STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Complainant, vs. MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Respondent.	Case 210 No. 40379 MP-2084 Decision No. 25452-A
MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 213 No. 40568 MP-2098 Decision No. 25578-A

Appearances:

Perry, Lerner & Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 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, 5225 West Vliet Street, Milwaukee, Wisconsin 53201, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Milwaukee Board of School Directors (hereinafter Board), having filed a complaint with the Wisconsin Employment Relations Commission (hereinafter Commission) on March 24, 1988, alleging that the Milwaukee Teachers' Education Association (hereinafter Association) had committed a prohibited practice within the meaning of Sec. 111.70(3)(b)4, Stats., by violating the collective bargaining agreement between the parties in that the Association attempted to arbitrate a matter that is not arbitrable under the collective bargaining agreement of the parties (hereinafter Case 210); and the Commission having appointed James W. Engmann, a member of its staff, on May 18, 1988, to make and issue Findings of Fact, Conclusions of Law and Order in Case 210 as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and the Examiner having issued on May 18, 1988, a Notice of Hearing on Complaint scheduling hearing in Case 210 for August 4 and 5, 1988; and the Association having filed a complaint with the Commission on May 16, 1988, alleging that the Board had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by unilaterally refusing to participate in and complete the arbitration proceeding of the grievance at issue in Case 210 (hereinafter Case 213); and the Commission having appointed this Examiner on July 13, 1988 to make and issue Findings of Fact, Conclusions of Law and Order in Case 213 as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and the Association and Board having agreed that Case 210 and Case 213 be consolidated for hearing; and the Examiner having issued on July 13, 1988, a Notice of Hearing on Complaint

consolidating Cases 210 and 213 for hearing on August 4 and 5, 1988; and hearing on Cases 210 and 213 having been held on August 4 and 5 and October 7, 1988, in Milwaukee, Wisconsin; and a stenographic transcript have been prepared and received by the Commission on October 24, 1988; and the parties having exchanged briefs on January 31, 1989; and the parties having waived the filing of reply briefs; and the Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant in Case 210, Respondent in Case 213, Milwaukee Board of School Directors (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.

2. The Respondent in Case 210, Complainant in Case 213, Milwaukee Teachers' Education Association (Association), is a labor organization with its office 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.

3. The Board and the Association have been parties to a number of collective bargaining agreements. The relevant agreements contain the following provisions:

> PART IV - TEACHING CONDITIONS AND EDUCATIONAL IMPROVEMENTS
>
> . . .
>
> O. ALLEGATIONS OF MISCONDUCT
>
> 1. 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.

e. 1) Where the superintendent, after review of the assistant superintendent's recommendation, recommends dismissal of a nontenure teacher or suspension of a teacher, the teacher may, within ten (10) working days of receipt of the decision of the superintendent, request a hearing before the Finance/Facilities and Personnel Committee which shall be held within forty-five (45) working days of the request. The Committee, after a full and fair hearing which shall be public or private, at the teacher's request, shall make a written decision specifying its reasons and the action and recommendations prior to the next full meeting of the Board.

2) TENURE TEACHER. In any case where the superintendent, after review of the assistant superintendent's recommendation, recommends dismissal of a tenure teacher, the matter shall be processed in accordance with the provisions of this section, except that the full Board, rather than the Finance/Facilities and Personnel Committee, shall conduct the hearing.

f. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the final step of the grievance procedure. 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.

2. EMERGENCY SITUATIONS. When an allegation of serious misconduct, which is related to his/her employment, is made, the administration may conduct an administrative inquiry which would include ordering the teacher to the central office or authorizing him/her to go home for a period not to exceed three (3) days. Authority to order

an employe to absent himself or herself from work shall be vested in the designee of the administration. The administration shall notify the MTEA as to the identification of its designees. In no case can the designee be a member of the bargaining unit. The MTEA shall be notified previous to the decision. No teacher shall be temporarily suspended prior to the administrative inquiry, nor without the opportunity of his/her choice as set forth above. No teacher may be suspended unless a delay beyond the period of the administrative inquiry is necessary for one of the following reasons:

a. the delay is requested by the teacher;

b. the delay is necessitated by criminal proceedings involving the teacher; or

c. where, after the administrative inquiry, probable cause is found to believe that the teacher may have engaged in serious misconduct.

In the event the teacher suspended is cleared of the charges, he/she shall be compensated in full for all salary lost during the period of suspension, minus any interim earnings. At the conclusion of the administration's inquiry, hearings of the resultant charges, if any, shall be conducted in accordance with Part IV, Section O(1)(b).

. . .

PART VII - GRIEVANCE AND COMPLAINT PROCEDURE

A. PURPOSE

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

B. DEFINITIONS

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

. . .

> FOURTH STEP. If the grievance is not adjusted in a manner satisfactory to the MTEA within twenty (20) working days of the written disposition of the superintendent, it may be presented to final binding arbitration in accordance with the following procedures.
>
> The final decision of the impartial referee, made within the scope of his/her jurisdictional authority, shall be binding upon the parties and the teachers covered by this contract.

4. On February 11, 1985, Raymond E. Williams, then Executive Director of the Board's Department of Student Services, wrote to Robert Fisher, a teacher at North Division High School. Said letter stated in part as follows, "In accordance with Part IV, Section O(2), I am asking you to absent yourself from your teaching duties effective February 12, 1985, and to appear in my office . . . at 9:00 a.m. on February 14, 1985." No resolution came from that conference. On April 1, 1985, Ronald P. Simpson, Principal of North Division High School, wrote to Fisher, stating in part as follows:

> A meeting will be held in my office on Wednesday, April 3, 1985, at 10:30 a.m. At that time, we will consider the following charge:
>
> > On February 9, 1985, you inappropriately touched a female student.

That meeting was held in accordance with Part IV, Section O(1)(b) of the contract. The matter was not resolved during that meeting. On April 15, 1985, Evelyn Hoffman, Administrative Specialist in the Board's Department of Administrative Services, wrote to Fisher to advise him that a meeting would be held in accordance with Part IV, Section O(1)(c), on April 24, 1985. On April 25, 1985, Raymond E. Williams, now Assistant Superintendent of the Division of Human Resources, wrote to Fisher in part as follows:

> Based on the recanted testimony of the student in question, I am dismissing the charges against you. All records related to this misconduct will be destroyed.

5. On February 15, 1985, Principal Simpson sent a letter to Fisher in accordance with Part IV, Section O(1)(a), stating that facts had come to his attention which might lead to an accusation of misconduct and directing Fisher to be available for a conference on February 27, 1985. The matter was not resolved at that conference. In a letter dated April 1, 1985, Principal Simpson stated that a meeting would be held in accordance with Part IV, Section O(1)(b) on April 3, 1985, to consider the following charges against Fisher:

> Despite the fact that you were individually instructed to follow appropriate extended field trip procedures, on or about March 1, 1985, you:
>
> 1. Collected money from at least four (4) students without following said procedures.
>
> 2. Refused to provide assurance to the school that other North Division students are not participating in the unauthorized field trip.

In a letter dated April 15, 1985 Administrative Specialist Hoffman wrote to Fisher stating the matter had not been resolved at the April 3, 1985, meeting and scheduling a meeting for April 24, 1985, in accordance with Part IV, Section O(1)(c). In a letter dated April 30, 1985, Assistant Superintendent Williams found misconduct by Fisher and recommended that Fisher be suspended without pay for three (3) days. In a letter to Fisher dated May 2, 1985, Superintendent of Schools Lee R. McMurrin concurred with William's disposition of the matter. On July 31, 1985 the Board's Committee on Finance/Facilities and Personnel, by a vote of 4-0, determined there was cause to discipline Fisher on

the charges stated above. The Association appealed the matter to arbitration before Neil M. Gundermann. On July 2, 1986 Arbitrator Gundermann found no just cause for Fisher's suspension and reprimand and directed that the letter of reprimand be removed from Fisher's record and that he be made whole for his suspension.

6. In a letter to Fisher dated May 23, 1985 Principal Simpson advised Fisher that an accusation of misconduct might be made against Fisher and that Fisher should be available for a conference on May 28, 1985, in accordance with Part IV, Section O(1)(a). In a letter to Fisher dated June 4, 1985 Principal Simpson stated that the matter had not been resolved at the May 28, 1985 conference and advised Fisher that, in accordance with Part IV, Section O(1)(b), a meeting was scheduled for June 6, 1985 to consider the following charges:

1. Inappropriate sexually suggestive statements to a female staff member.

2. Inappropriate touching of a female staff member.

3. Intimidating a female staff member.

In a letter to Fisher dated June 6, 1985 Administrative Specialist Hoffmann stated that the matter had not been resolved at the June 6, 1985 meeting and that another meeting had been scheduled in accordance with Part IV, Section O(1)(c). In a letter to Fisher dated June 26, 1985 Assistant Superintendent Williams wrote as follows:

> A meeting was held on Thursday, June 20, 1985, under Part IV, Section O(1)(c) of the contract between the Board and the Milwaukee Teachers Education Association to discuss the following charges against you:
>
> 1. Inappropriate sexually suggestive statements to a female staff member.
>
> 2. Inappropriate touching of a female staff member.
>
> 3. Intimidating a female staff member.
>
> Present at this meeting were Mrs. Evelyn Hoffmann, administrative specialist; Dr. Ronald Simpson, principal, North Division High School; Mr. Barry Gilbert, MTEA; Ms. Carolynne Rotta, teacher; Cheryl Mahkorn, teacher; Ms. Cheryl Barczak, MTEA; Ms. Anne Weiland, Milwaukee Public Schools; you and myself.
>
> In support of the above charges, Dr. Simpson presented a statement prepared by Cheryl Mahkorn, a teacher at North Division, in which she described several incidents dating back to the 1983-84 school year where she was either indecently touched or had sexually suggestive remarks made to her by you.
>
> Ms. Mahkorn testified in support of her written statements and indicated that the incidents she referred to in her statements had indeed occurred and that she was an unwilling participant. When asked why she had not reported these incidents earlier, she indicated, "I was intimidated by him."
>
> Dr. Simpson also presented a statement from Ms. Carolynne Rotta. While her statements were not relevant to the specific charges regarding Ms. Mahkorn, she did indicate that she has experienced similar problems (suggestive remarks) with you in the past. In her testimony she indicated that she was also sometimes "intimidated" by you.
>
> In the case of Ms. Mahkorn, you denied all the allegations except that you may have leaned over her at one time and attempted to kiss her, and your hand could have brushed her

breast as it was pushed away by Ms. Mahkorn when you attempted to touch her breasts.

Other than your denial, there was no other evidence presented to discredit the written statement and verbal testimony of Ms. Mahkorn.

Likewise, no evidence was presented by you to discredit the written statements and verbal testimony of Ms. Rotta.

Based on the written and verbal statements of Ms. Mahkorn and corroborative statements of Ms. Rotta, and your own admission that you may have attempted to kiss Ms. Mahkorn and that you could have brushed her breast, I find it difficult to believe that you are innocent of the allegations presented by Dr. Simpson. Your admitted behavior does not substantiate your claim of innocence. For these reasons, I believe the incidents took place as described by Ms. Mahkorn. Such conduct is not only highly unprofessional and unacceptable in any setting but also illegal.

It is for these reasons and in consideration of your past work record that I will recommend to the Superintendent of Schools that you be discharged immediately.

7. On July 24, 1985, the Association filed a grievance in response to the letter from Assistant Superintendent Williams dated June 26, 1985, quoted in Finding of Fact 6 above (hereinafter Grievance 85/86). Grievance 85/86 stated as follows:

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

On June 20, 1985, a meeting was held in accordance with Part IV, Section O(1)(c) of the MTEA/MBSD Teacher Contract to give hearing to charges that Mr. Robert Fisher made inappropriate comments and inappropriately touched a female staff member at North Division High School. The hearing was conducted by Mr. Raymond Williams, Assistant Superintendent, Division of Human Resources with the Milwaukee Public Schools. Following the hearing, Mr. Williams notified Mr. Fisher and the MTEA of his decision relative to the charges in a letter dated June 26, 1985.

In the letter (copy attached) Mr. Williams states that Mr. Fisher admitted:

> ". . . your hand could have brushed her breast as it was pushed away by Ms. Mahkorn when you attempted to touch her breasts."

During the hearing, Mr. Fisher on two occasions specifically denied ever having touched Ms. Mahkorn's breasts. At no time during the hearing did Mr. Fisher state that he could have brushed her breast. At no time during the hearing did Mr. Fisher state that he had attempted to touch Ms. Mahkorn's breasts.

In the letter, Mr. Williams concludes that based upon Mr. Fisher's own admission that:

> ". . . you could have brushed her breast, I find it difficult to believe that your are innocent of the

allegations . . ." and "Your admitted behavior does not substantiate your claim of innocence."

By these statements, Mr. Williams has relied upon incorrect information or his own misunderstanding of what occurred at the hearing in arriving at a decision in this case. By so doing, Mr. Williams violated Part II, Section C and Part IV, Section O and the due process rights of Mr. Fisher by rendering a decision based upon false information.

Mr. Williams concludes his letter by stating:

> "It is for these reasons and in consideration of your past work record that I will recommend to the Superintendent of Schools that you be discharged immediately."

An examination of Mr. Fisher's work record (the central office personnel file) indicates that Mr. Fisher has never been disciplined in any way for any alleged wrongdoing. His file contains no letter of reprimand, no indication of suspension and no unsatisfactory evaluation. Again, Mr. Williams violated Part II, Section C and Part IV, Section O of the contract by basing his decision to discipline Mr. Fisher upon information that was incorrect.

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

   A. The administration should cease and desist from violation of the contract.
   B. The misconduct against Mr. Fisher should be dropped.

3. State Board Rule number and/or agreement number you feel has been violated:

   Part II, Section C and Part IV, Section O of the 1982-85 MTEA/MBSD Teacher contract.

On January 30, 1986, Superintendent McMurrin issued a third step response to Grievance 85/86 which reads in part as follows:

1. What are the issues involved in this grievance?

   1. The MTEA alleges that the Board violated Part IV, Section O when it relied on statements made by the grievant at a misconduct hearing before the assistant superintendent which the MTEA claims were not made.

   2. The MTEA claims that the Board violated Part IV, Section O when the prior suspension of the grievant, which is still on appeal, was considered by the assistant superintendent in rendering a decision.

2. What is your decision?

   The grievance is denied. These issues are an integral part of the misconduct case which is currently before Arbitrator Grenig. Therefore, they are not arbitrable as an independent grievance.

3. What is the basis for your decision?

1. The disputed statements were made and it was not improper to take them into consideration.

2. The grievant's prior suspension, whether appealed or not, is a part of the grievant's work record and may be considered in rendering a decision on a subsequent disciplinary action.

The Association appealed this decision to arbitration. Hearing on Grievance 85/86 was scheduled for May 12, 1988, before Arbitrator Edward B. Krinsky. In a letter dated February 4, 1988, the Board requested the Association to withdraw Grievance 85/86 from arbitration. In a letter dated February 19, 1988, the Association refused to withdraw Grievance 85/86. In a letter to Arbitrator Krinsky, dated April 27, 1988, the Board stated it would not proceed to arbitration on Grievance 85/86.

8. In a letter to Fisher dated July 3, 1985 Superintendent McMurrin concurred with Assistant Superintendent William's recommendation to discharge Fisher immediately, quoted in Finding of Fact 6 above. He wrote as follows:

> The charges of sexual harassment are serious and will not be tolerated. Your conduct as a teacher at North Division High School in relationship to these charges has been unprofessional and is also illegal. The fact that you admitted to certain improprieties while on duty at North Division makes it difficult for me to believe your self-proclaimed innocence.

On September 17, 1985, the Board voted 5-0 to terminate Fisher based on the charges stated above. The Association appealed this decision of the Board to arbitration (hereinafter Grievance 86/66). Jay E. Grenig was selected as the arbitrator through the procedures of the Commission. The parties stipulated that the issues before Arbitrator Grenig were as follows:

> Did the Employer violate Part IV, Section O of the collective bargaining agreement when it discharged Robert Fisher?
>
> If so, what is the appropriate remedy?

The pertinent contract provisions before Arbitrator Grenig were Part IV, Section O Allegations of Misconduct, Subsection 1(a), (b), (c), (d) and (e), and Part VII Grievance and Complaint Procedure.

9. Hearing on Grievance 86/66 began on March 20, 1986. A total of 13 days of hearing were held, ending on July 11, 1986. On June 20, 1986, the Board called Assistant Superintendent Williams as a witness. He testified in part as follows:

> Q. Mr. Williams, can you interpret the phrase as utilized in the last paragraph of this letter, in consideration of your past work record? First of all, that is your phrase, isn't it?
>
> A. That's correct.
>
> Q. Can you interpret the meaning of that phrase?
>
> A. To the best of my knowledge, it's been a little while, but there was a pending misconduct -- or a pending suspension against Mr. Fisher at that particular time which I considered as I reviewed the whole case and recommended a penalty.
>
> Q. And did you also consider the charges that are now pending before the Arbitrator?
>
> A. Right. I thought those charges were serious enough alone to warrant the recommendations I made, but I did also consider the pending suspension.

On cross examination by the Association, Assistant Superintendent Williams testified in part as follows:

> Q. At this level, at this particular hearing on June 20, 1985, would it be correct that at that time the prior disciplinary matter, which you state you were aware of and considered that was pending, had not at that time been implemented by a Board decision, had it?
>
> A. To be very honest, I don't really -- by a Board decision, I don't think so, but I don't really remember.
>
> Q. But would it be your best estimate that by that time on June 20, 1985, that the Board had not as yet made a decision on that disciplinary action?
>
> A. That would be my best recollection.

On redirect examination, Assistant Superintendent Williams testified as follows:

> Q. Mr. Williams, is it your testimony that at the time that you considered the penalty to be imposed in this case in June of 1985, you were aware of Mr. Fisher's pending misconduct that led to a three-day suspension?
>
> A. That's correct.

At the hearing Cheryl Barczak, a witness of the Association, testified in part as follows:

> Q. At this meeting before Mr. Williams, did Mr. Williams or anyone else present at the meeting while you were there discuss Mr. Fisher's past work record?
>
> . . .
>
> A. No.
>
> Q. Was Mr. Fisher's work record ever raised at that meeting as an issue by Mr. Williams or other administrators present?
>
> A. No.

The Grievant, Robert Fisher, testified in part as follows:

> Q. Do you recall any specific discussion by Mr. Williams or any other administrator present during that time about your work record at North Division during that meeting?
>
> Mr. Mukamal (Board's Attorney): Objection
>
> A. No.
>
> Mr. Mukamal: I believe we have a problem with a definition of the term work record, as elaborated during the prior day of hearing. If you're talking about disciplinary record, I don't have an objection; if you're talking about work record beyond that, then the concerns that I raised with respect to work record tesimony reassert themselves.
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> . . .
>
> The Arbitrator: I do not understand that question as putting his work record into evidence, at this time, or whether it be disciplinary or otherwise, it's just trying to ascertain the scope of the disucssions.

Mr. Reiher (Association's Attorney): It's also in response to Mr. Williams letter.

10. In its post-hearing brief, the Association's Statement of the Case stated in part as follows:

> . . . Mr. Williams was also aware of a 3-day suspension pending at the time against Mr. Fisher which had not as yet been acted upon by the Board. Mr. Williams had in fact recommended said 3-day suspension as a disciplinary action at a prior third-step hearing involving Mr. Fisher in which he was the hearing officer.
>
> . . . During the entire hearing, there was no disucssion of Mr. Fisher's work record. According to Mr. Williams, he did not review Mr. Fisher's personnel file or his evaluations. There was no reference made or discussion by Mr. Williams pertaining to the prior pending suspension involving Mr. Fisher.
>
> . . . Yet, on June 26, 1985, Mr. Williams notified Mr. Fisher in writing that he was sustaining the June 4, 1985 charges brought against him by Principal Simpson and recommending his immediate discharge to the school superintendent. His discussion was based upon the statements of Ms. Mahkorn and Ms. Rotta as well as Mr. Fisher's admissions that he may have attempted to kiss Ms. Mahkorn and that he could have brushed her breast. He was also taking into consideration his past work record. In this respect, he was considering the suspension pending against Mr. Fisher at the time which ha (sic) not yet been acted upon by the Board. (Citations to the transcript and exhibits omitted.)

In the Discussion section of its brief, the Association argued that the Board's investigation and decision to discharge Fisher was arbitrary, inconsistent and unfair. Specifically, the Association argued that the Board failed to apply its rules in an even-handed manner and without discrimination. As it pertains to the hearing before Assistant Superintendent Williams, the Association argued in part as follows:

> As it turned out, Mr. Williams was not exactly an impartial and neutral hearing officer. In recommending Mr. Fisher's discharge, he considered a then-pending three-day suspension which he had recommended earlier involving Mr. Fisher in another matter. In so doing, he knew that the Board had not yet acted on his recommended suspension in that case. He was also aware of other kinds of contacts or misconducts allegedly involving Mr. Fisher for which he had never been disciplined by the Board.
>
> Clearly, Mr. Williams wanted Mr. Fisher out of the Milwaukee Public Schools because of his past alleged misconducts and this predisposition obviously clouded his recall of the events occurring at the hearing as well as his judgment in recommending his discharge. In this respect, he knew that Principal Simpson had recommended a five-day suspension. And, he just plain ignored it. . . .
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> In addition, none of these same witnesses who were present at Mr. Williams' hearing testified at the arbitration hearings that any discussion occurred involving Mr. Fisher's work record. And, Mr. Williams himself admitted that no such discussion took place. Yet, he based his recommended discharge in part upon Mr. Fisher's work record.
>
> In this respect, he certainly would not want Mr. Fisher to have a chance to discuss his work record at the hearing or at least be on notice that he was considering it in his decision. Moreover, the work record he was referring to in

his discharge letter involved the then-pending suspension against Mr. Fisher and not his personnel file or past teaching evaluations. Of course, he did not review Mr. Fisher's evaluations in making his recommended discharge. The reason is obvious--they were satisfactory and positive in support of Mr. Fisher. And, one should not be treated in an even-handed and impartial manner by the Administration if you're a teacher named Bob Fisher. He certainly was not so treated in this case. (Citations to the transcript and exhibits omitted.)

In addition the Association argued that the decision to discharge Fisher was based upon invalid assumptions, selected facts and erroneous conclusions. Specifically the Association argued in part as follows:

> To make things worse and more unfair, Mr. Williams made a record long jump all the way from a five-day suspension recommendation to a discharge recommendation without any more facts than possessed by Principal Simpson at the time of his recommendation. That jump not only defied gravity, it defied common sense and the most rudimentary principles of fundamental fairness and due process of law. It was completely inconsistent with Principal Simpson's five-day suspension recommendation, which had been discussed with higher level authorities. And, Principal Simpson was much more cognizant of the needs of his building and the teachers at North Division than Mr. Williams.
>
> . . .
>
> Mr. Williams also sandbagged Mr. Fisher at his hearing when he gave him no notice that he was considering his then-pending three-day suspension (as his work record) in making a recommendation to Superintendent McMurrin. There was no discussion of Mr. Fisher's work record or the suspension during this hearing. And, Mr. Williams did not review Mr. Fisher's personnel file or his satisfactory evaluations in recommending his discharge. Thus, Mr. Fisher had no opportunity to confront or mitigate those factors considered by Mr. Williams in his discharge recommendation. In conjunction therewith, he was denied any chance to present his work history at North Division to the attention of Mr. Williams to show his relative worth at the school in contributing to the education of his students for the past 19 years.
>
> Thus, Mr. Williams' recommended discharge of Mr. Fisher to Superintendent McMurrin was itself based upon unfounded factual claims as well as improper considerations not discussed with Mr. Fisher. In essence, it denied him his right of allocution. (Emphasis in original; citations to the transcript and exhibits omitted.)

11. On January 26, 1987, Arbitrator Grenig issued his Award in Grievance 86/66. In the Facts section of his decision Arbitrator Grenig stated in part as follows:

> The Assistant Superintendent found the Grievant had admitted that he "may have attempted to kiss (the Complainant) and that (he) could have brushed her breast." He concluded that the Complainant's charges were true and recommended to the Superintendent that "in consideration of (the Grievant's) work record," the Grievant be discharged immediately. The Assistant Suprintendent (sic) testified that he had considered the Grievant's pending three-day suspension in conjunction with his review of the case and his penalty recommendation. He did not consider the Grievant's classroom performance. According to the Assistant Superintendent, the Complainant's charges alone were serious enough to warrant the recommendation of discharge.

In the Discussion section of his decision, Arbitrator Grenig wrote in part as follows:

> The record demonstrates that the proceedings conducted by the Employer leading to the Grievant's discharge were fair and objective. There were three hearings or meetings prior to the hearing before the Board. At those hearings or meetings, the Grievant was represented by a union representative and had the opportunity to present evidence on his behalf and to question the Employer's witnesses. At the Board hearing, the Grievant was represented by an attorney and had the opportunity to present evidence on his behalf and to question the Employer's witnesses.

In the Award section of his decision, Arbitrator Grenig wrote as follows:

> Having considered all the relevant evidence and the arguments of the parties, it is determined that the Employer did not violate Part IV, Section O of the Collective Bargaining Agreement when it discharged the Grievant. The grievance is denied.

12. The Board moved to confirm the award in Grievance 86/66 in Milwaukee County Circuit Court and the Association moved to vacate said award. Counsel for Fisher moved to intervene. On May 11, 1987, Circuit Court Judge George A. Burns granted the Board's motion to confirm the award of Arbitrator Grenig in Grievance 86/66, denied the Association's motion to vacate that award, and denied the motion to intervene by counsel for Fisher. The Association did not appeal this decision. Counsel for Fisher appealed the Circuit Court's denial of the motion to intervene and the motion to vacate to the Court of Appeals. On February 24, 1988, the Court of Appeals District 1 affirmed the decision of the Circuit Court.

13. At hearing in this matter the Association withdrew the first allegation of Grievance 85/86 on the basis that the Grenig Award is res judicata as to that issue. The portion of Grievance 85/86 which the Association wishes to present to Arbitrator Krinsky centers on Assistant Superintendent Williams' reliance on Grievant Fisher's past work record in recommending the appropriate penalty to the Superintendent of Schools.

14. There is no material difference in facts or issues between the Grenig Award and Grievance 85/86 with respect to whether the Board violated Article IV, Section O when Assistant Superintendent Williams relied upon Grievant Fisher's past work record in recommending the appropriate penalty to the Superintendent of Schools. Thus, the Grenig Award is res judicata as to Grievance 85/86.

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

CONCLUSIONS OF LAW

1. That the Arbitration Award in Grievance 86/66 issued by Arbitrator Jay E. Grenig on January 26, 1987, is res judicata as to the facts and issues involved in Grievance 85/86 filed by the Association on behalf of Robert Fisher; and that the Respondent in Case 213, Milwaukee Board of School Directors, did not commit and is not committing a prohibited practice within the meaning of Sec 111.70(3)(a)5 of the Municipal Employment Relations Act by refusing to submit Grievance 85/86 to arbitration under the collective bargaining agreement.

2. That the Respondent in Case 210, Milwaukee Teachers' Education Association, did not commit and is not committing a prohibited practice within the meaning of Sec. 111.70(3)(b)4 of the Municipal Employment Relations Act by submitting Grievance 85/86 to arbitration under the collective bargaining agreement.

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

ORDER 1/

IT IS ORDERED that the complaints in Case 210 and Case 213 are hereby dismissed in their entirety.

Dated at Madison, Wisconsin this 24th day of March, 1989.

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 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

1. Association

The Association argues that under legal standards governing arbitrability, Grievance 85/86 is clearly arbitrable, that the contract defines a grievance as "an issue concerning the interpretation or application of provision of this contract or compliance therewith", that Grievance 85/86 asserts that the Board violated Part IV, Section O, Step 1(c) of the contract in that Assistant Superintendent Williams improperly considered Fisher's past work record when he decided to increase the recommended penalty from a five-day suspension to discharge, and that, while one can argue with the Association's position with respect to the merits of Grievance 85/86, one cannot dispute that the grievance sets forth specific provisions of the contract which it contends the Board violated with respect to their interpretation and application. Citing the Steel Workers trilogy, adopted by the Wisconsin Supreme Court in Joint School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94 (1977), the Association argues that the Commission sits as does a court in applying the trilogy principles and, based upon these principles, the Commission must order the Board to proceed to arbitration and must reject the argument that the contractual issues raised in Grievance 85/86 are identical to the issues raised in Grievance 86/66. Citing AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 106 S.CT. 1415, 121 LRRM 3329 (1986), the Association argues that the parties agreed at the time of bargaining the contract that they would submit unresolved disputes to final and binding arbitration, that the Commission determines if the contract has a clause for binding arbitration and if the grievance falls within that clause, that the Commission does not determine if a violation of the contract has occurred, and that it is a matter for the arbitrator and not the court, the Commission or this Examiner to decide if the Association is correct in its contention that the Board violated the contract.

The Association also argues that where an Employer refused to proceed to arbitration in violation of a collective bargaining agreement, the Employer violates Sec. 111.70(3)(a)5, Stats., even if the Employer had a good faith but erroneous belief that it had no duty to arbitrate, citing Milwaukee Board of School Directors, Dec. No. 23592-A (McLaughlin, 5/88), aff'd, Dec. No. 23592-B (WERC, 12/88), and that the test of arbitrability established in the trilogy and adopted in Jefferson requires a finding of arbitrability if it cannot be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.

The Association also argues that the issue set forth in Grievance 85/86, as amended at hearing in this matter, is arbitrable under the parties' collective bargaining agreement, that the issue raised by Grievance 85/86 is separate and distinct from the issue in Grievance 86/66, that Arbitrator Grenig dealt with the question of good cause and general concepts of fairness and due process in Grievance 86/66, that Arbitrator Grenig in Grievance 86/66 did not deal with the question of compliance with the contract as to the specific points raised in Grievance 85/86, that the question of due process presented to Arbitrator Grenig went to the question of whether there was just cause for Fisher's termination, and that there was no testimony presented or arbitrator's decision on the procedural issue of whether the Board violated Part IV, Section O(1)(c) when the

were not covered in the hearing of Grievance 86/66 before Arbitrator Grenig, in the parties' briefs or in the arbitration award, and that an arbitrator has jurisdiction to determine whether the conduct of Assistant Superintendent Williams violated the contract in considering parts of Fisher's work record.

Finally, the Association argues that there are many prior arbitration awards which construe a single independent procedural issue, citing numerous cases, and that the issue is separate and arbitrable even if the requested remedy is the same.

2. Board

The Board argues that it did not violate Sec. 111.70(3)(a)5, Stats., when it refused to arbitrate Grievance 85/86 because both of the issues contained in that grievance constituted an integral part of the arbitration proceeding heard by Arbitrator Grenig, that both issues contained in Grievance 85/86 were thoroughly litigated in the arbitration proceedings before Arbitrator Grenig by way of testimony provided by witnesses, various exhibits and the post-hearing briefs that were submitted by the parties to Arbitrator Grenig, that Arbitrator Grenig incorporated the issues contained in Grievance 85/86 in the decision he rendered on January 26, 1987, and that the results of the arbitration proceeding have been upheld by the courts.

Specifically, the Board asserts that Assistant Superintendent Williams testified as to the events that took place at the third step misconduct hearing, the hearing at issue in Grievance 85/86, that Williams testified at that time as to his meaning of phrase "in consideration of your past work record", the phrase which is the subject of Grievance 85/86, that various other witnesses testified regarding the issue of Fisher's work record at the arbitration proceedings before Arbitrator Grenig, that the notes of various witnesses in attendance at the third step misconduct hearing at issue were admitted into evidence, that the post-hearing briefs that were submitted by both the Association and the Board covered both issues involved in Grievance 85/86, that Arbitrator Grenig stated as follows, "The Assistant Superintendent testified that he had considered the Grievant's pending three-day suspension in conjunction with his review of the case and his penalty recomendation", that Arbitrator Grenig also stated as follows, "The record demonstrates that the proceedings conducted by the Employer leading to the Grievant's discharge were fair and objective", and that to state that the issues contained in Arbitration 85/86 were not tried before Arbitrator Grenig would be asserting a statement beyond belief.

The Board also argues that the Association's argument that the Assistant Superintendent violated the contract by considering Fisher's "work record" totally lacks substance, that there is no provision contained under the contractual misconduct procedure that specifies how the Assistant Superintendent should conduct the third step misconduct hearing, that nothing in the contract specifies or limits the evidence or information upon which the Assistant Superintendent may or may not rely upon in rendering a decision, that, if the Assistant Superintendent violated any provision of the contract, Arbitrator Grenig would have certainly indicated such a violation and ruled against the Board, that neither the decision of the Circuit Court or the Court of Appeals noted any procedural violation by the Board, and that the Court of Appeals stated that Fisher had received due process "ad nauseum".

In addition the Board argues that the Association is precluded from proceeding to arbitration with Grievance 85/86 under the doctrines of splitting causes of action and res judicata. As to the doctrine of splitting causes of action, the Board argues that Grievance 85/86 was filed immediately after the third step misconduct hearing on June 20, 1985, that therefore the Association had knowledge of the alleged procedural violation far in advance of the proceeding before Arbitrator Grenig which began on March 20, 1986, that if the Association did not present such procedural challenge before Arbitrator Grenig, the Association has waived its right to raise such procedural challenge as an independent grievance under the doctrine of splitting causes of action, and that under this doctrine the Association was obligated to raise the procedural challenge noted in Grievance 85/86 before Arbitrator Grenig since it is

intricately related to the determination of just cause, citing Werner v. Riemer, 255 Wis. 386, 39 N.W.2d 457 (1949), Cohen v. Associated Fur Forms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952), and Laundry v. Schatt, 54 Wis.2d 723, 196 N.W.2d 692 (1972).

As to the doctrine of res judicata, the Board argues the Commission has given res judicata effect to arbitration awards and thereby allowing parties to refuse to arbitrate matters that have been resolved by prior arbitration awards, citing Moraine Park VTAE District, Dec. No. 22009-A (Schiavoni, 3/85), aff'd, Dec. No. 22009-B (WERC, 11/85), and City of Onalaska, Dec. No. 23483-A (Shaw, 6/86); that res judicata effect should be given to the award of Arbitrator Grenig as it relates to Grievance 85/86; and that the complaint filed by the Association alleging a prohibited practice by the Board in refusing to arbitrate Grievance 85/86 should be dismissed because the issues raised in Grievance 85/86, the remedy sought by the Association and the parties to Grievance 85/86 are substantially identical to the issues raised in the proceeding before Arbitrator Grenig. Finally, the Board argues that the arbitration awards submitted by the Association in support of its prohibited practice complaint are not relevant to these proceedings.

DISCUSSION

1. Case 210

The Board offered little or no evidence or argument to support its claim that the Respondent Association violated the collective bargaining agreement by arbitrating Grievance 85/86. For this reason, the Board has not met its burden of proof and the Complaint in this matter is dismissed.

2. Case 213

The Association argues that under the legal standard governing arbitrability, Grievance 85/86 is clearly arbitrable, citing the Steel Workers trilogy as adopted by the Wisconsin Supreme Court in Joint School District No. 10 v. Jefferson Educaton Association, 78 Wis2d. 94 (1977), and AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 106 S.Ct. 1415, 121 LRRM 3329 (1986).

However, the Commission has held that it will apply the principle of res judicata to a prior arbitration award:

> . . . where there is no significant discrepancy of fact involved in the prior award and in the subsequent case to which a complainant is requesting the Commission to apply the award. A balance must be struck between the need for consistency and finality to contract interpretation as evidenced by prior arbitration awards and invading the province specifically reserved by the courts to the arbitrator - deciding the merits of the dispute. Where no material discrepancy of fact exists, the prior award should be applied. In these circumstances both interests are accommodated without undermining either. 2/

More specifically, the Commission case law has established principles:

> . . . concerning the circumstances in which a prior grievance arbitration award relieves a party from an otherwise-existing obligation to submit a current grievance to contractually mandated grievance arbitration. Res judicata effect will be given the prior award (relieving the obligation to arbitrate

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2/ Wisconsin Public Service Corp., Dec. No. 11954-B (WERC, 5/74); see also, State of Wisconsin, Dec. No. 18084-A (McCormick, 6/82), aff'd by operation of law, Dec. No. 18084-B (WERC, 7/82).

the grievance) where the subsequent grievance is shown to share an identity of parties, issues and material facts. 3/

It is not disputed that the same Employer and Union are involved in the Grenig Award and Grievance 85/86. No material facts are in dispute, either, as the facts that make up Grievance 85/86 were part and parcel of the process that resulted in the Grenig Award. Thus, the instant case turns on whether there are differences in the issues between the Grenig Award and Grievance 85/86 sufficient to warrant requiring the Board to arbitrate some or all aspects of Grievance 85/86.

On brief the Association contends it has a contractual right to submit to Arbitrator Krinsky the following issues in Grievance 85/86:

> 1. Did Assistant Superintendent Raymond Williams violate the misconduct procedures of Part IV, Section O(1)(c) of the contract by relying on a matter (Prozellar) which had been dismissed and the teacher vindicated in arriving at a decisison to recommend termination of teacher, Robert Fisher? 4/
>
> 2. Did Assistant Superintendent Raymond Williams violate the misconduct procedures of Part IV, Section O(1)(c) of the contract by relying on a recommended three-day suspension (Florida field trip) prior to its presentation to the Board and which was later reversed by Arbitrator Neil Gundermann in recommending the termination of teacher, Robert Fisher?
>
> 3. Did Assistant Superintendent Raymond Williams violate the misconduct procedures of Part IV, Section O(1)(c) of the contract and the subsequent award of Arbitrator Neil Gundermann when it relied on the portion of Robert Fisher's employment record which Arbitrator Gundermann specifically ordered expunged from Mr. Fisher's employment record in recommending the termination of teacher, Robert Fisher?
>
> 4. Does it violate the misconduct procedures of Part IV, Section O(1)(c) of the contract for the administration to consider as part of the grievant's work record, a three-day suspension which is on appeal and which is subsequently reversed and ordered expunged from the employee's work record when recommending termination of the grievant?

All of these renditions of the issue are specific variations of the issue presented in Grievance 85/85 which basically asks whether the Board violated Part IV, Section O of the contract when Assistant Superintendent Williams based his decision to recommend immediate discharge of Fisher upon information that was incorrect. As such, it is a more specific version of the issue before Arbitrator Grenig which reads as follows:

> Did the Employer violate Part IV, Section O of the Collective Bargaining Agreement when it disharged Robert Fisher?
>
> If so, what is the appropriate remedy?

In answering that issue, Arbitrator Grenig heard testimony as to Assistant Superintendent Williams' use of Fisher's past work record in making his recommendation of immediate discharge of Fisher. As noted in Finding of Fact 9 above,

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3/ Moraine Park VTAE District, Dec. No. 22009-B (WERC, 11/85), citing State of Wisconsin, Dec. No. 20145-A (Burns, 5/83), aff'd by operation of law, Dec. No. 20145-B (WERC, 6/83); and State of Wisconsin, Dec. No. 20910-B, Footnote 8, (WERC, 3/85).

4/ This matter is covered in Finding of Fact 4 above.

Williams testified that there was "a pending suspension against Mr. Fisher at that particular time which I considered as I reviewed the whole case and recommended a penalty". On cross-examination, the Association clarified the testimony to the effect that the Board had not made a decision on that disciplinary action when Williams made his recommendation. On brief, as noted in Finding of Fact 10 above, the Association also acknowledged that Williams took into consideration Fisher's past work record and stated, "In this respect, he was considering the suspension pending against Mr. Fisher at the time which (had) not yet been acted upon by the Board." So not only are the facts not in dispute, as required for a finding of res judicata, but these facts were placed squarely before Arbtirator Grenig.

On brief to Arbitrator Grenig, the Association argued that the Board's investigation and determination to discharge Fisher were arbitratory, inconsistent and unfair to Fisher in two ways relevant to this matter, as noted in Finding of Fact 10. First, the Association argued that the Board failed to apply its rules in an even-handed manner and without discrimination in that Assistant Superintendent Williams was not an impartial and neutral hearing officer. Specifically, in recommending Fisher's discharge, the Association argued that Williams "considered a then-pending three-day suspension which he had recommended earlier involving Mr. Fisher in another matter. . . . In so doing, he knew that the Board had not yet acted on his recommended suspension in that case." Second, the Association argued that the decision to discharge Fisher was based upon invalid assumptions, selected facts and erroneous conclusions in that Williams did not give notice to Fisher that he was considering Fisher's three-day suspension in making his recommendation for immediate discharge. The Association argued as follows: "Thus, Mr. Williams recommended discharge of Mr. Fisher to Superintendent McMurrin was itself based upon unfounded factual claims as well improper considerations not discussed with Mr. Fisher." This is, in essence, the issue in Grievance 85/86.

In his decision, Arbitrator Grenig noted that Assistant Superintendent Williams "recommended to the Superintendent that 'in consideration of (the Grievant's) work record,' the Grievant be discharged immediately. The Assistant Superintendent testified that he had considered the Grievant's pending three-day suspension in conjunction with his review of the case and his penalty recommendation." Nonetheless, Arbitrator Grenig found that the "record demonstrates that the proceedings conducted by the Employer leading to the Grievant's discharge were fair and objective." Arbitrator Grenig therefore determined "that the Employer did not violate Part IV, Section O of the Collective Bargaining Agreement when it discharged the Grievant".

Nonetheless, the Association argues in Grievance 85/86 that the Board violated Part IV, Section O of the contract when Assistant Superintendent Williams considered a three-day suspension on appeal when he recommended immediate dishcarge of Fisher to the Superintendent. However, the record shows that the Grenig Award shares an identity of parties, issues and material facts with Grievance 85/86. In balancing the need for consistency and finality to contract interpretation with the invasion of the arbitrator's province to decide the merits, the record shows no significant discrepancy of fact or issue between the Grenig Award and Grievance 85/86. Thus, the Grenig Award is res judicata to Grievance 85/86, relieving the obligation on the part of the Board to submit Grievance 85/86 to the contractually mandated grievance procedure. Since the Board is not required to submit Grievance 85/86 to grievance arbitration, the Board did not violated Sec. 111.70(3)(a)5, Stats., by refusing to do so.

Dated at Madison, Wisconsin this 24th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION