:

> It is clear that the Commission has determined that the dispute involved in the instant proceeding cannot be resolved, as the MBSD requested, by resort to a unit clarification petition before the Commission. The WERC has made clear that here the dispute is essentially one of contract interpretation. It is further clear that the exclusive means of resolving contractual disputes under the MBSD/MTEA teacher contract is through the grievance procedure culminating in final and binding arbitration.

Since the Commission also clarified, according to the MTEA, that it will defer matters such as that at issue here to arbitration, it follows that the MBSD's violation of Sec. 111.70 (3) (a) 5, Stats., is apparent. Citing the portions of the Commission's decision that it views as relevant, the MTEA concludes that "the Commission has understood exactly what the MTEA contends in the instant case, i.e., that the MTEA in its timely grievance has asserted that the employer has violated the terms of its collective bargaining agreement and that the employer is not free unilaterally to withdraw from the arbitration process." The MTEA concludes that the MBSD must be ordered "to proceed to arbitration in accordance with the provisions of the contract."

The MBSD initiates its written argument filed after the Commission's unit clarification decision by contending:

> Any fair reading of the "unit clarification" decision . . . reveals that the MBSD's position was upheld in that matter and that the MTEA can take absolutely no comfort from that decision whatsoever. (Emphasis from text).

Specifically, the MBSD asserts that the first two of the Commission's Conclusions of Law establish that:

> It is quite obvious that if the affected individuals are not legitimately members of the MTEA bargaining unit when employed in a Recreation Division capacity, they cannot present a grievance arising out of any manner of employment connected with such capacity to an arbitrator appointed under the MTEA/MBSD collective bargaining agreement. Such an arbitrator would not have jurisdiction to make a ruling or a finding or to award a remedy of any kind under the MTEA contract, because the affected individuals do not come within the terms of the MTEA/MBSD collective bargaining agreement, which would have formed the only basis for the exercise of any jurisdictional authority by the Arbitrator. (Emphasis from text).

Because the arbitrator lacked jurisdiction over the affected employes initially, and still lacks jurisdiction over the affected employes after the Commission's decision, it follows, according to the MBSD, that its position must be upheld and the complaint must be dismissed. Contending that the MTEA has cited portions of the Commission's decision out of context, the MBSD asserts the following conclusions are inescapable:

> Given that the Commission has ruled that the individuals affected by the terminated arbitration proceedings . . . were not MTEA bargaining unit members during their service in the employment capacity forming the subject matter of that arbitration proceeding, it is overwhelmingly apparent that (the arbitrator) had no jurisdiction to entertain the MTEA's grievance, and that the MBSD did not have the obligation to complete the arbitration process in that case. Indeed, were the MBSD to have done so, it would have committed a prohibited practice via the AFSCME unit, in particular, a conscious effort to undermine its Local 1616 . . . bargaining unit . . . The MBSD's obligation to safeguard the rights of those labor organizations representing its employees naturally and properly precluded the MBSD from taking any such action.

The MBSD concludes that the complaint "never had any merit, does not have any merit, and has been ruled by the Commission . . . to have no merit," and it follows, according to the MBSD, that the complaint must be dismissed.

In a brief response to the MBSD's argument, the MTEA asserts that the MBSD has mischaracterized the Commission's decision, and the MTEA's position regarding the complaint. Specifically, the MTEA argues that:

> (Our) contention is that the teacher contract is violated when teacher bargaining unit duties are unilaterally moved out of the bargaining unit and performed by any employees at rates of pay and other conditions of employment which violate the MTEA teacher contract provisions relating to (1) hourly certificated rate for after school instruction; (2) contractual wage provisions relating to summer employment; and (3) contractual provisions relating to the seniority or hiring priorities for summer school employment . . .

The MTEA closes by asserting that whether the grievance is ultimately found to have merit is not relevant to the complaint, since the grievance states a claim governed by the contract. It follows, according to the MTEA, that the MBSD must be ordered "to proceed to arbitration."

Discussion

The complaint alleges an MBSD violation of Sec. 111.70 (3) (a) 5, Stats., by its conduct in unilaterally leaving an arbitration hearing on January 16, 1986, and in refusing, since that date, to complete the arbitration process.

The Commission has the authority under Sec. 111.70 (3) (a) 5, Stats., to determine alleged municipal employer violations of "an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . . " The Commission has enforced contractual agreements to arbitrate disputes regarding the interpretation of the contract, and where necessary, will address disputes regarding whether a particular grievance falls within the scope of an agreement to arbitrate. 4/

The law governing a Commission determination of whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the Steelworkers Trilogy 5/, and its progeny. The Wisconsin Supreme Court adopted the principles of the Steelworkers Trilogy in Dehnart v. Waukesha Brewing Co., Inc., 17 Wis2d. 44 (1962), and elaborated on the analysis appropriate to determine issues of substantive arbitrability in Jt. School Dist. No. 10 v. Jefferson Education Association, 78 Wis2d. 94 (1977). The Jefferson Court prefaced its statement regarding the analysis appropriate to determine issues of substantive arbitrability with the admonition that because "a party can not be required to submit to arbitration any dispute which he has not agreed to submit," 6/ the issue of substantive arbitrability is a question of law within the court's (or in this case, the Commission's) authority, and not within the arbitrator's "except by agreement of the parties." 7/ This admonition is significant to the present matter, because the MBSD has consistently contended the grievances at issue here pose purely statutory points not resolvable under Part VII of the MTEA/MBSD collective bargaining agreement. The Jefferson court's admonition is given a contractual dimension in the present matter by the terms of the FOURTH STEP of Part VII, which provides that an arbitrator's

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4/ Oostburg Joint School District No. 14 and Board of Education of Oostburg Joint School District No. 14, Dec. No. 11196-A (Torosian, 11/72), aff'd, Dec. No. 11196-B (WERC, 12/72).

5/ See the U.S. Supreme Court cases cited in footnote 2/.

6/ Jt. School Dist. No. 10 v. Jefferson Education Association, 78 Wis2d. 94, 101 (1977), citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574, 582; 24 LRRM 2416, 2419 (1960).

7/ 78 Wis.2d at 102.

decision, to be binding on the parties, must be "made within the scope of his/her jurisdictional authority." 8/ The statutory issues must be addressed to determine what, if any, contractual issues are presented by the grievances at issue here. 9/

Because the grievances at issue here are broad, and the underlying dispute ill-defined, it is appropriate to touch on what is not in dispute. The MTEA does not contend that the labor agreement empowers the arbitrator to determine the issue of substantive arbitrability. Nor does the MTEA assert that the MBSD aborted the arbitration hearing without a good faith belief that the grievances were not substantively arbitrable. The MBSD did initially place the issue of arbitrability before the arbitrator at the January 16, 1986, hearing, but ultimately left the hearing, contending that the arbitrator's inquiry into the merits of the dispute would prejudice the MBSD's position on the non-arbitrability of the grievances. The Jefferson Court clarified that the MBSD could have "submitted the merits to the (arbitrator) and at the same time challenged the arbitrability of the question and reserved the right to challenge in court an adverse ruling on arbitrability . . ." 10/ By this procedure, the MBSD could have presented its case on the merits and preserved a "de novo" 11/ judicial, or, in this case, administrative, review of the issue of arbitrability. The MTEA does not contend, and the record does not present, any issue that the MBSD's failure to follow this procedure, standing alone, constitutes a prohibited practice.

The preliminary issue of whether the grievances state a claim the MTEA and the MBSD agreed to arbitrate (under Part VII) centers on the MBSD's contention that the dispute is one which involves two potentially conflicting collective bargaining agreements and thus poses a purely statutory issue of unit placement exclusively resolvable through the Commission's authority under Sec. 111.70 (4) (d), Stats. The MTEA has acknowledged unit placement issues are presented by the grievances, but has contended those issues are not purely statutory. Resolution of this dispute requires an examination of the impact on the present facts of the Commission's decision 12/ in a companion unit clarification decision.

The grievances are not without ambiguity, but do claim that MTEA represented teachers have been utilized by the MBSD to perform instructional duties covered by the MTEA/MBSD contract, without being selected or paid under the relevant provisions of that contract. The grievances can also be read to present an additional issue regarding whether the MBSD has violated its contract with the MTEA by placing non-teachers into positions in the Recreation Division's Computer Camp and FLEX programs.

8/ See text accompanying footnote 21/ below.

9/ The U.S. Supreme Court stated four guiding principles "gleaned from the trilogy" in AT&T Technologies v. CWA, 121 LRRM 3330, 3331-3332 (1986):

> The first principle . . . is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration that which he has not agreed to so submit." . . . The second rule . . . is that the question of arbitrability . . . is . . . an issue for judicial determination . . . The third principle . . . is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims . . . Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability . . .

The Wisconsin Supreme Court's analysis in Jefferson is consistent with these guiding principles. Jefferson is the case which structures the discussion in the text above, and the four guiding principles of AT&T are subsumed in that discussion.

10/ 78 Wis.2d at 106.

11/ Ibid.

12/ Milwaukee Public Schools, Dec. No. 25143 (WERC, 2/88).

The Commission's unit clarification decision did not address the first issue, but fully addressed the second. Regarding the second issue, the first two Conclusions Of Law made by the Commission establish that employes in the Computer Camp and FLEX programs, viewed exclusively from the perspective of their duties in those Recreation Division programs, can not be considered professional employes as that term is defined by Sec. 111.70 (1) (L), Stats., and thus can not be placed in the bargaining unit of teaching professionals represented by the MTEA. These two Conclusions Of Law preclude any claim by the MTEA that it serves as the exclusive collective bargaining representative for Computer Camp and FLEX instructors as a class of part-time employes.

The MBSD claims that these Conclusions Of Law fully resolve the arbitrability issue as a matter of statutory construction, but the MTEA contends that the second issue posed by its grievances continues to present issues of contractual interpretation. Specifically, the MTEA asserts that its contract with the MBSD assures MTEA represented teachers of certain work. Essentially, the MTEA contends that if not by statute, through Commission certification of its teacher unit, then by contract with the MBSD, it has acquired a right to work definable as "academic instruction," and that the duties of the Computer Camp and FLEX positions at issue in the grievances constitute such work. The Commission, however, has rejected this assertion as a matter of unit placement:

> The MTEA's argument regarding the unit placement of the Computer Camp and FLEX instructors can not be accepted. The assertion that labelling the work involved as "academic instruction" serves to determine unit status must be rejected. Even assuming "academic instruction" can be meaningfully defined, the MTEA's exclusive focus on the subject matter involved is without support in the MERA or relevant case law. 13/

Thus, the Commission viewed the question of unit placement under MERA to follow from the determination of professional status under Sec. 111.70 (1) (L), Stats. The MTEA, in this case, seeks to avoid the implications of this conclusion by contending the MTEA/MBSD contract vests such duties in the MTEA represented teacher unit. The Commission did note in its decision that "overlapping contractual obligations between different parties . . . can result . . . (in) 'work jurisdiction' type disputes." 14/ According to the MTEA, the grievances at issue here pose this type of dispute.

The possibility of such disputes does not, however, establish that the grievances at issue here present such disputes. As the Jefferson Court noted: "Mere invocation of a contract clause does not preclude examination . . . of the issue of arbitrability." 15/ The difficulty with the MTEA's argument on this point is that its allegedly contractual claim simply restates the statutory issue of unit placement. The MTEA has not, from the filing of the disputed grievances through the issuance of the Commission's unit clarification decision, contended that the specific duties in the Computer Camp and FLEX programs are separable from the underlying instructional positions in the Recreation Division. Rather, the dispute has been whether the employes filling such positions should be placed in the MTEA or the AFSCME bargaining unit based on the totality of those duties. The MTEA, by asserting the present grievances present a contractual "work jurisdiction" type dispute, claims that its contract secures such work for teachers. This claim obscures that the duties involved constitute clearly defined positions filled by individuals whom the Commission has found not to be professional employes. Thus, the MTEA's argument obscures that the asserted contractual "work jurisdiction" dispute poses the possibility that the MTEA could move non-professional positions into a unit of professional teachers, without an

> Although the legislature has empowered the Commission to make unit determinations, nothing in the Municipal Employment Relations Act prevents parties from voluntarily defining the appropraite (sic) unit, with certain exceptions. For example, professionals and non-professionals cannot be co-mingled in a single unit without an appropriate vote. 16/

The MTEA grievances do not assert any contractual provision which could arrogate to the MTEA/MBSD contract authority the Commission has found not to be granted by Sec. 111.70 (4) (d) 2 a, Stats., to the Commission or to contracting parties.

Thus, the Commission's unit clarification decision precludes any MTEA claim to represent Computer Camp or FLEX program instructors as part-time employes occupying positions represented by the MTEA. That decision also precludes any MTEA claim to move the non-professional duties encompassed in those positions into the MTEA teacher unit, for assignment to MTEA represented teachers only. As noted above, these claims present statutory matters of unit placement not contemplated by Part VII of the MTEA/MBSD collective bargaining agreement.

The MBSD claims that the second issue posed by the grievances is the sole issue presented here, and that resolution of that issue fully resolves the questions regarding the arbitrability of those grievances. As noted above, however, the grievances pose another issue which the Commission did not address in its unit clarification decision. If that issue poses contractual issues beyond the statutory matters of unit placement discussed above, then further analysis under Jefferson is necessary.

The grievances do pose a contractual issue separable from the statutory matters of unit placement addressed above. Specifically, that contractual issue is whether the Board violated the MTEA/MBSD contract by employing MTEA represented teachers, in their professional capacity, to perform in the Computer Camp and FLEX programs. The reasons this issue is separable from the unit placement issues discussed above are rooted in the undisputed fact that the MTEA represents MBSD employed teachers performing in their professional capacity, and in the nature of a unit clarification determination. In a unit clarification, the Commission does not consider prohibited practice allegations. 17/ Thus, that the MBSD was content, over time, to use both DPI-certified and non-DPI-certified instructors was a relevant, and significant factor in the unit clarification to establish that the positions, viewed as a class, were not professional in nature. 18/ As the Commission noted regarding the non-certified FLEX and Computer Camp instructors:

> FLEX instructors need no more qualification than familiarity with a foreign language and culture, and the non-certified Computer Camp instructors need only a demonstrated knack for handling a computer. While foreign languages and cultures and computer science can constitute "a field (sic) science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education," that form of computer science and foreign language study practiced by the Recreation Division's non-certified instructors can not be considered of this nature.
>
> The issue becomes, however, far closer when applied to employees such as Lypek and Zinser. They teach essentially the same material in summer school as in the Recreation Division, differentiated primarily by the time available to impart that material . . . Although this is a close issue

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16/ Dec. No. 25143 at 16, citing Stoughton Joint School District No. 3, Dec. No. 15995 (WERC, 12/77). See also Sec. 111.70 (4) (d) 2 a, Stats.

17/ See Sec. ERB 11/06 (2), Wis. Adm. Code.

18/ See footnote 13/ at page 15 of Dec. No. 25143, and accompanying text.

> . . . the work of a Recreation Division Computer Camp instructor is not professional in nature, requiring the sort of knowledge described in Sec. 111.70 (1) (L), Stats., but is rather of a type requiring only a particular knack, which Zinser and Lypek have acquired as a function of their professional background . . . 19/

However, that the MBSD has been content, over time, not to require DPI certification of all applicants as a condition of hire into the FLEX or Computer Camp programs does not establish that the Board has not sought, in creating or in maintaining those programs, to employ MTEA represented teachers in their professional capacity at a below MTEA/MBSD established rate of pay. As the Commission noted in the unit clarification decision:

> . . . it is not inconceivable that the Recreation Division, in hiring DPI-certified teachers for its Computer Camps, obtains certified teachers who will function, in all practical respects, in their professional capacity. 20/

In sum, the first issue posed by the grievances does pose contractual issues separable from the unit placement issues which dominate the second issue posed by the grievances. The first issue does not question whether non-professional duties can be moved into the MTEA represented teacher unit, but whether the MBSD, through its Recreation Division, employed MTEA represented teachers in their professional capacity.

Because the first issue posed by the grievances can not be characterized as a matter posing purely statutory issues of unit placement falling outside of Part VII of the MTEA/MBSD contract, it is necessary to apply the more standard aspect of the Jefferson analysis. The Court stated that aspect of the analysis thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face, and whether any other provision of the contract specifically excludes it. 21/

Unlike the Jefferson case, the arbitration clause at issue here is a broad one. The MBSD acknowledged at the January 16, 1986, hearing that the grievances at issue here do fall within the definition of "grievance" contained at Part VII, Section B. In addition, the Board has not cited any contract provision which would specifically exclude the grievances from arbitration, apart from the statutory unit placement issues discussed above. Regarding the Computer Camp programs, the grievance alleges a violation of Part VI, which governs "summer school positions," and Appendix A, which sets forth a rate of pay for those positions. Regarding the after school FLEX program, 22/ the grievances allege a violation of Paragraph 14 of Appendix C, which sets forth a pay rate for "the after-school vocational skills program . . . or similar teaching situations . . ." The arbitration clause is broad, and the grievances states claims facially governed by the contract. It follows that "it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute." 23/ Thus, the first issue posed by the grievances -- whether the MBSD has employed MTEA represented teachers to perform precisely as they do in their professional capacity as MBSD employed teachers in a DPI regulated public education system to so serve in the Computer Camp and FLEX programs in violation of the MTEA/MBSD collective bargaining agreement -- is arbitrable.

19/ Ibid., at 15.

20/ Ibid.

21/ 78 Wis.2d at 111.

22/ The MTEA has arguably waived any interest in the "noon-hour" FLEX program. The statement noted above should not be read to determine the waiver, which is a question for the arbitrator.

23/ 78 Wis.2d at 113.

Before moving on to the issue of remedy, it is necessary to emphasize that the conclusion stated above does not conflict with the Commission's conclusion in the unit clarification that "(w)hile working for the Recreation Division . . . Computer Camp instructors are not employed as professional employes . . ." 24/ As noted above, the Commission's conclusions were reached viewing the Recreation Division programs standing alone, and without regard to any evidence of possible prohibited practices. This is not to say any contract violation has occurred here. Rather, the issue of whether the MBSD offered MTEA represented teachers a second job, not addressed by the MTEA/MBSD contract, in the Recreation Division's Computer Camp and FLEX programs or whether the MBSD offered MTEA represented teachers their own work, addressed by the MTEA/MBSD contract, but at a reduced rate of pay, is a question for the arbitrator.

The remedy entered above need not be discussed in detail. The MBSD has been ordered to complete the arbitration process of the two grievances at issue here, consistent with the conclusions reached above regarding what part of those grievances is arbitrable.

It is conceivable that if the MTEA prevails on the merits of the grievances that MTEA and AFSCME could assert conflicting claims to govern the wages, hours and conditions of employment of MTEA represented teachers who also serve in Recreation Division Computer Camp and FLEX programs. As noted by the MTEA, courts have considered the problems of bipartite arbitration of tripartite disputes which arise from the overlapping contractual obligations of a single employer faced with the conflicting claims of two unions. 25/ Nevertheless, bipartite arbitration has been ordered above. AFSCME has declined to appear as a party in this dispute, and the MBSD has not requested that AFSCME be joined as a necessary party to the dispute. Against this background, ordering tripartite arbitration would be at best premature and at worst improper.

Dated at Madison, Wisconsin, this 2nd day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner