STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MAINTENANCE/CUSTODIAL WORKERS' ASSOCIATION Requesting a Declaratory Ruling Pursuant to Section 227.41, Wis. Stats., Involving a Dispute Between Said Petitioner and NEKOOSA SCHOOL DISTRICT	Case 32 No. 41034 DR(M)-455 Decision No. 25876

Appearances:

Kelly & Haus, Attorneys at Law, by Mr. Robert C. Kelly, Lake Terrace, 121 East Wilson Street, Madison, Wisconsin 53703-3422, on behalf of the Association.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich and Mr. Jeffrey T. Jones, 401 Fifth Street, Suite 222, P.O. Box 1004, Wausau, Wisconsin 54402-1004, on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Maintenance/Custodial Workers' Association having on August 25, 1988, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 227.41, Stats., seeking a declaratory ruling that an interest arbitration award issued pursuant to Sec. 111.70(4)(cm), Stats., should be vacated or modified under ERB 32.16 and 32.17; and hearing having been conducted on September 29, 1988 in Nekoosa, Wisconsin before Examiner Peter G. Davis; and the parties having submitted written argument, the last of which was received on December 27, 1988; and the District having on January 3, 1989 advised the Commission, in writing, of the District's position that the Association's December 27, 1988 reply brief should not be considered because said brief was untimely filed and contained factual allegations which go beyond the scope of the record agreed upon by the parties at hearing; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That at all times material herein, the Maintenance/Custodial Workers' Association, herein the Association, was a labor organization functioning as the collective bargaining representative of certain employes of the Nekoosa School District and having its principal offices at 1605 County Highway G, Nekoosa, Wisconsin 54457.

2. That the Nekoosa School District, herein the District, is a municipal employer having its principal offices at 600 South Section Street, Nekoosa, Wisconsin 54457.

3. That pursuant to the interest arbitration provisions of Secs. 111.70(4)(cm)6 and 7, Stats., the Association and the District submitted their respective final offers and evidence and argument in support thereof to Arbitrator Howard S. Bellman; that on June 21, 1988, Arbitrator Bellman issued his award wherein he selected the District's final offer; that the text of his award stated:

> Background
>
> The collective bargaining unit has been developed in recent years by the parties through voluntary recognition of the Union and negotiations. It currently consists of "all full-time and regular part-time employees in the position of Maintenance/Custodial and/or Cleaner". The parties have also agreed that full-time employees work 30 hours or more per week.

At the time of the hearing herein there were five Maintenance/Custodians and all of them were full-time calendar year employees. There also were four Cleaners and all of them worked 30 hours or more per week, but only during the school year. There were no unit members working less than 30 hours per week.

In addition to the calendar year-school year distinction, the record also discloses the job content differences between the two classifications. Normally, the Maintenance/Custodians work a day and an evening shift, while the Cleaners work during the evening. There is considerable overlap among their day-to-day tasks especially regarding custodial work. On the other hand, the Maintenance/Custodians are called upon to perform a very broad spectrum of repair and maintenance work, including plumbing, electrical, carpentry, and mechanical duties. The Cleaners' work consists mainly of regular cleaning tasks, and some painting. Thus, there is an unmistakable difference in the skills required, despite the considerable overlapping.

The parties are seeking a collective bargaining agreement for the 1986-1987 and 1987-1988 fiscal years which end on June 30, 1988.

THE FINAL OFFERS:

Wages: The parties have agreed to wage rates for the Maintenance/Custodians for both years, and for the Cleaners for the first year. The Maintenance/Custodian top rates are $9.90 and $10.20, respectively. The Cleaner first year top rate is $5.75. (In all instances the top rates follow two 90-day probationary rates.) In its final offer the Employer proposes a second-year top rate of $5.92, whereas the Union proposes $7.00.

Apparently, the agreed upon first year wage rate for Cleaners represents an approximate 5.4% increase. Otherwise, this represents an Employer policy of 3% increases in every instance, and a Union proposal of an approximate 22% increase in the second year for Cleaners.

Insurance: The Union proposes that the Employer pay 100% of the single health insurance premium and 90% of the family premium for all unit members. The Employer proposes to pay dollar amounts which are 3% higher than the 1986-1987 level of contribution and apparently equal 93% of the premiums.

The Union also proposes that the Employer contribute 100% and 90% of a dental insurance premium. The Board offer does not provide for any such contribution for the Cleaners, but for contributions of $11.35 and $35.06 for the Maintenance/Custodians. This has apparently been the subject of material confusion by both parties in that, as noted in the Employer's main brief, both parties' exhibits indicate that this offer was unit-wide.

The Union proposes that the life and long term disability insurance benefits that the previous labor agreement provided for the Maintenance/Custodians be extended to the Cleaners during the years in issue. The Employer would maintain those benefits, but only for the Maintenance/Custodians.

Sick Leave: Likewise, the Union proposes that the sick leave benefits of the prior agreement be continued and extended to the Cleaners; whereas the Employer would only maintain them for the Maintenance/Custodians.

Holidays: The parties have agreed to the following paid holidays for the Maintenance/Custodians: New Year's Day, Good Friday, Memorial Day, July 4, Labor Day, Thanksgiving, Christmas Eve Day and Christmas. The Union proposes the same paid holidays for Cleaners, but the Employer offers only New Year's Day, Labor Day, Thanksgiving, Christmas Eve Day and Christmas.

Vacations: The Union proposes that th vacation benefits of the prior agreement be continued and extended to the Cleaners, whereas the Employer would only maintain them for the Maintenance/Custodians.

Retirement: The Union also proposes that the Employer contribution to the Wisconsin Retirement System beyond its statutory obligation be continued and extended to the Cleaners, whereas the Employer would limit its contribution for the Cleaners to its statutory obligation.

DISCUSSION:

The brief history of this bargaining unit and its recent accretion of school year employees highlight certain aspects of the Union's final offer.

First, the second year wage increase of approximately 22% proposed by the Union represents its goal of comparability to nearby unionized school districts, as well as its judgment that the Cleaners and Maintenance/Custodians have substantially similar responsibilities. There is material disagreement between the parties over the appropriate universe of school district comparables in this case, including whether nonunionized workers should be considered. In their respective arguments they also discuss the job content of workers elsewhere, and the compensation of apparently similar employees in nearby nonschool public sector and private sector employment. It is not necessary to sift through all of those varying contentions however, if as the Employer contends, a 22% wage increase is excessive essentialy regardless of such contextual matters.

The Arbitrator, in general, prefers comparing rates of compensation to rates of increases. However, even where the rate of compensation is clearly relatively low, it is not necessarily appropriate, in the view of the undersigned, to catch up immediately through arbitration. As the Employer asserts, arbitration should respect collective bargaining as a model, and that process would probably provide for incremental catch-up where the gap is over 20%.

Furthermore, without putting too fine a point on the amount of time both classifications spend performing substantially the same work, because the record does not provide such evidence, there is really no doubt that the skills required of the Maintenance/Custodians justify a substantial disparity in compensation by conventional standards.

Secondly, the fact that the Cleaners work only during the school year is also fundamental in judging these final offers. Clearly the calendar year-school year distinction should be irrelevant to some issues of wages, hours and working conditions. But when it comes to holidays and vacations, for example, as it does in this case, it is very material. The Union proposal includes identical vacations and holidays regardless of the work year.

Indeed, the teacher bargaining unit at this district, as well as the school secretaries who are not unionized, are also school year employees and do not receive vacation benefits. 1/

(It is also the case that the teachers' collective bargaining agreement provides for the Employer to make a dollar amount contribution to health insurance premium funding.)

These factors convince the Arbitrator that the Empoyer's final offer should be selected, although they do not reflect all of the parties' contentions. Rather, they eclipse the other matters discussed by the parties including cost to the Employer, cost of living data, and other criteria for such decisions as specified in the Wisconsin Municipal Employment Relations Act.

AWARD

On the basis of the foregoing, the record as a whole, and due consideration of the "factors" specified in the Municipal Employment Relations Act, the undersigned Arbitrator selects and adopts the final offer of the Municipal Employer.

1/ In its brief the Employer asserts that it "may employ (Cleaners) during the summer months" but currently "they are employed and continue to work only during the school year with no assurance of summer work." The foundation of this assertion is not at all clear. If indeed the Cleaners become calendar year workers subject to layoff during the summer, the Arbitrator's conclusions in favor of the Employer's position should be completely reexamined.

4. That the Association's petition for declaratory ruling asserts that all unit employes, including Cleaners, are full-time calendar year employes and that Arbitrator Bellman's award was not lawfully made because his award determined the wages and fringe benefits of school year employes, a matter not submitted by the parties to him for resolution.

5. That the District's final offer to the Arbitrator stated in pertinent part:

ARTICLE IX - INSURANCES: add the following

HEALTH:

Cleaners: Effective one month after ratification of a tentative agreement or issuance of an arbitration award, the District shall contribute $67.22 toward the single premium and $177.20 toward the family premium for health insurance plan prvided to full-time employees.

Effective July 1, 1987, the District shall contribute up to $69.24 for the single premium and up to $182.52 for the family premium for the health insurance plan provided to all full-time District employees covered by the Agreement who are eligible for this coverage.

DENTAL:

Effective July 1, 1987, the District will contribute the sum of $35.06 toward the family premium and the sum of $11.35 toward the single premium for the dental insurance plan provided to all full-time Maintenance/Custodian employees as of July 1, 1985.

ARTICLE XIV - HOLIDAYS: Add the following

Cleaners: Cleaner employees to receive five (5) holidays as follows:

New Years Day
Labor Day
Thanksgiving Day
Christmas Eve Day
Christmas Day

ARTICLE XX - WAGES:

	1986-87	1987-88
Cleaners	$5.75	$5.92
Cleaner (Probationary Second 90 days)	$5.25	$5.41
Cleaner (Probationary First 90 days)	$4.75	$4.89

6. That the Association's final offer to the Arbitrator stated in pertinent part:

ARTICLE IX - INSURANCE

HEALTH - Effective July 1, 1987 the District shall provide each full-time employee with health insurance coverage. The District shall pay 100% of the single or 90% of the family premium as the employees elect.

DENTAL - Effective July 1, 1987 the District shall provide each full-time employee with dental insurance coverage. The District shall pay 100% of the single or 90% of the family premium as the employees elect.

LIFE - Effective July 1, 1987 the District shall provide each full-time employee with life insurance coverage up to the next $1,000 of each employee's annual income. The District shall pay the full cost of such coverage.

LONG TERM DISABILITY - Effective July 1, 1987 the District shall provide each full-time employee with long term disability insurance based upon the employee's annual income. The District shall pay cost of such coverage.

ARTICLE X - SICK LEAVE

Effective July 1, 1987 all full-time employees covered by this Agreement will be eligible for the maximum of ten (10) workdays off with pay for personal injury or illness not covered by Worker's Compensation Insurance in any one school calendar school year. For the purpose of this Agreement, the school year commences with July 1 and ends on June 30. First year employees will not be eligible for sick leave until completion of their probationary period.

A paid sick day for pay purposes shall consist of the employees normally scheduled workday hours (excluding all overtime hours).

Under no circumstances will paid absences under the sick leave provision exceed eight (8) hours per day or forty (40) hours per week at the employee's straight time hourly rate.

Unused portions of sickness allowance will be accumulated up to a maximum of fifty (50) days. This will make a maximum available sick leave allowance of sixty (60) days in any one work year period.

Full-time employees will not be eligible for sick leave payment when receiving holiday pay, funeral leave, personal time off, worker's compensation, leave of absence, or for unscheduled workdays.

No cash out (payment) of the unused portion of the accumulated sick leave allowance will be made upon termination of employment.

A doctor's certification of the extent of injury or illness will be provided by the full-time employees upon request of the Superintendent of Schools or Supervisor of Buildings and Grounds. The cost of such certification to be borne by the District.

Full-time employees absent for ilness in excess of one continuous week will be required to furnish the employer with a doctor's certificate of illness to return to full employment. The cost of such certification to be borne by the District.

The above provisions represent maximum periods of sick leave with pay for full-time employees that have completed their probationary period. If the Supervisor of Buildings and Grounds believes an unusual case exists warranting exceptional consideration, he may submit a recommendation in writing to the Superintendent of Schools for appropriate action consideration based on Board policy.

ARTICLE XIV - HOLIDAYS

Effective July 1, 1986 all full-time employees covered by this Agreement who have completed their probationary period will be eligible for the following holidays with pay for their respective positions:

Maintenance/Custodian:

New Years' Day
Good Friday
Memorial Day
July 4 (two-day holiday observance of the third or fifth of July at the empoyer's option
Labor Day
Thanksgiving Day
Day after Thanksgiving
December 24
Christmas Day

Cleaners:

New Year's Day
Labor Day
Thanksgiving Day
December 24
Christmas Day

Effective July 1, 1987 all full-time employees covered by this Agreement who have completed their probationary period will be eligible for the following holidays with pay:

New Year's Day
Good Friday
Memorial Day
July 4 (two-day holiday observance of the third or fifth of July at the empoyer's option
Labor Day
Thanksgiving Day
Day after Thanksgiving
December 24
Christmas Day

When the above holidays fall on a Sunday, the following Monday shall be recognized as the legal holiday. If the holiday falls on a Saturday, the preceding Friday shall be observed.

Employees laid off or on leave of absence shall not be eligible for holiday pay.

Employees on paid absence, such as sick leave, will receive holiday pay that day in lieu of the paid sick day, etc.

A paid holiday for pay purposes shall consist of eight (8) hours at the involved full-time employee's regular straight time rate.

All employees covered by this Agreement will be eligible for double-time on Sundays and holidays for District approved activities other than building checks, which will continue to be paid at the rate of time and one-half.

In the event a paid sick leave day, vacation day, holiday or personal day is taken during the workweek, employees required to work on Saturday will be eligible for time and one-half pay.

ARTICLE XVI - VACATION

Vacations must be scheduled and approved by the Supervisor of Buildings and Grounds and the Superintendent of Schools. It is understood that employee vacation requests will be reviewed with the Supervisor of Buildings and Grounds to insure continuity of work schedules.

Full-time employees will not be allowed to schedule vacations during school vacations within the school year unless authorized by the Superintendent of Schools upon the recommendation of the Supervisor of Buildings and Grounds.

Full-time employees may schedule one-day vacations not to exceed a maximum of two (2) weeks of vacation eligibility contingent upon an available replacement with the approval of the Supervisor of Buildings and Grounds.

Full-time employees employed by the District as of July 1, 1986 will be subject to the vacation schedule set below:

After 1 Years	- 2 Weeks Vacation
After 8 Years	- 3 Weeks Vacation
After 12 Years	- 4 Weeks Vacation
After 18 Years	- 5 Weeks Vacation
After 25 Years	- 6 Weeks Vacation
After 30 Years	- 7 Weeks Vacation

Vacation pay in accordance with this Agreement will consist of forty-four (44) regular hours per week for those Maintenance/ Custodian employees employed by the District prior to forty (40) hours per week for vacation pay.

For all full-time employees hired after July 1, 1986 the following vacation schedule will be followed:

After 1 Years	- 2 Weeks Vacation
After 8 Years	- 3 Weeks Vacation
After 12 Years	- 4 Weeks Vacation
After 20 years	- 5 Weeks Vacation

Vacation pay in accordance with this Agreement will consist of forty (40) regular hours per week for all full-time employees employed after the 1977/78 school year.

ARTICLE XVII - RETIREMENT

Effective July 1, 1987, the District will pay up to six (6) (6%) percent of each individual full-time employee's contract salary to the Wisconsin Retirement System in addition to the said employee's contribution to the system.

ARTICLE XX - WAGES

Cleaner employees will be paid an hourly rate for the 1986/87 school year (July 1, 1986 - June 30, 1987) and the 1987/88 school year (July 1, 1987 - June 30, 1988) as follows:

	1986/87	1987/88
Cleaners	$5.75	$7.00
Cleaner Probationary Second 90 days	$5.25	$6.50
Cleaner Probationary First 90 days	$4.75	$6.00

7. That among the exhibits which the District submitted to the Arbitrator were charts which compared the parties' final offers for those employes denominated in the charts as the part-time Cleaners with the compensation received by school year employes in other school districts; and that also among the exhibits submitted by the District were the following:

SUMMARY OF OUTSTANDING ISSUES BETWEEN SCHOOL DISTRICT OF NEKOOSA AND NEKOOSA MAINTENANCE/CUSTODIAL WORKERS ASSOCIATION

A. Wages for Cleaner employes:

Board		Union	
1986-87	1987-88	1986-87	1987-88
5.75	5.92	5.75	7.00

B. Fringe benefits for Cleaner employees: The Board is proposing limited fringe benefits for Cleaner employees to include health/dental insurance and five holidays. Union proposes five holidays and vacation benefits in first year and full fringe benefits in second year including health/dental insurance, long term disability insurance, life insurance, sick leave benefits, nine holidays and Board payment of employee retirement contribution.

C. Board contribution for health/dental insurance: The Board is proposing a limitation on the contribution to health/dental insurance in 1987-88. The Union is proposing modifications to contract language to provide for payment of 100% of a single premium and 90% of family premium for health/dental insurance for all employees.

SUMMARY OF FINAL OFFERS FOR 1986-87 REGARDING PART-TIME CLEANERS

Board Final Offer	Union Final Offer
A. Wages - $5.75 per hour	A. Wages - 5.75 her hour
B. Health Insurance - To be granted in the event of voluntary settlement or arbitration award during the contract year at level of contribution agreed to by the parties	B. Holidays - Five holidays to be paid by the District

C. Holidays - Five holidays to be paid by the District

C. Vacation - Full vacation benefit pursuant to vacation schedule applicable to maintenance/custodian employes

SUMMARY OF FINAL OFFERS
FOR 1987-88 REGARDING PART-TIME CLEANERS

Board Final Offer	Union Final Offer
A. Wages - $5.92	A. Wages - $7.00
B. Health Insurance - At contribution rate ($ amount) agreed to by the Board and the Union for both Cleaner employees and Maintenance/Custodian employees	B. Health Insurance - Board to pay 100% of single premium and 90% family premium for Cleaner employees and Maintenance/Custodian employees
C. Dental Insurance - At contribution rate ($ amount) agreed to between the Board and Union for Cleaner employees and maintenance/custodian employees	C. Dental Insurance - Board to pay 100% of single premium and 90% family premium for Cleaner employees and maintenance/custodian employees
D. Holidays - Same five holidays as granted for 1986-87 school year	D. Life Insurance - Cleaner employees to be eligible for life insurance
	E. Long Term Disability Insurance - Cleaner employees to be eligible for long term disability
	F. Sick Leave - Cleaner employees to be eligible for full sick leave benefits
	G. Holidays - Cleaner employees to be eligible for nine (9) holidays which includes the same five (5) holidays received in 1986-87
	H. Retirement - Cleaner employees to receive full payment of retirement contributions by School Board on wages earned by employee

8. That the following statements of position and testimony were given at hearing before the Arbitrator:

THE ARBITRATOR: This is in the interest of the arbitration proceeding in the matter of the petition of the Maintenance and Custodial Workers' Association and the School District of Nekoosa.

My name is Howard S. Bellman and I'm the Arbitrator appointed by the order of the Employment Relations Commission. Representing the union is Robert C. Kelly and representing the municipal employer is attorney Dean R. Dietrich.

I have before me, the usual documents transmitted to the Arbitrator in these matters by the Commission, and I am ready to proceed, and, Mr. Kelly, I understand you are ready to proceed and to present the union's position here?

MR. KELLY: Yes, sir. We've prepared all our exhibits in booklet form for the convenience of the Arbitrator for Counsel.

Immediately behind the cover page is a list with the exhibits. This is an unusual case to go to arbitration. I will say this by way of an opening statement and I will have a witness. The facts are that prior to 1985, a group of maintenance/custodians here in the District were recognized for the first time by the District as a bargaining representative for those six custodial employees. They call themselves the Maintenance/Custodial Workers' Association, and through bargaining with the District, they came up, mutually, with a contract covering the '85-'86, '86-'87 fiscal years, with July 1st to June 30th in each case; That contract covered by its terms regular full-time, full-year maintenance one custodial employees in the position of maintenance one, custodian. As I said, there are six. There are three schools in the District; high school, middle school and elementary school. These six employees were assigned two to a school.

There was concern among the six employees because of the fact that part-time people were a board and the fact that the District relied very, very heavily on the part-time people to do a portion of the work of the maintenance/custodial employees, actually the work of a custodian, and there were a number of these people working part time in the District. The Maintenance/Custodial Employees Association sought recognition for regular, part-time custodial workers of which there were three. The term of the contract eventually used was working over 30 hours were full-time employees, and regular full time or part time were three at that time. They commenced bargaining relative to the wages, hours, conditions of three. Originally, that bargaining took on just bargaining for separate contracts, and that Association represented three people, and, of course, the bargaining that became apparent that the interest of the party would be served by having one collective bargaining agreement, which is the reason that the parties dealt with '86-'87 to some extent, and since the Cleaner people were looking for two-year period, which would be '86-'87-88, extended the maintenance/custodial people for that same period of time, so that that which appears as Exhibit 4 is the agreement reached for that period of time covering the custodial workers and the cleaners. The issues here relate totally to the Cleaner employees. The Maintenance/Custodial people agreed and appear on that Exhibit. The dispute relates to the wages; matters of wages and fringe benefits that should be attributable to the Custodial workers, and the fact is that other than wages, the fringe benefits are presently available to all of those persons in the Association under the contract for Maintenance/custodial people.

The issues open are, if you would turn to Exhibit 5, sir? These are the wages of the Cleaners for the two-year period, July 1st, '86, through June 3, '87, and July 1st, '87 through June of '88. I have the -- The Exhibit shows the proposals of the two parties side by side. You'll notice that there is no dispute about Cleaners' wages for '86-'87. It's the '87, '88 school year, or fiscal year that's before the Arbitrator. The Association is purposing (sic) a wage of $7 for Cleaners other than probationary people. The District proposes $5.92, and likewise, there is a disparity that you see demonstrated there between probationary people after 90 days and probationary people for the first 90 days.

THE ARBITRATOR: Now, we're talking three people?

MR. KELLY: Three people, sir. Likewise, and I might add at this time that the wages of the Maintenance/custodians' Unit are $9.90 for the first year for Maintenance/custodians', $8.50 for people after the second 90-day period, and $7.50 for people in the first 90 days, and $10.20, and $8.75 and $7.73 for the same groups of Maintenance/custodians.

THE ARBITRATOR: You're now looking at the stipulated agreements?

MR. KELLY: No. I'm looking at what we have in our exhibits as Exhibit 11, but they are all stipulated in the agreement.

It is our position that in many instances, the words "Cleaner" and "Maintenance/custodians" is the same.

Secondly, there is the issue of insurance. The Association is asking for 100 percent of the single and 90 percent of the family premium for health, and for dental, they are asking for full payment of life insurance up to the next $1,000 of income of employees' annual income and the District pay long-term disability insurance. The District, on the other hand, is proposing a limit, a dollar on making available health insurance and dental insurance, again, with cap and no life insurance, no LTD. Those are benefits. All those benefits are benefits available to the Maintenance and Custodian employees under the contract tentatively agreed to.

The Association is proposing that the custodial employees, the Cleaners, be entitled to have ten days of -- ten work days with pay for sick leave, or ten days of sick leave accumulated to 50 each -- Well, it would be ten days each accumulated to 50. That's a benefit that the Maintenance/custodial employees presently have. The District proposes there be no such benefits for the Custodial employees.

Another bone of contention is paid holidays. The Association proposal is in two-part; one for July 1, '86, and one effective July 1, '87, and those there is no dispute as to the paid holidays for the first year between the parties, but also there is for the second year, the effects of the second year, the Association is asking that all full-time employees, including the Cleaners, receive New Year's Day, Good Friday, Memorial Day, July 4th, as spelled out, the Labor Day, Thanksgiving Day, December 24th and Christmas Day. Those benefits are presently available to Maintenance/custodians under the contract.

The District proposes, on the other hand, that they continue with five days as is presently the case for Custodial/Cleaner employees only.

Another bone of contention before the Arbitrator is paid vacations. A proposal of the Association, which is spelled out in the exhibit is that Cleaner employees be given the same paid vacation benefits that is presently available to the Maintenance/custodial employees. That's spelled out in our proposal. The District proposal is that Cleaners -- full-time Cleaners receive no vacation benefits at all.

The last issue before the Arbitrator is retirement. Presently, Maintenance/custodial employees are entitled to -- up to 6 percent of their share of the WRS contribution be made by the employer, and the proposal is that Custodial employees as Cleaners, full-time Cleaners, will be entitled to the same benefits; that is, they be treated in the same as the Custodial/maintenance people. The District purposes (sic) that there be no retirement benefit. That's basically as we see it.

THE ARBITRATOR: Let me ask you one question. I'm still back at the unit description. There has been no employment relations commission representation case here, is that correct?

MR. KELLY: That's correct.

THE ARBITRATOR: So, the whole unit is one that is constructed by voluntary reservation?

MR. KELLY: Yes, hammered out in negotiation.

THE ARBITRATOR: And in that definition agreed upon -- In that unit agreed upon, is a definition of full time.

MR. KELLY: Parties agreed to as to what full time means, yes.

THE ARBITRATOR: And everyone in the unit is within that definition?

MR. KELLY: Presently, every employee is.

THE ARBITRATOR: So, if someone doesn't meet the definition of full time, they are not in this unit?

MR. DIETRICH: For purposes of the full time --

MR. KELLY: Whether his benefits might be different.

MR. DIETRICH: Well, no. I think his question is the exact wording of the recognition clause, and I think you're right. If somebody worked 20 hours a week, they would not fall in the unit.

THE ARBITRATOR: Everyone that's covered by this decision is, by agreement of the parties, a full-timer. I'm not making a decision that will cover any part-timers because you have agreed that the Union doesn't represent part-timers.

MR. KELLY: I don't know if that's true. I think everybody presently in the unit works 30 hours or more, and that's what's before the Arbitrator. There are no part time employees presently represented by the Union. However, the recognition clause does call for all regular full time being persons working 30 hours or more, and regular part time, but there are presently no part-time employees.

THE ARBITRATOR: So, that covers that set of questions. The next question I have is, then, I take it, given the description of the issues that I have already heard, that part of the dispute is whether some of these benefits should be different among employees depending on what class they are in, as opposed to depending on whether they are full-time or part-time?

MR. KELLY: Absolutely.

MR. DIETRICH: Although our position is that the Cleaner position is a school year position. That's different than full time versus part time. They are full time. In your listing of the issues, you indicated no retirement benefit as the Board's position. The Board does provide the employer contribution. So, to clarify that, you are saying not to pay -- The Board's position is not to pay the employee contribution, but we do pay ours.

THE ARBITRATOR: You have a statutory obligation?

MR. DIETRICH: Right.

THE ARBITRATOR: You presumably want to go through this notebook some on the record?

. . .

Tr. 44-45

THE ARBITRATOR: Let's make sure that that's understood because I don't want you to have two different versions of the dispute. You understand that this dispute goes to both classifications?

MR. KELLY: I don't know.

(Discussion had off the record.)

MR. KELLY: Correct.

MR. DIETRICH: Correct.

THE ARBITRATOR: Thank you.

MR. DIETRICH: Again, Mr. Arbitrator, we realize that this dispute was somewhat different that the traditional setting, so employers number 6 is, again, an attempt to identify the issues and dispute as it relates to Cleaners for the first year of the contract, and that, again, the wages are indicated to be the same. The issue of holidays appear to be the same. The issue of heatlh insurance in the Board final offer provided for health insurance, and the Union in its final offer had requested vacation.

THE ARBITRATOR: Now, I see in this document and maybe others, you refer to part-time Cleaners?

MR. DIETRICH: Right. The designation is to parttime (sic) perhaps should more accurately be school year. They are considered full time and we would stipulate to that, that based on the discussions, they are considered full time.

9. That in the initial brief to the Arbitrator, the District argued inter alia:

. . .

It is obvious from the above that the Board Offer fully and adequately compensates the Cleaner employees for the work they perform as compared to other similarly situated employees in comparable municipalities. The Association Final Offer requesting the 22% increase to $7.00 per hour is simply unsupported by these comparables, none of the comparables are even close to that wage rate. The Union provides the Arbitrator with a summary of the wage and fringe benefit package for City of Nekoosa employes (UN.EH. 23) yet offers no testimony to support a determination that the Cleaner employees should properly be compared to full-time laborer employees in the City of Nekoosa. Again, the part-time rate for employees in the City is a more fair and accurate comparison for the Cleaner employees in the School District of Nekoosa. The District has hired these employees to perform cleaning services during the school year similar to the hiring of part-time employees by the City of Nekoosa. The suggestion by the Association that these Cleaner employees should be compared to full-time employees in the City of Nekoosa is simply unwarranted and should be ignored by the Arbitrator.

. . .

CONCLUSION

4. The granting of full fringe benefits to school year employees in (sic) unsupported by the comparables thus the School Board Final Offer incorporating limited fringe benefits is the most fair and equitable offer.

. . .

10. That a portion of the Association's initial brief to the Arbitrator stated:

. . .

The custodial staff organized, as the Nekoosa Maintenance Custodial Workers Association, (hereinafter referred to as the "Association"), in late 1984 and sought Board of Education recognition as the collective bargaining representative for both the full-time and the regular part-time custodial employees. The custodial staff at that time consisted of six Maintenance I/Custodians, three "Mtne people", i.e. three school year only cleaners 1/ (Er. Ex. 8, p.4) twenty-three

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1/ The District's practice, prior to July 1, 1986, had been to lay the cleaner employees off during the summer months and to replace them with part-time summer employees (Assn. Ex. 5, pp.4,5) and students (Ass. Ex. 5, p.6) who were paid a lower wage and who were accorded no fringe benefits. This can no longer occur because the District has agreed, (see Assn. Ex. 2, Article II(m)p.2), that it will not utilize temporary, summer or seasonal employees, if doing so results in a reduction in the hours of any full-time or regular part-time employees.

. . .

part-time and summer employees (Assn. Ex. 5, p.4), sisteen part-time student employees (Assn. Ex. 5, p.6) and fifteen summer student employees (Ass. Ex. 5, p.6).

. . .

That is exactly what the Association did -- it petitioned the Board of Education to recognize it as the bargaining representative of those employed as "full-time and/or regular part-time cleaners" (Tr. 5).

The Board responded to the Association's petition at its May 13, 1986 meeting (Assn. Ex. 6) by agreeing to recognize the Association as the bargaining representative for a separate bargaining unit comprised of "three part-time cleaners employed by the District".

11. That the focal point of the dispute the parties submitted to Arbitrator Bellman was the determination of the wages and fringe benefits of unit employe employed as Cleaners by the District; that before the Arbitrator, the District consistently argued that the Cleaners were school year employes who were therefore distinct from the full-time calendar year Maintenance/Custodians; that portions of the record submitted by the parties to the Arbitrator are consistent with the District assertion that the Cleaners were school year employes; and that the text of Arbitrator Bellman's award establishes that he selected the District's offer in large part because he accepted the District's premise that the Cleaners were school year employes.

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

CONCLUSION OF LAW

That the award issued by Arbitrator Howard S. Bellman on June 21, 1988 in the above matter was lawfully made and does not require modification under the provisions of Sec. 111.70(4)(cm)6 and 7, Stats., and ERB 32.16 and 31.17.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

That as the award issued by Arbitrator Howard S. Bellman on July 21, 1988 was lawfully made and does not require modification, there is no basis under Sec. 111.70(4)(cm)6 and 7 and ERB 32.16 or 32.17 for the Commission to vacate or modify same.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

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

(Footnote 1/ continued on page 16)

1/ continued

judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

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

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

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

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

. . .

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

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

NEKOOSA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

POSITIONS OF THE PARTIES:

The Association: 2/

Arbitrator Bellman's Award was not lawfully made because the Arbitrator exceeded and so imperfectly executed his powers that a mutual, final and definitive interest arbitration award was not made in that the Arbitrator did not determine what the wages and fringe benefits of full-time Cleaner employes should be, which was the matter submitted to him.

The bargaining unit here involved, again by express agreement of the parties, is a unit made up of those persons who are employed by the District as either Maintenance/Custodians or Cleaners on a full-time or regular part-time basis. Full-time employes by definition of the parties are those employes who work thirty (30) hours or more per week, fifty-two (52) weeks per year. The four Cleaner employes herein involved are not school year employes - they are full-time employes - employes who work thirty or more hours per week, fifty-two weeks per year.

There is nothing in the record to support a finding that the involved cleaners are school year employes other than counsel's assertion in his brief that the District "may employ (cleaners) during the summer months" but currently "they are employed and continue to work during the school year with no assurance of summer work." This assertion is contrary to the prohibition of Article II(m) of the tentatively agreed upon provisions which prohibits the District from employing temporary, summer or seasonal employes if doing so would result in the reduction of the hours of work of full-time or regular part-time employes.

The parties here were dealing with a unit of full-time and regular part-time employes - not school year employes. The parties here did not bring to the table proposals and counterproposals concerning the wages and/or fringe benefits accordable to school year employes, rather they brought to the table proposals and counter proposals concerning the wages and fringe benefits of full-time Cleaner employes. A cursory review of the final offers submitted by the parties herein makes that fact abundantly clear. The parties were unable to resolve this dispute between themselves hence they submitted the dispute to Arbitrator Bellman.

Arbitrators have the authority to award on matters submitted to them and nothing more. Here the arbitral submission required the Arbitrator to determine whether or not full-time Cleaner employes were to be accorded those fringe benefits proposed by the Association. This the Arbitrator did not do as a reading of his Award makes abundantly clear.

Arbitrator Bellman, it is clear, awarded in this case based on his erroneous conclusion that the Cleaner employes involved were school year employes. This despite the fact that the final offers involved were clearly and expressly applicable only to full-time employes. This despite the fact that the foundation of the District's assertion that "cleaners...are employed and continue to work only during the school year with no assurance of summer work" was not at all clear to him.

The involved employes are, we respectfully submit, entitled to more -- far more than this. They are entitled at a minimum to a reasoned definitive determination of the matters they collectively submitted to the mediation/arbitration process. Indeed, they are collectively entitled, the Association respectfully suggests, to a mutual, final and definitive award which is free from any material mistake which unfairly affects its merits.

2/ We have not considered the Association's reply brief as it was untimely filed without good cause shown.

The Association respectfully requests under these circumstances that the Commission by way of remedy:

(1) Vacate and set aside Arbitrator Bellman's Award issued in this matter.

(2) Order that the dispute herein be resubmitted to an arbitrator, mutually selected by the parties from a panel furnished by the Commission, for the issuance upon hearing this matter de novo, of a final, binding award pursuant to Section 111.70(4)(cm)6 and 7 of the Municipal Employment Relations Act.

The District

In Wausaukee School District, Dec. No. 17576 (WERC, 1/80), the Commission determined that in exercising its discretionary jurisdiction under Sec. 227. 06(1), Stats., (now, Sec. 227.41(1), Stats.) to review an interest arbitration award, the Commission, to determine whether the award warranted vacating under ERB 31.18 (here, ERB 32.16), would apply the test enunciated in Scherer Const. Co. v. Burlington Mem. Hosp., 64 Wis.2d 720 (1974). As cited by the Commission, that test was as follows:

> . . . to vacate an arbitration award, the court must find not merely an error in judgment, but perverse misconstruction or positive misconduct . . . plainly established, manifest disregard of the law, or that the award itself violates public policy, is illegal, or that the penal laws of the state will be violated. Wausaukee School Dist., supra, at 10. (quoting, Scherer Const. Co., 64 Wis.2d at 734).

Here, there is no basis for overturning Arbitrator Bellman's Award pursuant to the above standard or the more specific grounds set forth in ERB 32.16(1)(d) and ERB 32.17(3).

Arbitrator Bellman's Award was lawfully made. It was based upon the evidence and issues presented in the parties' final offers and at the arbitration hearing. The cost analysis of the District's and Association's offers was based upon the nine (9) month status of the Cleaner employes. The Arbitrator rendered an Award based upon this evidence and his finding that the Cleaner employes were school-year employes. The Association did not offer any evidence to the contrary, nor was the District's evidence challenged at the hearing.

There is absolutely no basis for overturning the Arbitrator's Award. There is no showing that the Arbitrator exceeded his authority, or so imperfectly executed his authority that a mutual, final, and definitive award was not made. The Association is attempting to overturn the Award by suggesting a different set of facts and circumstances than those actually presented to the Arbitrator at the arbitration hearing. The declaratory ruling process is not meant to encompass such allegations.

A review of the record demonstrates that the Arbitrator's Award was based upon the evidence and facts as presented by the parties. Thus, there is no basis to overturn that Award. The Commission must deny the petition for declaratory ruling to preserve the integrity of the arbitration process.

DISCUSSION:

A declaratory ruling petition filed pursuant to Sec. 227.41, Stats., is the vehicle by which a labor organization can acquire Commisison review of interest arbitration awards under the standards established by ERB 32.16 and ERB 32.17. School District of Wausaukee, Dec. No. 17576 (WERC, 1/80), aff'd CtApp III (1/83) Doc. No. 81-1869.

ERB 32.16(1) provides in pertinent part:

> In determining whether an interest arbitration award was lawfully made, the Commission shall find that said award was not lawfully made under the following circumstances:

(a) Where the interest arbitration award was procured by corruption, fraud or undue means;

(b) Where there was evident partiality on the part of the neutral arbitrator or curruption on the part of an arbitrator;

(c) Where the arbitrator was guilty of misconduct in refusing to conduct an arbitration hearing upon request or refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear supporting arguments or evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrator exceeded his or her powers, or so imperfectly executed them that a mutual, final and definite interest arbitration award was not made.

ERB 32.17 provides in pertinent part:

. . .

If it appears that an interest arbitration award is lawfully made, but that the award requires modification or correcting, the commission shall issue an order modifying or correcting the award. An interest arbitration award may be modified or corrected when:

(1) A court enters an order, which is not subject to further appeal, reversing a commission ruling that a particular proposal contained in said award is a mandatory subject of bargaining;

(2) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in said award;

(3) Where the arbitrator has awarded upon a matter not submitted, unless it is a matter not affecting the merits of the award upon the matters submitted;

(4) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Here, the Association asserts the Arbitrator's Award was either unlawfully made under ERB 32.16(1)(d) or requires modification under ERB 32.17(2) and (3) because the Award was premised upon the erroneous assumption that Cleaners are school year employes.

ERB 32.16 and 32.17 draw heavily upon Secs. 788.10 and 788.11, Stats., which establish the standards under which the courts will vacate or modify interest arbitration awards issued pursuant to Sec. 111.77, Stats., and grievance arbitration awards issued pursuant to Chapter 788 and/or Secs. 111.10, 111.70(4)(cm)4, and 111.86, Stats. Thus, it is appropriate for us to seek guidance from the holdings of our courts when they have interpreted Secs. 788.10 and 788.11, Stats. Therefore, we cited Scherer Construction Co. v. Burlington Memorial Hospital, 64 Wis.2d 720 (1974) in Wausaukee for the proposition that:

...to vacate an arbitration award, the court must find not merely an error in judgment, but perverse misconstruction or positive misconduct...plainly established, manifest disregard of the law, or that the award itself violates public policy, is illegal, or that the penal laws of the state will be violated.

It should also be noted that when interpreting Sec. 788.10(1)(d) Stats., the functional equivalent of ERB 32.16(1)(d), the Court in Oshkosh v. Union Local 796-A, 99 Wis.2d 95, 102-103 (1980) held:

> In reviewing the validity of this arbitration award, several basic principles guide our discussion. The law of Wisconsin favors agreements to resolve municipal labor disputes by final and binding arbitration. An arbitrator's award is presumptively valid, and it will be disturbed only where invalidity is shown by clear and convincing evidence. Milwaukee B. of School Directors v. Milwaukee Teachers' Ed. Asso., 93 Wis.2d 415, 422, 287 N.W.2d 131 (1979).
>
> This court's acceptance of the Steelworker's Trilogy in the case of Denhart v. Waukesha Brewing Co., 17 Wis.2d 44, 115 N.W.2d 490 (1962), is indicative of a policy of limited judicial review in cases involving arbitration awards in labor contract disputes.
>
> . . .
>
> Therfore, the court's function in reviewing the arbitration award is supervisory in nature. The goal of this review is to insure that the parties receive what they bargained for.
>
> . . .
>
> The parties bargain for the judgment of the arbitrator-correct or incorrect-whether that judgment is one of fact or law.

Our role in reviewing an interest arbitration award under ERB 32.16 and ERB 32.17 parallels that of the court under Chapter 788. The law in Wisconsin clearly favors the resolution of labor disputes involving municipal employers and employes through final and binding interest arbitration. Pursuant to the directive of Sec. 111.70(4)(cm) 8.d. Stats., we established administrative rules, subject to legislative approval, which parallel the provisions of Chapter 788. Thus, we think it clear that our role, like that of the court under Chapter 788, is a supervisory one and that awards are "presumtively valid" so long as the parties receive what they are entitled to under Secs. 111.70(4)(cm)6 and 7, Stats.

Here, the Arbitrator was obligated under Sec. 111.70(4)(cm)6.d. to select "the final offer of one of the parties on all disputed issues." He met that obligation by selecting the District's offer as to the disputed wages and fringe benefits of Cleaners and, to a limited extent, of Maintenance/Custodians.

As noted in our Findings of Fact, the Arbitrator selected the District's final offer in large part because he accepted the District's assertions that Cleaners are school year as opposed to calendar year employes. As noted in footnote 1/ of the Award, the record before the Arbitrator may not have definitively established the school year employment status of Cleaners. Nonetheless, the District consistently asserted said status at hearing and in its post-hearing briefs to the Arbitrator. Exhibits submitted to the Arbitrator detailing the historical evolution of the Cleaner position are consistent with a school year status. The Association did not directly contest the District's assertions during hearing or in its brief to the Arbitrator. Thus, it is clear to us that based on the record and offers before him, the Arbitrator could reasonably have reached the conclusion which he did. Moreover, as noted earlier herein, even if we were to conclude that the Arbitrator's judgement in that regard was not one we would have reached, our limited supervisory role would require that we sustain the Award. As noted by the Court in Oshkosh, an award is sustainable so long as the arbitrator "exercises a measure of rational judgment." As noted by the Court in Oshkosh, an arbitrator's award would be sustainable whether he accepted one party's theory or the other so long as the award "has a foundation in reason." Here, Arbitrator Bellman, as arbitrator's often are, was confronted with the need to select one offer or the other on the basis of a record that was less than clear on a critical issue. As his Award indicates, he could reasonably have rejected the District's "school year status" argument and selected the Association's offer

as easily as he accepted said argument and selected the District's offer. Either way, the parties received what they were entitled to under Sec. 111.70(4)(cm)6 and 7, Stats., an award based upon "a measure of rational judgment." Either way, we would conclude that the Award was lawfully made and not in need of modification.

Given the foregoing, we reject the Union's request that we vacate or modify the Award.

Dated at Madison, Wisconsin this 1st day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By SH Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner