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-B

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 10K, Milwaukee, Wisconsin 53201-8210, appearing on behalf of the Milwaukee Baord of School Directors.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Richard B. McLaughlin issued his Findings of Fact, Conclusions of Law and Order in the above matter on May 2, 1988, wherein he ordered Respondent Milwaukee Board of School Directors (herein MBSD) to proceed to arbitration on specified limited aspects of the FLEX and Computer Camp grievances filed by the Milwaukee Teachers' Education Association (herein MTEA) on June 14, 1983, based on his conclusion that MBSD had 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., by unilaterally leaving an arbitration hearing and subsequently refusing to complete the arbitration process concerning those grievances. MBSD filed a timely petition for review on May 23, 1988, and briefing to the Commission concerning same was completed on August 12, 1988. The Commission has considered the Examiner's decision, the record, and the written arguments, and the Commission is fully advised in the premises and satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed.

NOW, THEREFORE, it is hereby

ORDERED 1/

That the Findings of Fact, Conclusions of Law and Order issued by Examiner Richard B. McLaughlin on May 2, 1988, shall be and hereby are affirmed and adopted as the Commission's Findings of Fact, Conclusions of Law and Order in the above matter.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

(Footnote one found on page two)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MILWAUKEE TEACHERS'
EDCUATION ASSOCIATION

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This is a Commission review of an Examiner decision involving an alleged Sec. 111.70(3)(a)5, Stats., refusal to arbitrate.

MBSD's Division of Municipal Recreation and Community Education (also referred to herein as Recreation Division) provides recreation programs including an after-school Foreign Language Exploratory Program (herein FLEX) and a summer Computer Camp program. Some but not all of the individuals it employs as instructors in those recreation programs are also regularly employed in positions within the MTEA-represented professional teachers unit of MBSD employes. The Examiner's Finding of Fact 7 which is not disputed herein provides the following additional background:

> 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 Recreations 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.

Beginning in January of 1986, MBSD has sought a Commission determination as to whether the AFSCME bargaining unit and agreement covers its teacher unit employes when they are working as recreation program instructors, or whether, instead, the MTEA-represented professional teacher bargaining unit and its agreement cover those employes at those times.

During the pendency of the petition, MBSD's representatives walked out of a grievance arbitration proceeding after asserting objections to arbitral jurisdiction concerning two MTEA teacher unit grievances which alleged that MBSD was violating specified substantive provisions of the MTEA-teacher unit. One of the the grievances alleged that MBSD "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 (and has) failed to follow the contractual summer school hiring priorities and the contractual pay rates for summer school instruction (such that) . . . (t)he administration should hire employes utilizing the contractual summer school priorities and pay the employes the contractual pay rates for summer school instruction." The other grievance alleged that MBSD "has instituted the Foreign Language Exploratory Progarm 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 . . . (the contract such that) (t)he administration should pay all employes in accordance with Appendix C., paragraph 14 of the contract - After School Instructional Pay Rates".

MTEA filed the instant complaint on February 3, 1986, requesting that MBSD be found to have unlawfully refused to arbitrate a grievance which it had previously agreed to arbitrate and further requesting the MBSD be ordered to participate in reconvened arbitration proceedings in the matters through to completion.

The preface of the Examiner's decision sets forth the procedural development of these two proceedings in detail. It suffices here to note that after the Commission issued its February 8, 1988 disposition of the abovenoted proceeding initiated by MBSD (Dec. No. 25143, also referred to herein as the unit clarification decision), MTEA and MBSD argued the implications of that decision to the Examiner before he issued his decision on the instant refusal to arbitrate complaint matter.

AFSCME appeared and was heard along with MTEA and MBSD in the unit clarification proceeding. AFSCME was not a party to the instant complaint proceeding.

The Commission's February 8, 1988 decision formally declared only that none of the FLEX and Computer Camp instructors, when doing the work, constitute professional employes within the meaning of MERA such that none of those employes could be included by WERC order in the MTEA professional teacher bargaining unit. The Commission expressly declined to reach any of the other questions presented by MBSD's petition on the grounds that it would have been inappropriate to do so in the circumstances.

THE EXAMINER'S DECISION

The Examiner described his task as determining whether, as MTEA asserts, the grievances state claims that MBSD and MTEA agreed to arbitrate or whether, instead, the potential conflicts between MBSD's agreements with MTEA and with AFSCME render the question wholly a statutory one of appropriate unit placement of the employes when they are performing the FLEX and Computer Camp work in question. He expressly found,

> The Commission's February 8, 1988, unit clarification decision precludes the arbitration of unit placement issues posed by the grievances . . . (but) 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 teachers, who are represented by the MTEA while functioning in a professional teaching capacity during the MBSD's DPI-regulated regular and summer school instruction year, for service as instructors in the MBSD's Recreation Division's Computer Camp and FLEX programs.

Accordingly, he concluded that, MBSD's walkout and continuing refusal to arbitrate the subject grievances constituted a Sec. 111.70(3)(a)5, Stats., violation as regards some but not all aspects of the grievances. The Examiner ordered MBSD to proceed to arbitration on the grievances in question but limited his order as follows:

> The MBSD's obligation to 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.

In his Accompanying Memorandum, the Examiner described the grievances as presenting the following questions:

1. Whether "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." and

2. "Whether MBSD has violated contract with the MTEA by placing non-teachers into positions in the Recreation Divisions Computer Camp and FLEX programs."

He concluded that the Commission's unit clarification decision did not address #1, above, but fully addressed #2. In that regard, the Examiner stated,

> the Commission's unit clarification decision precludes any MTEA claim to represent Computer Camp and FLEX program instructors as part-time employes ocupying 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.

Thus, the Examiner reasoned that the aspects of the grievances subsumed in #2, above, were nonarbitrable because they were dominated by statutory unit placement considerations and hence were outside the intended scope of the parties' grievance definition and of MBSD's arbitration obligation.

He concluded however that the remaining issues (i.e., those described in #1, above), are substantively arbitrable because they are separable from the aspects of the grievances which posed purely statutory issues of unit placement, because there is a construction of the parties' broad grievance definition and arbitration clause that would cover them and because no other provision of the contract specifically excludes them from arbitration. He explained that so holding did not conflict with the Commission's unit clarification decision that "while working for the Recreation Division . . . Computer Camp instructors are not employed as professional employes . . ." because "the Commission's conclusions were reached viewing the Recreation Division programs standing alone, and without regard to any evidence of possible prohibited practices."

The Examiner recognized the possibility that if MTEA prevailed on the merits of the grievances, "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". He nevertheless ordered only bi-partite rather than tri-partite arbitration because AFSCME declined to appear as a party in this dispute and because MBSD has not requested that AFSCME be joined as a necessary party to the dispute, making an order for tri-partite arbitration "at best premature and at worst improper".

THE PETITION FOR REVIEW AND MBSD'S ARGUMENTS ADVANCED IN SUPPORT THEREOF

In its petition for review, MBSD argues that the Examiner diregarded the Commission's February 8, 1988 decision and particularly the determination therein that the Computer Camp and FLEX program instructors were not professional employes, were not performing professional work, and could not be a part of the MTEA teacher bargaining unit; that the Examiner improperly concluded that there was something left to arbitrate once the Commission had determined that instructors in those programs were not part of the MTEA bargaining unit; that the Examiner's order improperly requires the District to arbitrate purely statutory unit clarification issues solely reserved to the Commission and which have already been decided in whole or in part by the Commission; and that the Examiner's order could require MBSD to commit prohibited practices against AFSCME by undermining its bargaining unit and its exclusive representative status. The District therefore requests that the Commission reverse the Examiner and conclude: that no arbitrable issue existed under the MBSD-MTEA agreement; that MBSD's refusal to arbitrate issues involving Recreation Division instructors was not unlawful; and that the complaint should be dismissed in its entirety.

MBSD reiterates its argument to the Examiner 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 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 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. Any attempt by the Arbitrator to even address any aspect of the grievance (let alone to issue an award or to award any remedy, other than a summary dismissal of the grievance) would constitute an act in excess of her authority and would subject any award to vacation under Sec. 788.10(1)(D), Stats.

MBSD acknowledges that the Commission's decision "did rule that certain issues of contract interpretation requiring a possible arbitrable decision might arise in the context of the type of unit clarification sought by MBSD in case 181, "but MBSD contends that the Commission's comments referred only to an interpretation of the AFSCME-MBSD agreement and were in the context of determination of the status of the broader issue of unit clarification affecting the entirety of the AFSCME unit in question. MBSD contends that the status of the FLEX and Computer Camp instructors "was appropriately and entirely disposed of by the Commission's first and second Conclusions of Law, ruling that such individuals were not within the coverage of the MTEA/MBSD collective bargaining agreement". There were no issues for interpretation under the AFSCME-MBSD agreement because AFSCME and MBSD both agree that all FLEX and Computer Camp instructors are a part of the AFSCME bargaining unit when performing that work, "in accordance with their treatment by the parties for a period of many years". MBSD states that its "obligation to safeguard the rights of those labor organizations representing its employees naturally and properly precluded the MBSD from participating in the instant arbitration proceedings beyond appearing to raise jurisdictional objections".

MBSD further argues as follows. Since the Commission determined that Computer Camp and FLEX instructors are not professional employes and cannot be placed in the MTEA professional bargaining unit, "it naturally follows" that the MTEA unit agreement would not apply to such instructors. The Examiner erred and exceeded his authority when he concluded that it is arguable that a contrary conclusion could be reached by the arbitrator. The practical effect of the Examiner's ruling is to deem the work professional and to place it in the MTEA bargaining unit when it is performed by DPI certified personnel.

The Examiner relied in part on the notion, unsupported by record evidence, that the District intended to employ MTEA-represented teachers in their professional capacity at a below MTEA/MBSD established rate of pay. The Commission's decision implied just the contrary because it did not find the work, even when done by certified teachers, to be professional.

Despite the fact that certified teachers have been used in the recreation programs since their inception in 1911, MTEA has never sought to place language in the contract specifically addressing the use of MTEA-represented teachers in recreation programs. The contract language "similar teaching situations" refers to situations when licensed personnel are performing in their professional capacity, i.e., in programs which are DPI certified. The recreation programs are so different that the language in the contract cannot be deemed intended to cover both situations without some additional evidence of such an intent by the parties. Indeed, Part II.A.3 of the parties agreement (set forth in Examiner's Finding of Fact 5) expresses the intention that unit placement questions shall be resolved by submission to the Commission.

The Examiner has ordered arbitration of "whether or not the employment of some of the instructors violated the MTEA/MBSD teacher contract". Arbitration of that issue would require a determination of whether the work these instructors

perform falls within the definition of a "teaching situation" as used in the contract, and that, in turn, would turn on "whether they are members of the teacher bargaining unit. Clearly that is an issue of unit placement, which the Commission has already decided." It was implicit in the Examiner's and Commission's findings that AFSCME has served as exclusive representative for recreation instructors since August of 1979 that those instructors are covered by the AFSCME-MBSD agreement. For MBSD to participate in an arbitration about a segment of those employes in a proceeding concerning a different contract, unit and union would be tantamount to a recission of recognition of AFSCME as the exclusive collective bargaining representative for those instructors. Neither bilateral nor trilateral arbitration is necessary or appropriate in these circumstances. MBSD asserts that for it "To arbitrate, i.e., 'bargain', questions of the appropriate rate of pay for a job with a collective bargaining representative other than the one recognized as having exclusive rights over such terms and conditions would constitute a prohibited practice."

A party cannot be required to submit to arbitration any dispute which it has not agreed to submit. MBSD has steadfastly contended that instructional positions in the recreation programs are not covered by the MTEA-MBSD collective bargaining agreement. The Commission agreed with MBSD that these positions are not in the MTEA bargaining unit, thereby overcoming any presumption of arbitrability. It is thus patently clear that MBSD did not agree to arbitrate disputes over the pay rates for these positions under the MTEA-MBSD contract and its refusal to do so did not constitute a violation of contract prohibited practice.

In its reply brief, MBSD repeats several of its arguments noted above and further argues as follows. The Examiner and MTEA misinterpret the Commission's statement that "The procedural difficulties are compounded here by the fact that a separate agreement between the MBSD and the MTEA may present interpretive issues." (Dec. No. 25143 at 16). The Commission did not thereby endorse grievance arbitration under the MTEA-MBSD agreement, but rather it only pointed out that in the context of interpreting the AFSCME-MBSD contract, items in the MBSD-MTEA contract may be relevant in arriving at the appropriate interpretation of the AFSCME-MBSD agreement.

The MBSD has not accused the Examiner of intentionally reversing or modifying the Commission's unit clarification decision, only of issuing a decision the practical effect of which is to attribute a professional identity to work which the Commission has expressly held to be non-professional.

It is not possible that the employes in question were employed in their professional capacity given the Commission's conclusion that the work they performed was not professional in nature. Hence, contrary to MTEA's suggestion, there is no conflict between the AFSCME and MTEA agreements. The work is covered only by the AFSCME agreement and not by the MTEA agreement. "To force MBSD to arbitrate whether MBSD has employed certified teachers as FLEX and Computer Camp instructors in their professional capacity when there has been a finding by the Commission that neither the work nor the employees are professional within the meaning of MERA seems unreasonable and unnecessary."

FLEX and Computer Camp instructor work is materially different from other non-professional duties performed by MBSD teacher unit employes. Duties such as bus supervision, playground supervision, building supervision and cafeteria duty are incidental and/or collateral to the primary professional responsibility of classroom instruction. The recreation program instructor duties herein are not incidental or collateral to any DPI-certified instructional function. In seeking arbitration, MTEA seeks to have the duties declared analogous to the "professional" responsibility of summer school and after school instruction, contrary to the Commission's findings.

Finally, there can be no intent to arbitrate where the parties have not agreed to any degree of contract coverage of the work in question. The MTEA agreement simply does not apply to the positions or the work in question. There is therefore no basis on which to conclude that MBSD agreed to arbitrate with MTEA about FLEX and Computer Camp instructor matters.

MTEA'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR REVIEW

The Examiner should be affirmed in all respects. The grievances specifically asserted violations of the contract with respect to rates of pay and seniority in the interpretation and application of the contract to after school foreign language instruction and computer science instruction during the summer. Those matters fall squarely within the scope of the parties' arbitration clause. The Examiner carefully limited MBSD's obligation to arbitrate these matters to ensure that it tracked with the Commission's February 2, 1988 decision.

MBSD's assertion that the unit clarification decision resolved all arguable contractual disputes ignores explicit language of the Commission in reaching that decision. The Commission expressly left to the parties' contractual grievance procedure certain possible "interpretive issues" between MBSD and MTEA and specifically rejected MBSD's contention that the WERC had exclusive jurisdiction to determine those interpretive issues.

MBSD also seems to contend, incorrectly, both that the Examiner has determined the grievances against them on the merits and that the Examiner found or needed to find that MBSD's conduct was improperly motivated. The Examiner has only determined that MBSD has refused to arbitrate disputes which are subject to the parties' agreement to arbitrate. Whether MTEA can prevail on the arbitrable matters herein is not the issue in a proceeding to compel arbitration. Employer motivation was not relevant or determinative in the Examiner's decision.

MBSD also incorrectly asserts that by deciding that FLEX and Computer Camp work is not professional, the Commission decided all possible contractual issues under the MTEA contract so that none could remain for an arbitrator to determine. The Commission specifically noted that it was conceivable that conflicting contractual agreements had been made by the MBSD and that a determination of the MTEA contract depended on interpretation of the facts and circumstances which would be presented in arbitration. The Commission's own decisional language shows that it understood that its statutory determination that the work does not require an advanced academic degree and license did not resolve the possible overlapping obligations under the MTEA and AFSCME contracts to which the Commission expressly referred in its decision.

The fact that the FLEX and Computer Camp instructors are not professionals for MERA unit placement purposes does not preclude the possibility that the arbitrator will find the MTEA contract provisions specified in the grievances determinative of when and at what rate of pay teachers can be assigned such "non-professional" duties, just as other MTEA agreement provisions deal with such nonprofessional activities as bus duty, hall supervision and cafeteria duty.

Finally, MBSD's contentions concerning the proper interpretation of the substantive provisions of the contract claimed violated in the grievances must be rejected as addressed to the wrong forum. Such contentions should be presented to the arbitrator, not to the Commission in a proceeding to compel arbitration. Contrary to the arguments on the merits advanced by MBSD, MTEA

> contends that the contract and past practice for many years under the contract do protect bargaining unit duties for similar teaching situations from being performed by non-unit employees at rates less than those negotiated for such duties, and by persons hired in violation of the summer school seniority or "priorities". Clearly it is for the arbitrator to determine the interpretation and application of the above-mentioned provisions of the contract.

MTEA Brief to Commission at 20.

DISCUSSION

Precise Scope of Examiner's Order

We begin our review with a statement of what we think the Examiner has found to be arbitrable and nonarbitrable in this matter. If his Findings of Fact, Conclusions of Law and Order leave any doubt, the Examiner's Memorandum makes it

quite clear that he has found nonarbitrable the issues subsumed under item #2 in his Accompanying Memorandum, which reads:

> 2. Whether MBSD has violated its contract with the MTEA by placing non-teachers into positions in the Recreation Divisions Computer Camp and FLEX programs."

To the same effect, he clearly stated at p. 20 of that Memorandum, that our February 8, 1988 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 teachers only". It follows that under the Examiner's decision, the remaining matter for arbitration cannot involve questioning the propriety of MBSD's placing non-teachers into positions in the Recreation Division's Computer Camp and FLEX programs. Rather the matters remaining for arbitration relate solely to whether MBSD violated the MTEA-represented teachers' rights of some MTEA-represented teachers by placing other MTEA-represented teachers into positions in the Recreation Division's Computer Camp and FLEX programs and/or by failing to pay MTEA-represented teachers for that work in accordance with the provisions of the MTEA agreement. In light of the foregoing, MTEA's implications in its Brief to the Commission (e.g., pp. 20-21) that it is somehow entitled under the Examiner's decision to seek an arbitral remedy for MBSD's selections of non-MTEA-represented individuals instead of MTEA-represented teachers for any of the work in question is erroneous. Similarly, MTEA cannot under the Examiner's order seek a remedy for MBSD's failure to pay non-MTEA-represented individuals at other than MTEA agreement rates for the work in question.

Applicable Legal Standards

A party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Jt. School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94, 101 (1977) (also referred to herein as Jefferson Schools). However, the arbitration agreement enforcement forum'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". Id. at 111.

Applying those principles herein, the question before us is not whether the MTEA's or the MBSD's interpretations of the substantive provisions cited in the grievances is more persuasive, but rather whether there is a construction of the parties' arbitration clause that would cover those issues, and if, so whether there is any other provision of the agreement that specifically excludes them from arbitration.

We agree with the Examiner that the arbitration clause in question is susceptible to a construction whereby the parties have agreed to submit those matters to an arbitrator for determination. The parties' arbitration clause is a broad one, defining a grievance as a matter of interpretation or application of provisions of the agreement. It can fairly be interpreted as covering the questions of whether the District violated the summer school and after-school provisions specified in the grievances by the way it selected and paid MTEA-represented teachers to work in the FLEX and Computer Camp recreation programs.

Contrary to MBSD's position, the Commission's holding that MTEA is not the exclusive representative of any of the recreation instructors when they are performing in that function does not automatically and conclusively establish either that the parties cannot have agreed to pay and selection provisions protecting MTEA members when they work for the MBSD outside the teacher unit as recreation instructors or that they cannot have agreed to arbitrate the question of whether the MTEA-MBSD agreement does or does not include such provisions. For example, the MTEA agreement could have specifically provided that "when working outside the teacher unit employes shall be paid and selected in accordance with the terms of this agreement". While such language would be a permissive subject of bargaining 2/ and subject to unilateral MBSD evaporation at the next available

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2/ See, e.g., Milwaukee Schools, Dec. No. 20399-A (WERC, 9/83) at 20-21 and cases cited therein (proposals seeking to control wages, hours and conditions of employment of individuals in a different bargaining unit constitute permissive subjects of bargaining).

contract termination, its meaning and application would nonetheless remain an arbitrable subject matter in the interim. The contract language claimed violated in the grievances does not specifically refer to recreation instructors or to the FLEX and Computer Camp programs. Nevertheless, the parties' have agreed to an arbitration clause which is sufficiently broad to cover the questions which the Examiner found arbitrable herein.

We also agree with the Examiner that the parties' agreement does not expressly exclude those questions from the scope of the parties' contractual obligation to arbitrate. Part II.A.3 of that agreement sets forth a commitment to submit disputes about unit placement of new positions to the Commission (and hence not to arbitration). Viewing that commitment as an exclusion of any and all unit placement issues from arbitration does not undercut the Examiner's decision herein. For, the questions the Examiner found arbitrable are not questions of unit placement. They are separate from the unit placement (and work jurisdiction) questions which the Examiner properly held to be nonarbitrable. The question of whether MBSD agreed that teachers would be paid teacher contract rates and selected in teacher contract specified order for whatever recreation work outside the teacher unit teachers may be hired for are separate questions from whether MTEA is the exclusive representative of those employes when they are working as recreation instructors and whether those employes are in the professional teachers unit. Thus, in our February 2, 1988 decision, we were careful to leave to the parties' contractual interpretation procedures all but the purely statutory decision that recreation instructors are not professional employes when performing that work, and hence cannot be included by Commission order in the MTEA professional teachers unit. We expressly left to the parties' contractual interpretation procedures all of the other questions of contract interpretation. We noted that such interpretive issues could arise not only under the MBSD-AFSCME agreement but also under the MBSD-MTEA agreement and that the resultant obligations could ultimately be "overlapping" in nature.

In sum, niether the unit placement language in Part II.A.3 nor any other provision elsewhere in the agreement excludes from the parties' arbitration commitment the question of whether the after-school and summer school provisions cited in the grievances do or do not require MBSD to pay and select among MTEA-represented teachers in accordance with the terms of those provisions in connection with MBSD's employment of such individuals as FLEX and Computer Camp instructors.

The District must therefore direct its arguments concerning the merits of the abovenoted arbitrable issues to the arbitrator.

We recognize that it is possible that compelling MBSD to arbitrate the instant issues may ultimately present MBSD with a choice between complying with one of two conflicting grievance arbitration awards or with otherwise violating MERA. However, in light of the emphasis given in Jefferson to deferring to the parties' chosen method for contract dispute resolution, we find it necessary to require arbitration and to have the conflicting obligations sorted out later, if necessary. In other words, until an actual conflict of statutory or contractual obligations is presented, we find the purposes of MERA better served by applying the well-established principles of deference to the parties' agreed-upon contract dispute resolution procedure. 3/ The alternative would be to turn the arbitral presumption on its head by presuming the parties could not have intended to arbitrate a dispute about whether their agreement provides protections of unit members when they are working in positions outside the unit in the face of a broad arbitration clause and the absence of an express exclusion of such disputes from the scope of arbitration.

3/ We do not perceive MBSD to be in such an actual conflict situation at present. Merely participating in the arbitration ordered herein would not violate any bargaining obligation it may have with AFSCME as regards recreation instructors. If the arbitrator determined that the MTEA agreement provisions specified in the grievances do not apply to MTEA-teachers when they are performing duties in positions outside the teachers unit, then there would be no conflicting obligations imposed on MBSD.

While we take no comfort in opening the possibility of duplicative and perhaps conflicting arbitral or administrative proceedings, we find that to be a necessary price to be paid in service of the underlying MERA policies favoring voluntary resolution of contract interpretation disputes through arbitration reflected in the Jefferson Schools decision.

It should be emphasized, as noted above, that if the MTEA agreement language is interpreted by the arbitrator to be applicable to FLEX and Computer Camp instruction, such language would be a permissive subject of bargaining, given our prior holding that the FLEX and Computer Camp instructors cannot be placed in the MTEA bargaining unit. See Note 2, supra.

It should also be emphasized that neither the Examiner nor the Commission is to be understood as expressing an opinion in this proceeding on the merits of the aspects of the grievances held arbitrable herein. That determination is for the arbitrator.

For the foregoing reasons, then, we have affirmed the Examiner's decision.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner