STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	:	Case 200 No. 39310 MP-2012 Decision No. 24948-B

Appearances:

Perry, Lerner & Quindel, S.C., Attorneys at Law, by Mr. Richard Perry at hearing and on brief and Ms. Barbara Zack Quindel on brief, 833 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Teachers' Education Association.

Mr. Milton B. Ellis, Attorney at Law, Milwaukee Board of School Directors, P.O. Drawer 10K, Milwaukee, Wisconsin 53201, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association (MTEA or Association) having filed a complaint with the Wisconsin Employment Relations Commission (WERC or Commission) on August 31, 1987, alleging that the Milwaukee Board of School Directors (MBSD or Board) had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to complete the arbitration process as required by the collective bargaining agreement; and the Board having filed with the Commission on October 2, 1987 a Motion to Restrain Proceedings, requesting the Commission to restrain all proceedings with respect to this matter, including the appointment of an Examiner; and the Association having filed a letter in opposition to said motion on October 5, 1987; and the Board having filed with the Commission on October 7, 1987, a letter in response to the Association's letter received October 5, 1987; and the Commission through General Counsel Peter G. Davis having advised the parties on October 13, 1987, that this matter had been assigned by the Commission to Examiner James W. Engmann, a member of the Commission's staff; and the Examiner having advised the parties on October 26, 1987, he would schedule one date to hear both the motion and the merits of this matter; and the Board having filed a letter with the Commission on October 28, 1987, requesting the motion be determined in advance of any hearings in this matter; and the Association having filed a letter on October 30, 1987, indicating it opposed holding hearing on the motion prior to hearing on the merits; and the Commission having formally appointed Examiner Engmann on November 6, 1987, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and the Examiner having reviewed the arguments of the parties regarding the Motion to Restrain Proceedings; and the Examiner having denied the Motion to Restrain Proceedings on November 6, 1987; and the Board having advised the Commission on November 17, 1987, that it would proceed to arbitration and requested an order dismissing the Association's complaint in this matter; that the Association having on December 4, 1987, advised the Commission that it opposed the District's request; that the District having filed a Motion to Dismiss on December 8, 1987, alleging that since the Board has acceded to submission of the grievance to arbitration, the matter before the Commision was moot; and the Examiner having advised the parties on December 19, 1987, that he was taking said Motion to Dismiss under advisement and that he intended to schedule hearing on the merits, at which time he would hear evidence and argument as to the motion; that the Examiner having issued a Notice of Hearing on Complaint on January 28, 1988; that the Board having filed an answer and affirmative defenses on February 4, 1988; that the Board having filed a Supplemental Motion to Dismiss on March 2, 1988, alleging that this matter was moot in

that the Board had removed and destroyed the letter of reprimand; and hearing on said complaint and motions having been held on March 4, 1988 in Milwaukee, Wisconsin; and a stenographic transcript having been prepared and received by the Commission on April 19, 1988; and posthearing briefs having been exchanged on June 8, 1988; and the Examiner having considered the evidence and arguments of the parties, and being fully advised in the premisses, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Milwaukee Teachers Education Association (MTEA or Association), is a labor organization with its offices at 5130 West Vliet Street, Milwaukee, Wisconsin 53208. The Association is the certified exclusive collective bargaining representative for teachers employed by the Board. At all times material to this matter, James Colter has been the Association's Executive Director and Barry Gilbert has been an Assistant Executive Director of the Association.

2. The Respondent, Milwaukee Board of School Directors (MBSD or Board), is a municipal employer with its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin 53201. The Board operates the Milwaukee Public Schools. At all times material to this matter, Edward R. Neudauer has been the Board's Executive Director of the Department of Employee Relations and David Kwiatkowski has been the Board's Manager of Labor Relations.

3. The Association and Board have been parties to a number of collective bargaining agreements. During the 1985-86 school year, the parties were under an extension of the 1982-85 teacher contract. That agreement contained the following provisions:

> PART IV
>
> TEACHING CONDITIONS AND
> EDUCATIONAL IMPROVEMENTS
>
> . . .
>
> O. ALLEGATIONS OF MISCONDUCT
>
> 1. MISCONDUCT. No teacher shall be suspended, discharged, or otherwise penalized, except for "just cause." No teacher shall be involuntarily transferred, nonrenewed, or placed on a day-to-day assignment as a disciplinary measure. In the event a teacher is accused of misconduct in connection with his/her employment, the accusation, except in emergency cases as referred to herein, shall be processed as follows:
>
> a. The principal or supervisor shall promptly notify the teacher on a form memo that an accusation has been made against the teacher, which if true, could result in proceedings under Part IV, Section O, of the contract. The memo will also indicate that it will be necessary to confer on the matter and that at such conference the teacher will be allowed to be represented by the MTEA, legal counsel, or any other person of his/her choice. This notice shall be followed by a scheduled personal conference during which the teacher will be informed of the nature of the charges of alleged misconduct in an effort to resolve the matter. Resolution of "day-to-day" problems which do not have a reasonable expectation of becoming serious will not necessitate a written memo.
>
> b. If the principal or supervisor decides on further action, he/she shall specify the charges in writing and then furnish them to the teacher and the

MTEA and attempt to resolve the matter. The teacher and the MTEA shall have a reasonable opportunity to investigate and to prepare a response.

c. If the matter is not resolved in this manner, a hearing shall be held within ten (10) working days to hear the charges and the response before the assistant superintendent of the Division of Human Resources or his/her designee, at which time the teacher may be represented by the MTEA, legal counsel, or any other person of his/her choosing. Within five (5) working days of the hearing, the teacher and the MTEA shall be notified of the decision relative to the charges in writing and the reasons substantiating such decision.

d. The superintendent shall, within five (5) working days, review the decision of the assistant superintendent of the Division of Human Resources and issue his/her decision thereon. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the final step of the grievance procedure in cases not involving a recommendation for dismissal or suspension. A teacher who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 788, Wisconsin Statutes.

. . .

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. . . . .

B. DEFINITIONS

1. A grievance is defined to be an issue concerning the interpretation or application of 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.

. . .

D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

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

The impartial referee procedure shall be subject to the following:

a. The certifying party shall notify the other party in writing of the certification of a grievance.

b. The certifying party shall forward to the impartial referee a copy of the grievance and the other party's answer and send a copy of such communication to the other party.

c. Upon receipt of such documents, the impartial referee shall fix the time and place for a formal hearing of the issues raised in the grievance not later than thirty (30) days after receipt of such documents unless a longer time is agreed to by the parties.

. . .

2. APPOINTMENT OF IMPARTIAL REFEREE. The impartial referee shall be selected as follows:

a. The certifying party shall request the WERC to submit to the parties a list of names of five (5) persons suitable for selection as impartial referee.

b. If the parties cannot agree upon one (1) of the persons named on the list, the parties shall strike a name alternately, beginning with the MTEA, until one (1) name remains. Such remaining person shall act as impartial referee. In subsequent selections, the parties shall alternate the first choice to strike a name.

. . .

4. On March 17, 1986, the Association filed a complaint with the Commission alleging that the Board has engaged in and is continuing to engage in prohibited practices contrary to Secs. 111.70(3)(a)1 and 4, Stats.; that said complaint was assigned to Examiner David Shaw as Milwaukee Public Schools, Case 180 No. 36692 MP-1826 (hereinafter Case 180); and that the Association sought in part the following relief in Case 180:

a. That the Commission find that the respondent Milwaukee Board of School Directors violated sec. 111.70(3)(a)1 and 4, Stats., when it failed and refused to supply the MTEA with information it needs to intelligently represent members of the bargaining unit by concealing from the MTEA the identity of students who have information concerning incidents which are the subject of disciplinary proceedings by the Administration of MBSD.

b. That the Commission find that MBSD violated sec. 111.70(3)(a)1 and 4, Stats., by failing and refusing to furnish the MTEA in a timely fashion with the identity of students it expects to call as witnesses in misconduct proceedings against a member of the bargaining unit.

5. On April 24, 1986, the Association sent a letter to the Board which read as follows:

April 24, 1986

Mr. Raymond Williams
Assistant Superintendent
Division of Human Resources
Milwaukee Public Schools
P.O. Drawer 10K
Milwaukee, Wisconsin 53201

Dear Mr. Williams:

On April 25, 1986 at 1:30 p.m. a hearing is scheduled in your office to consider charges brought by Mr. William Thomas, Principal of Custer High School, against Mr. David Roberts, a teacher at Custer High School, in accordance with Part IV, Section O of the contract.

The administrations case is based largely upon the statement of a student, Ms. Lori Neubauer. Because of this fact, I request that Ms. Neubauer be present at this hearing for direct and cross-examination. It is my understanding that Ms. Neubauer is now a student at Juneau High School.

Your cooperation is appreciated.

Sincerely,

Barry Gilbert
Assistant Executive Director

BG/DER

cc Evelyn Hoffman

6. On May 1, 1986, the Board sent a letter to David Roberts which read as follows:

May 1, 1986

Mr. David Roberts
7205 W. Brentwood Ave.
Milwaukee, WI 53223-6125

Dear Mr. Roberts:

A meeting was held on April 25, 1986 under Part IV, Seciton O, 1(c) of the contract to review charges of misconduct against you. The charges are;

1. Conduct unbecoming a teacher;

2. Depriving a student of an opportunity for education;

3. Disobeying a direct order from the principal.

Present at this hearing, in addition to you and me, were Mr. William Thomas, Principal, Custer High School; Mrs. Evelyn Hoffmann, School Administrative Specialist; and Mr. Barry Gilbert, M.T.E.A.

Mr. Thomas, in his review of the charges against you, stated that you had on several occasions called a female student out of class for what he believed were non-school related reasons. He, in fact, inferred that these reasons appeared to be romantic in nature. He also indicated that he warned you about contact with this student.

In testimony given to Mr. Thomas by the student in question, she stated that during the times she was called out of class by you, you made such statements as "How beautiful you are" and "my lust is taking over." A complaint from her parents was also received.

Mr. Gilbert, in defense of you, gave testimony to the effect that you had come in contact with the student in question only because of your responsibilities in supervising the "sweep" room. He indicated that the student was in the "sweep" room because she constantly walked the halls. Mr. Gilbert also indicated that the student had become friendly with you, borrowed your calculator, and that you had either called her room or called her out of class only to retrieve the calculator, which you had difficulty in getting her to return.

While the evidence is not strong that you called the student out of classes for romantic purposes, it is clear that on several occasions you either called her classroom or called her from class reportedly to get her to return a calculator. Depriving a student of valuable educational time for a relatively insignificant matter cannot be justified and tends to give the "wrong" appearance especially in cases involving a male and female. If indeed your intentions were honorable, the utilization of a school administrator to help with the problem would hve been a better alternative. Your poor judgment tends to raise serious questions relative to your real motives.

Therefore, while I don't concur with all the recommendations of your principal, I am recommending to Superintendent Dr. Lee R. McMurrin that a letter of reprimand be placed in your personnel file.

Let this action be a warning that future such incidents of this nature could lead to more serious disciplinary action being taken against you.

Respectfully,

Raymond E. Williams /s/

RAYMOND E. WILLIAMS
Assistant Superintendent
Division of Human Resources

REW/vlj

c: Dr. Lee R. McMurrin
Mr. William Thomas
Mrs. Evelyn Hoffmann
Mr. Barry Gilbert

7. On May 20, 1986, the Association filed a grievance with the Board pursuant to Part VII of the collective bargaining agreement. Said grievance stated in part as follows:

1. What is the action or situation about which you have a grievance?

On April 8, 1986, Mr. David Roberts, a teacher at Custer High School, received the form memo alleging misconduct. At

subsequent meetings, Mr. Roberts was charged with misconduct based largely upon the statements of a student.

The MTEA had requested in writing that the student be present at the hearing conducted in accordance with Part IV, Section O(1)(c) of the contract for direct and cross-examination. The Administration denied the request and conducted the hearing without its witness. The refusal to bring forth the witness as request violated Mr. Roberts' due process rights under the contract.

The contract was further violated when the superintendent failed to review the decision of the assistant superintendent.

2. What do you think should be done about it?

All correspondence relating to charges of misconduct against Mr. David Roberts should be expunged from his personnel file and destroyed.

8. On April 8, 1987, the Board issued its Step 3 response which stated in part as follows:

1. What are the issues involved in this grievance?

The MTEA alleges that the district's refusal to bring forth a student witness during early stages of misconduct proceedings against the grievant, violated the grievant's due process rights under the labor contract.

2. What is your decision?

The grievance is denied.

3. What is the basis for your decision?

The district has the right to decide whether student witnesses will be present for direct and cross-examination at appropriate stages of the disciplinary process. The contract has not been violated.

9. On April 21, 1987, the Association wrote to the Commission, copy to the Board, requesting a panel of five arbitrators. On April 28, 1987, the Commission sent to the Association, copy to the Board, a panel of five arbitrators. On July 16, 1987, the Association wrote to Arbitrator Morris Slavney as follows:

July 16, 1987

Mr. Morris Slavney
Arbitrator
4820 Tokay Boulevard
Madison, Wisconsin 53711

Re: Arbitration between the Milwaukee Board of School Directors and the Milwaukee Teachers' Education Association on Grievance # 86/48 (David Roberts

Employment Relations Commission to act as an arbitrator in the above captioned grievance.

Based upon the date you provided, the parties have mutually selected the following date to hold the hearing:

Thursday, September 3, 1987

The scheduled hearing will be held at the Milwaukee Board of School Directors Central Administration Building located at 5225 West Vliet Street beginning at 10:00 a.m. in Room 127.

The parties will arrange to have a court reporter present for the hearing.

At the request of the Wisconsin Employment Relations Commission, enclosed please find a form which you are to complete and remit to the Commission at such time you have issued your award or have otherwise closed your file on this grievance.

Your cooperation on this matter is greatly appreciated.

Sincerely,

Robert P. Anderson
Assistant Executive Director

RPA/LM

cc: Barry Gilbert
Richard Perry
David Kwiatkowski
Stephen Schoenfeld, WERC

10. On July 21, 1987, the Board wrote to Arbitrator Slavney as follows:

July 21, 1987

Arbitrator Morris Slavney
4820 Tokay Boulevard
Madison, WI 53711

Re: MTEA/MBSD Arbitration Grievance No. 86/48
(David Roberts Misconduct Proceeding --
Student Witnesses)

Dear Mr. Slavney:

I have just received notice of the upcoming arbitration proceeding referenced above. The Grievance Initiation Form filed by the Milwaukee Teachers' Education Association ("MTEA") alleges that the contract was violated when the Board declined to produce student witnesses for direct and cross-examination in the context of misconduct hearings before the Administration preliminary to applicable Board hearings and arbitration hearings set forth by the contractual misconduct procedure.

Please be advised that this precise issue is currently pending in litigation before the WERC as a prohibited practice as WERC Case 180 No. 36692 MP-1826. Two days of hearing and one day of mediation have already occurred in this case and two additional days of hearing are currently

scheduled during the month of August. The Board takes the position that it is under no obligation to produce student witnesses or to permit them to be examined by the MTEA at any point in time prior to the Board hearing (including at the hearings noted on the Grievance Form). It intends to vigorously assert that position throughout the course of the upcoming WERC hearings.

Given that the subject matter of the above-referenced grievance is currently being heard by the WERC as a prohibited practice, the Board hereby declines to submit that same matter to arbitration. Accordingly, it hereby serves notice that it declines to process the arbitration matter currently pending before you any further and will not appear for any hearings in connection therewith.

Thank you very much for you kind consideration of this matter.

Very truly yours,

Stuart S. Mukamal /s/

STUART S. MUKAMAL
Assistant City Attorney

SSM:pml

CC: Richard Perry
Dr. Edward Neudauer
David Kwiatkowski

11. On July 23, 1987, Arbitrator Slavney wrote to the Board as follows:

July 23, 1987

Stuart S. Mukamal
Assistant City Attorney
City of Milwaukee
800 City Hall
Milwaukee, WI 53202-2601

Re: Milwaukee Board of School Directors
and
Milwaukee Teachers' Education Association
Grievance # 86/48 (David Roberts Misconduct)
A/P M 87-283

Dear Mr. Mukamal:

I have your letter of July 21, wherein you indicate that the above named Employer does not intend to proceed to arbitration in the above matter, scheduled by me to be hearong (sic) on September 3rd, for the reason "that the subject matter of the above referenced grievance is currently being heard by the WERC as a prohibited pracitce". If in fact that would be the issue before the arbitrator, and/or the Employer will not participate in said arbitration, this arbitrator will not proceed to hear the matter.

However, I will not schedule any other matter for said date just in case there may be a resolution of the issues before the WERC, and an agreement to proceed to arbitration.

Incidently, in advising me of my selection, Robert P. Anderson of MTEA, described the grievance as noted above, with no

reference being made to "student witnesses" or to the pending WERC proceeding.

Sincerely,

Morris Slavney /s/

Morris Slavney
Arbitrator

ms:t
cc: Attorney Richard Perry
Robert P. Anderson
Dr. Edward Neudauer

12. On July 28, 1987, the Association wrote to Arbitrator Slavney as follows:

July 28, 1987

Arbitrator Morris Slavney
4820 Tokay Boulevard
Madison, Wisconsin 53711

Re: MTEA/MBSD Arbitration Grievance No. 86/48
(David Roberts Misconduct Proceeding--
Student Witnesses)

Dear Mr. Slavney:

This is in response to the letter of counsel for the Milwaukee Board of School Directors in the above-captioned matter dated July 21, 1987.

The Assistant City Attorney states:

> "Given that the subject matter of the above-referenced grievance is currently being heard by the WERC as a prohibited practice, the Board hereby declines to submit that same matter to arbitration. Accordingly, it hereby serves notice that it declines to process the arbitration matter currently pending before you any further and will not appear for any hearings in connection therewith.

The underlying jurisdictional facts of this matter are as follows:

1. On May 20, 1987, the MTEA filed a timely grievance asserting that the employer violated the due process provisions of the contract in disciplining David Roberts, a member of the MTEA teacher bargaining unit. The grievance was processed without resolution and on April 21, 1987 the MTEA invoked arbitration.

2. On July 16, 1987, the MTEA and the MBSD mutually selected you as arbitrator from a panel appointed by the Wisconsin Employment Relations Commission and the parties mutually selected September 3, 1987 to conduct the hearing in the above matter.

3. In his letter of July 21, 1987, the Assistant City Attorney attempts to unilaterally withdraw from the arbitration process after the parties had mutually agreed to submit this matter to arbitration before you at a hearing on September 3, 1987.

4. The David Roberts grievance has not been submitted to the WERC nor has any evidence been submitted to the Commission with respect the the facts surrounding his grievance. The case submitted to the WERC does not include Mr. Roberts nor does it include contractual rights Mr. Roberts may have under the MTEA collective bargaining agreement. It deals with the statutory duty of the employer to furnish information to the MTEA which is possessed by the employer and which the MTEA needs if it is to properly represent employees in the bargaining unit.

It is the position of the MTEA that, since the parties have mutually agreed to submit this grievance to arbitration; have mutually selected an arbitrator; and have mutually agreed upon a date to hear said grievance, the Milwaukee Board of School Directors is not at liberty unilaterally to break this agreement. The MTEA, therefore, respectfully requests that the arbitrator continue with the arbitration process as had been originally agreed upon by the parties with the approval of the arbitrator.

At the arbitration hearing, the employer will be free to set forth to the arbitrator any relevant arguments it believes supports its position with respect to whether the cited provisions of the contract have been violated. If the employer sees fit to default on its obligation to appear at the arbitration hearing, its default does not deprive the arbitrator of jurisdiction to determine the grievance. Such default simply constitutes a failure of the employer to present such evidence and arguments as it believes may support its contention in denying the grievance.

In view of the foregoing, it is respectfully submitted that the arbitrator should proceed and hear the case as had originally been scheduled by mutual agreement of the parties.

Very truly yours,

Richard Perry /s/

Richard Perry

RP:jj
cc: James R. Colter, Executive Director
Milwaukee Teachers' Education Association
Stuart S. Mukamal, Assistant City Attorney
J36/rp0727871-2

13. On July 29, 1987, the Board wrote to Arbitrator Slavney as follows:

July 29, 1987

Arbitrator Morris Slavney
4820 Tokay Boulevard
Madison, WI 53711

Re: MTEA/MBSD Arbitration Grievance No. 86/48
(David Roberts Misconduct Proceeding--
Student Witnesses)

Dear Mr. Slavney:

The Milwaukee Board of School Directors respectfully but firmly disagrees with the entirety of the letter submitted by Mr. Perry of July 28, 1987 relative to the above.

Mr. Perry admits in his letter that the subject matter of the above-referenced grievance is identical to the subject matter of the prohibited practice complaint filed by the WERC. What the MTEA really seeks is "two kicks at the cat." The Board reiterates its position that the matter is not arbitrable under the circumstances, and that whatever obligation it might have otherwise had to appear at any arbitration hearings is extinguished as a result thereof. Additionally, it believes that a "default" decision in this matter as suggested by Mr. Perry would be entirely improper and in excess of arbitral jurisdiction and authority.

I believe that this position is perfectly consistent with that set forth in your letter of July 23, 1987. If you have any questions, please do not hesitate to contact me at any time.

Very truly yours,

Stuart S. Mukamal /s/

SSM:pml
CC: Richard Perry
David Kwiatkowski

STUART S. MUKAMAL
Assistant City Attorney

14. On August 31, 1987, the Association filed a complaint with the Commission alleging that the Board had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to complete the arbitration process as required by the collective bargaining agreement. On October 2, 1987, the Board filed with the Commission a Motion to Restrain Proceedings. On November 6, 1987, this Examiner denied the Board's Motion to Restrain Proceedings.

15. On November 16, 1987, the Board sent a letter to this Examiner that reads as follows:

November 16, 1987

Examiner James W. Engmann
Wisconsin Employment
Relations Commission
P.O. Box 7870
Madison, WI 53707-7870

Re: MTEA v. MBSD
Case 200 No. 39310 MP-2012
(David Roberts)

Dear Mr. Engmann:

We have had the opportunity to review your recent Order in the above matter, in light of the fact that the record has now been completed in the parallel case before Examiner David E. Shaw (Case 180 No. 36692 MP-1826). That Order ruled that the grievance involved in the above-referenced case (which the MTEA seeks to arbitrate) was different from the matters presented to Examiner Shaw on the grounds that the former presented a "contractual" issue, while the latter presented a supposedly "statutory" issue.

I would note that the so-called "contractual" issue (more precisely, a claim founded upon supposed "contractual due process") was raised in the MBSD's Answer to the Complaint filed by the MTEA initiating Case 180, and was fully litigated in the proceedings before Examiner Shaw. In the event that the Commission sought to address this issue, Examiner Shaw would be fully capable of doing so. I would note that both the subject matter ("student witnesses") and the nature of the

relief sought by the MTEA are substantively identical in both the grievance implicated in the above-referenced proceeding and the proceeding completed before Examiner Shaw.

The MBSD is not interested in engendering needless litigation before the Commission; indeed, its entire posture in this case was to press the Commission to curtail needless and duplicative litigation initiated by the MTEA. In the interests of efficiency and expedience, and in view of the fact that the record before Examiner Shaw is now complete (as to both the "statutory" and "contractual" issues), the MBSD will proceed to arbitration before Arbitrator Slavney at a time and date to be determined. In this respect, the MBSD will request that Arbitrator Slavney take notice of the full record of the proceedings before Examiner Shaw and that his award not be rendered until Examiner Shaw has rendered his Findings of Fact, Conclusions of Law and Order in Case 180. Furthermore, by doing so, the MBSD does not waive any of its rights to contest the substantive arbitrability of the matters alleged in the MTEA's grievance before Arbitrator Slavney. Indeed, the MBSD has maintained and continues to maintain that that grievance is not substantively arbitrable.

In light of the above, the MBSD requests an Order dismissing the MTEA's Complaint filed in the above-referenced matter.

Thank you for your kind assistance.

Very truly yours,

Stuart S. Mukamal /s/

STUART S. MUKAMAL
Assistant City Attorney

SSM:pml

CC: Richard Perry
Dr. Edward R. Neudauer
David Kwiatkowski
Examiner David E. Shaw
Arbitrator Morris Slavney

16. On December 3, 1987, the Association sent a letter to this Examiner that reads as follows:

December 3, 1987

Examiner James W. Engmann
Wisconsin Employment Relations Commission
P.O. Box 7870
Madison, WI 53707-7870

Re: MTEA v. MBSD
Case 200 No. 39310 MP-2012
(David Roberts)

Dear Mr. Engmann:

Consistent with your ruling of November 6, 1987, please schedule the hearing in the above-captioned matter at the earliest possible date.

The MTEA does not find the November 16 proposal of the Employer adequate to remedy the alleged prohibited practices set forth in the above-captioned complaint.

Very truly yours,

Richard Perry /s/

Richard Perry

RP/ssm
S#54/rp120387/1
cc: James R. Colter, Executive Director, MTEA
Stuart S. Mukamal, Assistant City Attorney

17. On December 7, 1987, the Board sent a letter to this Examiner which reads as follows:

December 7, 1987

Examiner James W. Engmann
Wisconsin Employment
Relations Commission
P.O. Box 7870
Madison, WI 53707-7870

Re: MTEA v. MBSD
Case 200 No. 39310-MP-2012
(David Roberts)

Dear Examiner Engmann:

We are frankly puzzled by Mr. Perry's letter of December 3, 1987 relative to the above. The MBSD's action as stated in my earlier correspondence acceding to arbitration of the grievance underlying the above-referenced matter before Arbitrator Morris Slavney was not a "proposal." It is a statement of intention that requires dismissal of the complaint filed by the MTEA. There is no purpose to be served in scheduling hearing on the MTEA's complaint, as such has become moot.

Accordingly, attached is our Motion to Dismiss the above-referenced matter. Thank you for your kind assistance.

Very truly yours,

Stuart S. Mukamal /s/

STUART S. MUKAMAL
Assistant City Attorney

SSM:bd
Enc.
cc: Atty. Richard Perry
Mr. Dave Kwiatkowski

18. On February 19, 1988, the Board sent a letter the Association that reads as follows:

February 19, 1988

Mr. Barry Gilbert, Assistant Executive Director
Milwaukee Teachers' Education Association
5130 West Vliet Street
Milwaukee, WI 53208-2683

Dear Mr. Gilbert:

This is to confirm our conversation of February 18, 1988, wherein I informed you that the warning letter that was issued to Mr. David Roberts has been expunged from his file and destroyed. I believe that this action resolves grievance 86/48.

Sincerely,

David A. Kwiatkowski /s/

DAVID A. KWIATKOWSKI
Labor Relations Manager
Department of Employee Relations

DAK/vw

Copy to: Mr. Raymond Williams
Mr. Stuart Mukamal
Labor Relations Staff

19. On March 1, 1987, the Board sent a letter to this Examiner that reads as follows:

March 1, 1988

Examiner James W. Engmann
Wisconsin Employment Relations Commission
P.O. Box 7870
Madison, Wisconsin 53707-7870

Dear Mr. Engmann:

Re: MTEA v. MBSD
Case 200 No. 39310 MP-2012
(David Roberts)

I have currently been designated Attorney of Record for the Milwaukee Board of School Directors with respect to the above-referenced case. Enclosed please find the Supplemental Motion to Dismiss Proceedings which is herewith being filed on behalf of the Milwaukee Board of School Directors in the above-referenced matter. We would request that this motion be granted prior to the scheduled proceeding for this case on March 4, 1988.

Sincerely,

Milton B. Ellis /s/

MILTON B. ELLIS
Labor Relations Analyst
Department of Employee Relations

MBE/ak

Enclosure

Copy to: Richard Perry
Stuart Mukamal
Labor Relations Staff

Attached to the Supplemental Motion to Dismiss Proceedings discussed in the March 1, 1988, letter was the February 19, 1988, letter quoted above.

20. This complaint involves legal questions of public interest and importance, that it presents a factual situation which is likely to recur and that judgment in this matter will have a practical legal effect upon the existing controversy.

21. By this collective bargaining agreement, the parties have agreed to submit the dispute in the underlying grievance to arbitration, and that by refusing to do so, the Board violated the collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. That the instant complaint is not moot.

2. That the Board, by refusing to arbitrate the grievance underlying this case from July 21, 1987, through November 16, 1987, violated the collective bargaining agreement and, therefore, violated Sec. 111.70(3)(a)5, Stats.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

1. IT IS ORDERED that the Board's Motion to Dismiss and Supplemental Motion to Dismiss are denied.

2. IT IS FURTHER ORDERED that the Milwaukee Board of School Directors, its officers and agents, shall immediately

a. Cease and desist from refusing to arbitrate the grievance underlying this matter in violation of the collective bargaining agreement Sec. 111.70(3)(a)5, Stats.

b. Proceed to arbitration on the grievance underlying this matter.

c. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this decision what steps it has taken to comply with the above order.

Dated at Madison, Wisconsin this 14th day of November, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann
James W. Engmann, Examiner

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

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

(Footnote one continued on page seventeen)

(Footnote one continued from page sixteen)

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.

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES

Complainant

The Board's Motion to Dismiss for mootness must be denied in that the evidence in this matter indicates that both the prohibited practice, as well as the matter dealt with in the arbitration, have not been fully resolved and are likely to recur in the future; therefore a resolution is required to end the existing controversy, citing School District of Webster, Dec. No. 21312-A (Crowley, 6/84).

More specifically, the November 1987 statement by the Board of its willingness to arbitrate does not render this matter moot, that such a stance would allow one party to indefinitely delay arbitration of a case and later decide it would proceed to arbitration and evade review as a prohibited practice, that this is not the first time the Board has unilaterially refused to arbitrate a case after having selected an arbitrator and scheduled a date and, hence, the Board's statement of willingness to arbitrate this grievance does not render the instant matter moot, citing Milwaukee Board of School Directors, Dec. No. 23592-A (McLaughlin, 5/88).

As to the Board's February 1988 removal of the disciplinary letter, agreeing to relief in and of itself does not render a case moot, that the granting of the remedy requested did not acknowledge or deal with the two violations of the contract alleged by the Association to have occurred and that the removal of the disciplinary letter does not moot the grievance since the MTEA has a right to obtain the arbitrator's determination of whether the actions of the Board alleged in the grievance are violative of the contract, citing Milwaukee Police Association v. City of Milwaukee, 92 Wis2d 175, 285 N.W.2d 133 (1979).

As to the merits, the grievance is clearly arbitrable under legal standards governing arbitrability, that while one can argue with the Association with respect to the merits of the grievance, no one can dispute that the grievance sets forth specific provisions of the collective bargaining agreement which the Association contends the Board has violated, and that under the Steel Workers trilogy, as adopted by the Wisconsin Supreme Court in Joint School District No. 10 v. Jefferson Education Association, 78 Wis2d 94 (1977), the WERC must order the MBSD to proceed to arbitration.

The Association cites AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 121 LRRM 3329 (1986) for the proposition that arbitration is a matter of contract, that the question of arbitrability is an issue for judicial (or, in Wisconsin under Chapter 111, WERC) determination, that in making this determination, the court is not to rule on the potential merits of the underlying claims, and where the contract contains an arbitration clause, there is a presumption of arbitrability.

Contrary to the Board's contention that it cannot be held to commit this prohibited practice since it is for the WERC and not the arbitrator to determine arbitrability, the obligation to proceed to arbitration is not created by the arbitrator but by the contractual agreement of the parties, that the Board is not free to challenge jurisdiction wherever it chooses, regardless of how much good faith it has that such a challenge is proper, that the test is an objective one, and that if in refusing to go to arbitration the Board is found to have been incorrect, it has violated Sec. 111.70(3)(a)5, Stats., by its refusal to allow the arbitrator to make a decision regarding the application or interpretation of the provisions of the collective bargaining agreement.

The test of arbitrability requires a finding of arbitrability if it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, citing Jefferson, supra; that both

issues set forth in this grievance are arbitrable under the parties' collective bargaining agreement; that the Board's argument that the contractual issues raised in this grievance are identical to the statutory issue raised in Case 180 must be rejected; that Case 180 involves an allegation of a violation of Sec. 111.70(3)(a)1 and 4, Stats.; that this case involves an allegation of a violation of the Board of Section O(1)(c) of the collective bargaining agreement; that the Board has been unable to provide a single reason for challenging the arbitration of the issue of the superintendent's review; and, thus, the Board must be found in violation of Sec. 111.70(3)(a)5, Stats., for its refusal to arbitrate.

Respondent

The Commission should grant the two Motions to Dismiss this case that were filed on behalf of the Board and declare that the subject matter involved in the grievance herein is moot; that on December 7, 1987, the Board agreed to proceed to arbitration on the grievance herein; that the Association refused to arbitrate the matter and recalcitrantly decided to proceed with this prohibited practice complaint; and that the Commission should have granted the Board's first Motion to Dismiss this complaint since the Board was willing to litigate the matter before the arbitrator. The Board also expunged the letter of reprimand and, therefore, the Board's second motion should most assuredly be granted because the subject matter that gave rise to the grievance, the letter of reprimand, was no longer part of the case; that therefore the matter should be declared moot; that the only remedy that the MTEA could seek out of this proceeding is advisory arbitration; that this would be in excess of the Commission's jurisdiction in light of the prohibited practice complaint filed in this matter; that the Association obtained the only relief under the grievance herein that it would be entitled to by an arbitrator; and that, therefore, the Commission should grant the Board's motion to dismiss on the basis of mootness.

As to the failure of the superintendent to issue his concurrence to the recommendation that was made by the assistant superintendent within five working days, such oversight constitutes a miniscule procedural violation which was not at the heart of the Association's argument; that the main issue raised in the grievance herein is the ability to interview student witnesses; and that this issue must be rendered moot in light of the fact that the letter of reprimand has been expunged.

As to the merits, the Board maintains that it did not violate Sec. 111.70(3)(a)5, Stats., when it refused to arbitrate the grievance herein because the issue involved in this grievance was already before the Commission in the form of a prohibited practice complaint in Case 180; that in Case 180 the Association was attempting to obtain an order from the Commission directing the Board to produce students for examination and cross-examination purposes during the first three steps of the contractual misconduct procedure; that this is exactly the same issue that was sought by the Association in the grievance underlying this case; that the issue of contractual due process was raised in Case 180; that the Association's action in this particular case presents none other than an attempt to litigate one issue in two different forums; that a hearing before the arbitrator on this issue of student witnesses would have represented nothing but frivolous and needless litigation since the same issue is before an Examiner in the prohibited practice case; and that, therefore, the Board is justified in not having the issue involved in this grievance tried before an arbitrator.

The Association's argument that teachers are not afforded adequate contractual due process rights if examination and cross-examination of student witnesses is not allowed is strenuously flawed and without foundation; that previously the Circuit Court and the Appellate Court ruled in another grievance that the contractual misconduct procedure specified under Part IV, Section O(1)(c) provided contractual due process ad nauseum for all teachers who are accused of any form of misconduct; that based on this, it is ludicrous for anyone to give credence to the argument advanced by the Association that the contract is flawed in that it does not provide adequate due process; and that because the contract found to provide a teacher with contractual due process ad nauseum, it should stand up to any challenge which remotely implies that it does not provide adequate contractual due process.

The Board did not participate in this arbitration because the issue presented for arbitration was not contained under any provisions of the contract between the parties, that there is no proposal contained in the contract which obliges the Board to provide student witnesses for examination and cross-examination at the first three steps of the contractual misconduct procedure; and that, therefore, the Board is justified in refusing to arbitrate this grievance.

The Board cites AT&T Technologies, Inc., v. Communication Workers of America, 475 U.S. 643, 121 LRRM 3329 (1986) to supports its action in refusing to arbitrate the grievance herein in that the Supreme Court ruled that issues of substantive arbitrability are to be decided by the courts and not by arbitrators; that the rationale behind this decision was to prevent arbitrators from establishing the limits on their own jurisdictions; and that the Board refused to arbitrate the issue contained in the grievance herein due to the substantive arbitrability question.

Finally, because the Board strongly believes that the prohibited practice complaint filed on behalf of the MTEA represents a frivolous complaint and needless litigation before the Commission, the Board requests an award of attorney's fees and costs in its favor.

DISCUSSION

Mootness

The Wisconsin Supreme Court has defined mootness as follows:

> A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 2/

In its Motion to Dismiss, the Board argues that this case is moot on the basis that the Board now agrees to proceed to arbitration of the underlying grievances.

Certainly this Examiner is not being asked "to determine an abstract question which does not rest upon existing facts or rights". While the Employer argues that its refusal to arbitrate no longer exists, this does not render this complaint moot. The question of whether the Board's action of refusing to arbitrate the underlying grievance for almost four months violates the statute still exists. Nor is this "a pretended controversy", one that does not exist. The parties disputed for almost four months whether the underlying grievance was arbitrable; the parties still dispute whether the Board's refusal for almost four months to arbitrate the underlying grievance violates the statute. Certainly this case does not seek "a decision in advance about a right before it has actually been asserted or contested". The complaint in this matter was not filed until after the conduct complained of had taken place; that is, the complaint alleging a refusal to arbitrate and, therefore, a violation of the collective bargaining agreement and Sec. 111.70(3)(a)5, Stats., was not filed until after the Board refused to proceed to arbitration.

Thus the only possible basis on which the controversy could be found to be moot would be on the claim that a judgment in the matter would not have any practical legal effect.

In Unified School District No. 1 of Racine County, 3/ the Commission determined that a prohibited practice complaint is not mooted merely because the activity complained of has ceased. The Commission stated as follows:

2/ WERB v. Allis Chalmers Workers Union Local 246, UAWA-CIO, 252 Wis 436, 32 N.W.2d 190 (1948).

3/ Decision No. 11315-A (WERC, 4/74).

> If the Commission were to dismiss the case as moot at this point in time, the Respondent could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy exercised in MERA and would have the "practical legal effect" of leaving the Complainant without an effective remedy. 4/

Such is the case here. To determine this case is moot would allow the Board to refuse to arbitrate other issues until such time as the Association filed a complaint and said complaint was scheduled for hearing. Then the District could agree to arbitrate the underlying grievance prior to a determination of the question of the refusal to arbitrate, thereby preventing the Commission from determining the legality of such action.

In School District of Webster, 5/ the Examiner came to a similiar conclusion. There the Examiner was presented with an allegation that the Employer had refused to bargain in good faith by unilaterally changing the status quo. The Employer argued that the case was moot as a result of the subsequent settlement of a successor collective bargaining agreement.

In determining the complaint was not moot, the Examiner stated as follows:

> The Association is entitled to know whether or not the District's conduct violated MERA. If it is determined that the District violated MERA, the Association has the right to such affirmative relief as will prevent any recurrence of such conduct. There is no guarantee that a party charged with a prohibited practice, who voluntarily ceases such conduct, will not in the future resume such improper conduct. The imposition of an appropriate order to conform its conduct to the law is the best means of preventing such a recurrence. 6/

So it is here. The Association has the right to know if the Board's actions in this matter violate the statute and, if so, the Association has the right to an order preventing the illegal activity from being repeated.

In its Supplemental Motion to Dismiss, the Board also argues that this case is moot on the basis that the Board has granted the relief sought in the arbitration proceeding -- the removal of a letter of discipline -- and, thus, there is no remedy to be granted by the Commission or the arbitrator. Thus the Board not only argues that the issue is moot before the Commission, but since the Board has conceded the remedy, the Board argues the case is moot before the arbitrator.

The fact that the Board has removed the letter of reprimand does not impact on the analysis of whether the case is moot before the Commission. The question still exists before this Examiner of whether the Board was in violation of Sec. 111.70(3)(a)5, Stats., by refusing to proceed to arbitration for four months on the underlying grievance. The Association is still "entitled to know whether or not the District's conduct violated MERA" and, if it has, the Association still "has the right to such affirmative relief as will prevent any recurrence of such conduct". 7/

As for the question of whether granting the relief requested moots the case before the Arbitrator, the Board assumes that the only remedy which would be received by the Association, if successful, is removal of the letter. But the

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4/ Id.

5/ Decision No. 21312-A (Crowley, 6/84), rev'd on other grounds, Dec. No. 21312-B (WERC, 9/85).

6/ Id., citing Massillon Publishing Co., 88 LRRM 1040 (1974).

7/ Id.

Arbitrator could determine whether the District's conduct violated the collective bargaining agreement. This determination is part of the relief that could be won by the Association and this relief might prevent any recurrence of such conduct. The Board has not granted this relief and, therefore, relief still exists which can be granted by the arbitrator.

Finally, the complaint involves legal questions of public interest and importance and presents a factual situation which is likely to recur and, hence, the rule of mootness is not applicable to the complaint. 8/

For these reasons this Examiner concludes that this case is not moot and, therefore, the Board's Motion to Dismiss and Supplemental Motion to Dismiss are denied.

Merits

The Association alleges in its complaint that the Board violated Sec. 111.70(3)(a)5, Stats., by advising the arbitrator in a letter dated July 21, 1987, that it was declining to arbitrate the grievance involved in this case, and by subsequently refusing to proceed to arbitration.

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. 9/

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, 10/ the principles of which have been adopted by the Wisconsin Supreme Court. 11/ The analysis of the U.S. Supreme Court in AT&T Technologies, Inc. v. Communication Workers of America 12/,a case cited by both parties in support of their positions, is consistent with the analysis of the Wisconsin Supreme Court. 13/

In AT&T the Court gleaned four guiding principles from the Steelworkers Trilogy. The Court said:

> The principles necessary to decide this case are not new. They were set out by this court over 25 years ago in a series of cases known as the Steelworkers Trilogy . . . .
>
> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be

. . . . . .

8/ Id., citing Local 150, SEIU, Dec. No. 16277-C (WERC, 10/80).

9/ Milwaukee Board of School Directors, Dec. No. 23592-A (McLaughlin, 5/88); Oostbury Joint School District No. 14 and Board of Education of Oostbury Joint School District No. 14, Dec. No. 11196-A (Torosian, 11/72), aff'd, Dec. No. 11196-B (WERC, 12/72).

10/ Steelworkers v. American Manufacturing 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).

11/ Dehnart v. Waukesha Brewing Co., 17 Wis2d 44 (1962); Joint School District No. 10 v. Jefferson Education Association, 78 Wis2d 94 (1977).

12/ 475 U.S. 643, 121 LRRM 3329 (1986).

13/ Milwaukee Board of School Directors, supra at 18, note 9.

> required to submit to arbitration any dispute which he has not agreed so to submit." 14/

As to the first principle, the Board argues that since it has not agreed to submit this specific grievance to arbitration, it cannot be required to do so. The Association, on the other hand, agrees that a party cannot be required to submit to arbitration a dispute it has not contractually agreed to submit, but it argues that the Board has agreed to submit this grievance to arbitration by the terms of the collective bargaining agreement.

Contrary to the Board's position, this first principle is not to suggest that each party can evaluate each grievance to determine if it wishes to submit that grievance to arbitration. The agreement to submit a grievance to arbitration is not made by each party at the time of arbitration but is agreed to by the parties at the time they include an arbitration clause in their collective bargaining agreement.

The Court continues:

> The second rule, which follows inexorably from the first, is that the question of arbitrability -- whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. 15/

As to the second principle, the Association and the Board agree that the question of arbitrability is one for the court or, in this case, the Commission to determine. The Board, however, infers that since the question of arbitrability is one for the Commission to determine, the Board does not violate Sec. 111.70(3)(a)5, Stats., when the Commission's decision as to arbitrability is sought.

Such is not the case. If the Commission determines that a collective bargaining agreement includes a clause for final and binding arbitration and if the Commission determines that a grievance comes within the ambit of that clause, an employer violates the contract clause when it refuses to arbitrate the grievance and, therefore, violates Sec. 111.70(3)(a)5, Stats.

The Court continues:

> The third principle derived from our prior cases 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. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . . 16/

As to the third principle, the Association agrees that in deciding whether the parties have agreed to submit a grievance to arbitration, the court or the Commission is not to rule on the potential merits of the underlying claims. Yet much of the Board's argument goes to the underlying claims. First, the Board

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14/ AT&T, supra, 121 LRRM at 3331, citing Warrior & Gulf, supra 363 U.S. at 582 and American Mfg. Co., supra, 363 U.S. at 570-571 (Brennon, J., concurring).

15/ AT&T, supra, 121 LRRM at 3331, citing Warrior & Gulf, supra, 363 U.S. at 582-583.

16/ AT&T, supra, 121 LRRM at 3332.

argues that the issues involved in the grievance are before the Commission in a prohibited practice complaint in Case 180. The Board argues that the issues are the same because the potential relief is the same.

But the issues before the Examiner in Case 180 are distinct and different from the potential issues before the arbitrator in this case. In Case 180, the Association alleges that the Board violated Secs. 111.70(3)(a)1 and 4, Stats., by failing and refusing to furnish information to the Association which is necessary for the Association to intelligently perform its statutory function as representative of members of the bargaining unit. More specifically, the Association alleges that the Board violated Secs. 111.70(3)(a)1 and 4, Stats., by failing to provide the Association with the names of students who are expected to appear as witnesses against unit members in disciplinary proceedings or who have evidence concerning unit members accused of misconduct in disciplinary hearings. One issue before the Arbitrator is whether the Board's refusal to bring forth a student witness as requested in writing for a hearing conducted in accordance with Part IV, Section O(1)(c) of the collective bargaining agreement violates that section of the agreement. The Board argues that this is the same issue that is before the Examiner in Case 180 and that the Association is attempting to litigate one issue in two different forums.

But the Board fails to distinguish between issue and remedy. It may be that if violations are found in both CXase 180 an the grievance underlying this case, the remedy woudl be similar; nevertheless, the issues in the two cases are separate adn distinct. The issue before the Arbitrator is not whether the failure to produce student witnesses violated Secs. 111.70(3)(a)1 and 4, Stats. Nor is the issue before the Examiner in Case 180 whether failure to produce student witnesses violates the collective bargaining agreement. Whether the Board is required to produce student witnesses by its statutory obligation to bargain with the Association is separate and distinct from whether it is required to do so by its contractual obligation of Part IV, Section O(1)(c). If it was determined in Case 180 that failure to produce student witnesses does not violate Secs. 111.70(3)(a)1 and 4, Stats., that would not determine whether said action violated the collective bargaining agreement. Thus the Association is not litigating the same issue in two different forums.

The Board also argues that the Circuit Court and the Appellate court ruled in another grievance that the contract provided due process ad nauseùm and that, therefore, this grievance has no merit. While these courts may have stated that the grievant before them had contractual due process ad nauseum, the question of whether contractual due process requires the Board to furnish student witnesses was not before these courts so the issue remains unresolved.

A second issue before the arbitrator in this case is whether the Board violated the collective bargaining agreement when the superintendent failed to review the decision of the assistant superintendent. This issue is not before the Examiner in Case 180.

The Court continues:

> Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "(a)n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 17/

As to the fourth principle, the Association agrees that the parties intended that the interpretation and application of the misconduct procedure of the contract was to be subject to the grievance procedure, up to and including arbitration. The Board does not offer argument as to this principle.

17/ AT&T, supra, 121 LRRM at 3332, citing Warrior & Gulf, supra, 363 U.S. at 582-583.

To apply these principles to this case, the issue of arbitrability -- whether the collective bargaining agreement reates a duty for these parties to arbitrate the underlying grievance -- is a determination for the Commission to make. In doing so, the Commission will not rule on the potential merits of the underlying grievance. Instead the Commission will determine if the parties have agreed to submit the underlying dispute to arbitration. In doing so the Commission will operate under a presumption of arbitrability if the parties' collective bargaining agreement contains an arbitration clause.

In this case, the parties' contract does contain an arbitration caluse. The arbitration clause at issue here is a broad one covering issues "concerning the interpretations of application of provisions of this contract or compliance therewith . . . ". Part VII, Section B(1). Certainly the question of whether the Board violates Part IV, Section O(1)(c) when it refuses to produce student witnesses concerns the interpretation or application of the provisions of this contract, as does the question of whether the Board violates Part IV, Section O(1)(d) when the superintendent fails to review the decision of the assistant superintendent.

The Board has not cited any contract provision which would specifically exclude either issue in this grievance from arbitration. Where the "arbitation clause is broad and the grievances state 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 interpretations that covers the dispute'." 18/ If there were any doubts that the issues contained in this grievance were arbitrable, such doubts would be resolved in favor of arbitrability. As there are no doubts, the issues posed in the grievance are arbitrable. Therefore, the Board violated the collective bargaining agreement when it refused to arbitrate the grievance underlying this matter and, thereby, the Board committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

Dated at Madison, Wisconsin this 14th day of November, 1988.

By James W. Engmann
James W. Engmann, Examiner

18/ Milwaukee Board of School Directors, supra at 21, quoting Jefferson, 78 Wis.2d at 113. See also AT&T, supra.