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-C

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, 823 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.

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

Examiner James W. Engmann having on November 14, 1988 issued Findings of Fact, Conclusions of Law and Order in the above matter, wherein he determined that the Milwaukee Board of School Directors had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate a grievance filed by the Milwaukee Teachers' Education Association and wherein he therefore ordered the Board to arbitrate said grievance; and the Board having on December 2, 1988 timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.; and the parties having filed written argument in support of and in opposition to said petition, the last of which was received on March 27, 1989; and the Commission having reviewed the Examiner's decision, the record, and the parties' written arguments and being fully advised in the premises, makes and issues the following

ORDER 1/

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.

(Footnote 1/ is continued on page 2.)

A. That the Examiner's Findings of Fact 1-19 are affirmed.

B. That the Examiner's Findings of Fact 20 is set aside and Examiner's Finding of Fact 21 is adopted as Commission Conclusion of Law 2.

C. That the Examiner's Conclusion of Law 1 is affirmed, and Examiner's Conclusion 2 is renumbered and adopted as Commission Conclusion of Law 3.

(Footnote 1/ continued from page 1.)

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.

D. That Paragraph 1 of the Examiner's Order is affirmed.

E. That Paragraph 2(a) of the Examiner's Order is revised to read:

Cease and desist from violating the parties' collective bargaining agreement by refusing to arbitrate grievances which are covered by the arbitration clause, on its face, and which are not specifically excluded from the arbitration procedure by some other provision of the contract.

F. That Paragraph 2(b) of the Examiner's Order is modified to read:

b. Take the following affirmative action which the Commission finds will effectuate the purposes and policies of the Municipal Employment Relations Act.

1. Proceed to arbitration on the merits of the Roberts grievance filed by the MTEA on May 20, 1986.

2. Notify the MTEA, in writing, of its willingness to proceed to arbitration on the Roberts grievance.

3. Notify all employes by posting in conspicuous places where bargaining unit employes are employed copies of the Notice attached hereto and marked "Appendix A". Such copies shall be signed by the Superintendent of Schools and shall be posted immediately upon receipt of a copy of this Order for sixty (60) days. Reasonable steps shall be taken to insure that said Notice is not altered, defaced or covered by other material.

c. That Paragraph 2(c) of the Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

Commissioner William K. Strycker did not participate.

Appendix "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. We will not violate our collective bargaining agreement with the Milwaukee Teachers' Education Association by refusing to proceed to arbitration of grievances which are covered by the arbitration clause, on its face, and which are not specifically excluded from the arbitration procedure by some other provision of the contract.

Dated this _______ day of _____________________________, 1989.

By ____

for the Milwaukee Board of School Directors

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

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MILWAUKEE BOARD OF SCHOOL DIRECTORS

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

BACKGROUND:

On August 31, 1987, the Milwaukee Teachers' Education Association (MTEA) filed a complaint with the Wisconsin Employment Relations Commission (Board) alleging that on July 21, 1987, the Milwaukee Board of School Directors had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate a grievance filed by employe Roberts. On October 2, 1987, the Board filed a Motion to Restrain Proceedings alleging that the grievance the MTEA wished to arbitrate raised issues which were duplicative of issues raised in another complaint filed by the MTEA being litigated before Commission Examiner Shaw. The Examiner denied the Board Motion on November 6, 1987 concluding that the Shaw case involved statutory duty to bargain issues while the grievance the Board was refusing to arbitrate sought enforcement of certain contractual rights.

By letter dated November 16, 1987, the Board advised the Examiner and the MTEA that it was now prepared to arbitrate the Roberts grievance although it remained the Board's position that the grievance was not substantively arbitrable. The MTEA advised the Examiner on December 4, 1987 that it wished to proceed to hearing. On December 8, 1987, the Board filed a Motion to Dismiss alleging that because the Board was now willing to proceed to arbitrate the Roberts grievance, the case was moot, and the complaint should be dismissed. The Examiner subsequently advised the parties that he was proceeding to schedule hearing as to the Board's Motion and the merits of the underlying complaint. On January 28, 1988, the Examiner issued a Notice of Hearing setting hearing for March 4, 1988.

On February 4, 1988, the Board filed its Answer which stated *inter alia* that: (1) the Roberts grievance was not substantively arbitrable; (2) matters raised by the Roberts grievance were already fully litigated before Examiner Shaw; (3) the case was moot given the Board's willingness to proceed to arbitration; and (4) the MTEA was acting in bad faith and proceeding solely to harass the Board. On March 2, 1988, the Board filed a Supplemental Motion to Dismiss asserting that because the Board had removed the letter of reprimand from employe Roberts' file, the grievance underlying the refusal to arbitrate case was now moot and the complaint should be dismissed. Hearing was held before the Examiner on March 4, 1988. Post-hearing briefs were received through June 7, 1988.

THE EXAMINER'S DECISION

Responding to the Board's Motion to Dismiss, the Examiner first analyzed the issue of whether the MTEA's refusal to arbitrate complaint had been rendered moot by the Board's ultimate agreement to proceed to arbitration.

Applying the Wisconsin Supreme Court's definition of "mootness" as set forth in WERB v. Allis Chalmers Workers Union Local 246, UAWA-CIO, 252 Wis. 436 (1948, the Examiner concluded that as the Board refused to arbitrate the underlying grievance for four months and as the complaint was not filed until after the Board's refusal and as the Board does not concede that its actions were violative of Sec. 111.70(3)(a)5, Stats., the case does not present:

> 1. "An abstract question" which does not rest upon existing facts or rights; or
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> 2. "A pretended controversy"; or
>
> 3. An effort by a party to receive "a decision in advance about a right before it has actually been asserted or contested."

As to the Board argument that the case was moot because a decision "cannot have any practical legal effect", the Examiner concluded that acceptance of this argument was inappropriate because, under the Commission's rationale in Unified School District No. 1 of Racine County Dec. No. 11315-A (WERC, 4/74), dismissal of the complaint would frustrate the public policy behind the Municipal Employment Relations Act and would deprive the MTEA of the right to seek a remedy which would prevent the Board from engaging in future refusals to arbitrate. Lastly, citing Local 150, SEIU, Dec. No. 16277-C (WERC, 10/80), the Examiner concluded that the complaint was not moot because it raised legal questions of public interest and importance in a factual situation which was likely to recur.

The Examiner then turned to the Board's Supplemental Motion to Dismiss wherein the Board argued that the case was moot because the Board had removed the letter of reprimand which prompted the underlying grievance from Roberts' file. Initially, the Examiner noted that removal of the letter was irrelevant to the issue of whether the refusal to arbitrate is moot. As to the question of whether removal of the letter would moot the case before the arbitrator, the Examiner opined that the MTEA was entitled to seek from the arbitrator a determination of whether the issuance of the letter was violative of the collective bargaining agreement.

Having rejected the Board's mootness arguments, the Examiner turned to the merits of the refusal to arbitrate dispute. Concluding that the United States Supreme Court's decision in AT & T Technologies Inc. v. Communications Workers of America, 475 U.S. 643 (1986) was consistent with the Wisconsin refusal to arbitrate analysis adopted by the Wisconsin Supreme Court in Dehnart v. Waukesha Brewing Co., 17 Wis. 2d 44 (1962) and Joint School District No. 10 v. Jefferson Education Association, 78 Wis. 2d 94 (1977), the Examiner then applied AT & T to the case at hand.

He held:

> 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 Steeloworkers Trilogy. . . .
>
> The first principlie gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 14/

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).

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 go. 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 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

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

issues are the same because the potential relief is the same.

But the issues before the Examiner in Case 190 are distinct and different from the potential issues before the Arbitrator in this case. In Case 190, 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 190 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 Case 180 and the grievance underlying this case, the remedy would be similar; nevertheless, the issues in the two cases are separate and 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

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

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

To apply these principles to this case, the issue of arbitrability -- whether the collective bargaining agreement creates 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

17/ AT & T, supra, 121 LRRM at 3332, citing Warrior & Gulf, supra, 363 U.S. at 582-593.

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 clause. The arbitration clause at issue here is a broad one covering issues "concerning the interpretation 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 "arbitration clause is broad and the grievances state claims facially governed by the contract (it) follows that lit cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation 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.

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

Based on the foregoing analysis, the Examiner ordered the Board to proceed to arbitration as to the underlying grievance.

POSITIONS OF THE PARTIES:

The Board's Initial Brief

The Board first argues that the Examiner erred when he found that removal of the letter of reprimand did not render the case moot. Citing Zieman v. North Hudson, 102 Wis. 2d 705 (1981), the Board asserts that when evaluating the Board's argument, the Examiner improperly considered the possibility that future refusal to arbitrate disputes might arise. The Board contends that only the propriety of the Board's actions as to the underlying grievance was properly before the Examiner. The Board further alleges that removal of the letter of reprimand renders the instant dispute "abstract" and "advisory" and thus moot under the Allis Chalmers analysis. Given the foregoing, the Board contends that the Examiner should have granted the Board's Motion to Dismiss.

As to the merits of the refusal to arbitrate, the Board asserts its refusal was based upon its belief that the underlying dispute was not "grievable" and had been previously litigated in a prohibited practice proceeding. The Board contends that under the principles set forth in AT & T, its refusal to arbitrate was therefore warranted. As to the "grievable" nature of the Roberts grievance, the Board argues that as it believes the collective bargaining agreement does not obligate the Board to provide the MTEA with the identity of student witnesses to alleged teacher misconduct, it was not obligated to arbitrate the Roberts grievance which asserts that such a contractual right exists. As support for its contractual argument, the Board points to judicial determinations that the parties' contract provides teachers with due process ad nauseum. Thus, the Board argues it is apparent that grievant Roberts received adequate due process even without knowledge of the identity of any student witnesses. As to the impact of a related prohibited practice proceeding which also raises "student witness" issues, the Board argues that the MTEA will receive "two kicks at the cat" if the Commission upholds the Examiner's decision that the Board must arbitrate the Roberts grievance.

The Board contends that application of the doctrine of collateral estoppel also precludes the Commission from ordering the Board to arbitrate the Roberts grievance. The Board asserts in this regard that as the remedy sought in the refusal to bargain prohibited practice case is identical to the remedy sought through the Roberts grievance (i.e., identification of student witnesses) and as the issue of contractual due process rights is being extensively litigated in the prohibited practice forum, the Examiner erred when he found the two cases to be distinguishable for the purposes of collateral estoppel. Citing Kerchefski v. American Family Insurance Co. 132 Wis. 2d 74 (1986), the Board contends that because all of the issues contained within the Roberts grievance were litigated in a full and fair manner during the prohibited practice proceeding, arbitration of the Roberts grievance runs counter to the goals of judicial economy and avoidance of resource misallocation which collateral estoppel seeks to foster.

Given the foregoing, the Board urges the Commission to overturn the Examiner's decision.

The MTEA's Responsive Brief

The MTEA contends that the Examiner correctly denied the Board's Motion to Dismiss for mootness. The MTEA notes that there has never been a mutual resolution of the Roberts grievance and that when the Board removed the letter of reprimand from the Roberts file, the Board never admitted any violation of contract. Furthermore, even if the underlying grievance had been resolved, the statutory issue of whether the Board committed a prohibited practice by refusing to arbitrate the grievance would remain for resolution. The MTEA argues that resolution through arbitration of disagreements regarding contractual interpretation allows the parties to build a body of contractual precedent which assists them in voluntarily resolving future disputes.

The MTEA asserts that in Milwaukee Police Association v. City of Milwaukee, 92 Wis. 2d 175 (1979) the Court rejected an argument that because the City had already complied with the monetary remedy awarded by the arbitrator, an arbitration award should not be confirmed due to "mootness". The MTEA cites that portion of the Court's decision which stated:

> The monetary remedy awarded to the grievant was only part of the arbitration award. In addition to reimbursement of wages, the award determined that the contract gave the arbitrator the authority to hear the dispute and render a decision. It also determined that in this particular instance the conduct of the respondent violated the collective bargaining agreement.
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> Thus, it cannot be said the matter before the trial court was moot, since confirmation of the award would have a "practical legal effect" upon the dispute of the parties.

Applying the foregoing to the case at hand, the MTEA contends that removal of the disciplinary letter does not "moot" the underlying issue regarding student witnesses or the totally separate question raised by the Roberts grievance of whether the failure of the superintendent to review the assistant superintendent's decision was contractually improper.

The MTEA urges the Commission to reject the Board argument that Ziemann v. Village of North Hudson, supra. is applicable herein. The MTEA argues that, unlike Ziemann, an actual controversy exists as to whether the Board's admitted refusal to arbitrate was proper. Also, unlike Ziemann, the MTEA notes that the ongoing relationship between the parties provides a valid need for resolution of contractual issues even where a portion of the relief sought by a grievance was ultimately unilaterally granted by the Board. The MTEA also believes the Examiner properly relied on Commission decisions in Unified School District No. 1 of Racine County, Dec. No. 11315 (WERC, 4/74) and School District of Webster, Dec. No. 21312-A (Crowley, 6/84), rev'd on other grounds, Dec. No. 21312-B (WERC, 9/98), when he rejected the Board's mootness argument because he concluded this type of dispute was potentially recurrent.

Turning to the merits of the Board's refusal to arbitrate, the MTEA argues that the Examiner properly applied applicable law when finding that the

Board was obligated to proceed to arbitrate the Roberts grievance. Contrary to the Board's argument, the MTEA contends that the lack of an explicit statement in Part IV, Section O(1)(c) of the contract does not render the grievance non-arbitrable. The MTEA asserts this Board argument goes to the merits of the grievance and not its arbitrability. Where, as here, the parties have a broad arbitration clause and where, as here, the grievance raises specific issues of contractual interpretation, the MTEA argues arbitrability is clear.

As to the Board contention regarding the relationship between the Shaw prohibited practice proceeding and the instant case, the MTEA asserts that the proceedings raise separate legal issues and that the Shaw case has no impact on this proceeding. Thus, the MTEA urges the Commission to affirm the Examiner's rejection of this Board argument.

Regarding the Board contention that the contractual teacher misconduct procedure cannot be read as requiring the employer production of student witnesses because the courts have upheld the procedure as constitutionally sufficient, the MTEA asserts this contention misses the point that the Roberts grievance raises contractual not constitutional issues. Thus, the court decisions recited by the Board do not render the grievance non-arbitrable.

Lastly, the MTEA urges the Commission to reject the Board argument that the doctrine of collateral estoppel precludes the arbitration of the Roberts grievance. Initially, the MTEA contends that collateral estoppel does not prevent a party from litigating the same set of facts to prove two separate statutory violations. Because the Shaw case involves issues regarding the Board's duty to bargain as to student witness issues, and the instant case involves the Board's duty to arbitrate a grievance raising student witness issues, the MTEA argues collateral estoppel does not apply herein. The MTEA also alleges that as, in any event, collateral estoppel does not apply unless there has been a valid final judgement in a cause of action, and as no decision has been issued in the Shaw case, the Board's reliance on collateral estoppel is totally misplaced.

Based on the foregoing, the MTEA asks that the Commission affirm the Examiner.

The Board's Reply Brief

The Board initially reiterates its position that the MTEA complaint should be dismissed as moot.

As to the Examiner's AT & T analysis, the Board argues that as the contract is silent on the right of a teacher to have student witnesses to alleged misconduct present at the third step contractual misconduct hearing, there should not be a presumption of arbitrability applied to the Roberts grievance. As to the MTEA contention that the Roberts grievance remains arbitrable because the grievance raises an issue regarding the superintendent's failure to review the assistant superintendent's decisions, the Board contends that because said issue is not at the core of the grievance, it should not be determinative herein.

Lastly, as to the MTEA contention that collateral estoppel does not apply herein because there has been no final judgement in the case before Examiner Shaw, the Board asserts that even without a final judgement, collateral estoppel applies because the same parties litigated the same issues in the Shaw case.

Given the foregoing, the Board asks the Commission to reverse the Examiner and dismiss the MTEA complaint.

DISCUSSION:

Looking first at that portion of the Examiner's well-crafted decision which responded to the Board's Motion to Dismiss, we concur with the Examiner's conclusion that the Board's ultimate willingness to arbitrate the Roberts grievance did not render this complaint moot. While we do not agree with the Examiner's finding that this case is not moot *inter alia* because it involves legal question of public interest and importance, 2/ we find his *Allis Chalmers* analysis persuasive. However, we find it appropriate herein to supplement that portion of his analysis which properly finds that there is a "practical legal effect" to proceeding. As noted earlier herein, although the Board is now willing to proceed to arbitration, it specifically indicates that it will argue to the arbitrator that the Roberts grievance is not substantively arbitrable. Thus, if we were to conclude that this case is moot and the parties were then to proceed to arbitration, the issue of substantive arbitrability would remain unresolved at least until the arbitrator issued his award. 3/ On the other hand, where, as here, a party initially refuses to proceed to arbitration, and a party to the contract challenges the propriety of the refusal to arbitrate in circuit court or before the Commission, substantive arbitrability is a question which the court or the Commission is to decide. *Jt. School District No. 10 v. Jefferson Education Association*, 78 Wis. 2d 94, 101 (1977). Thus, in the context of the instant refusal to arbitrate case, the substantive arbitrability of the Roberts grievance is an issue to be decided which will clearly have a "practical legal effect" on the parties' dispute.

Lastly, as to that portion of Examiner's mootness analysis which discussed the potential availability of relief to prevent recurrence of improper conduct, we note that the Examiner's order did not include a "cease and desist" and "notice posting" component, both of which are routinely

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2/ Thus, we have set aside the Examiner's Finding of Fact 20. In our view, this dispute, although of great interest and importance to these parties, is not of sufficient statewide importance to merit the Examiner's determination. See *Jt. School District No. 8 v. WERB*, 37 Wis. 2d 493 (1967).

3/ As noted by the Court in *Jt. School District No. 10 v. Jefferson Education Association* 78 Wis. 2d 94 (1977), because it "economizes time and effort", it is desirable to allow the arbitrator to make the initial determination of arbitrability. Such a determination is then subject to *de novo* judicial review unless the parties agree the arbitrator's determination in this regard is to be final.

included with remedial orders and both of which are aimed, in part, at preventing a recurrence of improper conduct. Consistent with the Examiner's rationale and our broad remedial authority (see WERB v. Milk and Ice Cream Drivers & Dairy Employees Union, Local No. 225 238 Wis. 379 (1941); UAWAAF, Local 232 v. WERB 250 Wis. 550 (1947)), we have modified the Examiner's order to include these remedial components.

Turning to the impact, if any, which removal of the letter of reprimand from the Roberts file has upon the instant case, the Examiner correctly concluded that this Board action is irrelevant to the question of whether the refusal to arbitrate case is moot. While the removal presumably may have some impact upon the relief to which the MTEA may be entitled to receive from an arbitrator if it prevails on the merits of the grievance, 4/ the Board action does not impact on the potential relief available from the Commission in this proceeding.

As to the matter of the Board's collateral estoppel argument based upon the Shaw case, we initially note that because no decision has been rendered by Examiner Shaw, no judgement exists which could form the basis for application of the collateral estoppel doctrine. 5/ Furthermore, as correctly found by the Examiner, the Shaw case involves issues as to whether the Board breached its duty to bargain with the MTEA by refusing to provide the MTEA with information necessary to the performance of the MTEA's representative function. The Roberts grievance, in part, raises issues regarding the Board's contractual obligation to produce said information. Thus, the issues in the two cases are not the same even if one were to ignore the fact that the Roberts grievance also raises issues totally unrelated to the Shaw case (i.e. the superintendent's alleged failure to review the decision of the assistant superintendent.) Clearly, then, the doctrine of collateral estoppel does not form a valid basis for dismissal of the instant complaint.

Turning to whether the Board is obligated to proceed to arbitration under the principles set forth by our Supreme Court in Jefferson, 6/ we recently had

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4/ We note that the Roberts grievance challenged not only the placement of the letter of reprimand in the file but also the Board's compliance with the provision of the contract requiring the superintendent to review the assistant superintendent's action.

5/ The Shaw case is presently being held in abeyance at the request of the parties.

6/ While the parties and thus the Examiner chose to focus their analysis upon the United States Supreme Court's decision interpreting Section 301 of the Labor Management Relations Act in AT & T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643 (1986), it is Jefferson which supplies the applicable Wisconsin law in the public sector. In private sector cases which are governed by Section 301, the Commission would be obligated to apply AT & T. See Northwestern Mutual, Dec. No. 22366-B (WERC, 7/86); Local 174, Teamsters v. Lucas Flour, 353 U.S. 448 (1957); Tecumseh Products Co. v. WERB, 23 Wis. 2d 118 (1963).

occasion to discuss those principles in another refusal to arbitrate cage involving these parties. In Milwaukee Board of School Directors, Dec. No. 23592-B (WERC, 12/88), we stated:

> 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 a, 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.

Applying these principles to the instant case, the parties' contract contains a broad grievance arbitration clause defining a grievance as a matter of interpretation or application of the contract and specifying the purpose of the procedure as providing "a method for quick and binding final determination of every question of interpretation or application of the provisions of this contract . . ." The Roberts grievance raises issues regarding the interpretation and application of Part IV, Section O(1)(c) and (d) of the parties' contract. Thus, we conclude that there is a construction of the parties' arbitration clause which would cover the grievance on its face. The Board has not cited any other provision of the contract which would specifically exclude grievances regarding Part IV, Section O(1)(c) or (d) from arbitration, and we find none. Thus, we conclude that the parties, through their contract, have agreed to arbitrate the Roberts grievance; 7/ that the

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7/ While the line between an ultimate Finding of Fact and a Conclusion of Law is at times an exceedingly fine one, we believe that Examiner's Finding of Fact 21:

> 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.

is more appropriately a Conclusion of Law. We have therefore adopted said Finding as our Conclusion of Law 2.

Roberts grievance is substantively arbitrable under Jefferson; and that the Board's refusal to proceed to arbitration is violative of Sec. 111.70(3)(a)5, Stats. We affirm the Examiner's conclusion in that regard.

Dated at Madison, Wisconsin this 6th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

Commissioner William K. Strycker did not participate.